

Contract of Sale

Definition: A contract of sale of goods is a contract where by the seller

- transfers or
- agrees to transfer

the property in goods to the buyer for a price.

A contract of sale may be absolute and conditional.

Essentials:

- 1) **Bilateral Contract:** A contract of sale has to be bilateral because the property in goods has to pass from one person (a seller) to another (a buyer). Its first essential is that the seller and the buyer must be a different persons, because a person cannot buy his own goods. There may be a contract of sale between one part-owner and another.

Exceptions:

- a) where a man's goods are sold under an execution, he may purchase them.
- b) Similarly a bankrupt may buy back his own goods from his trustee
 - but the trustee, the distrainor or the sheriff cannot be the buyer.
 - (King v England, 1864), (Plasycod Collieries Co. v Partridge Jones & Co, 1912)

- 2) **Transfer of Property:** The essential object of contract of sale is the exchange of property. There must be:
 - a transfer of property or
 - an agreement to transfer itfrom one party (the seller) to the other (the buyer). A mere transfer of possession of goods cannot be termed as a contract for sale. The term 'property' means
 - General property' in goods as distinguished from
 - Special Property

General Property: An ultimate absolute ownership enjoyed by the owner of the goods.

Special Property: Property of a qualified, temporary or limited nature. Such is the property of a pawnee in the goods pledge.

- 3) **Subject-matter: Goods:** The subject matter of a contract of sale must be goods. Goods means every kind of movable property other than
 - actionable claims and
 - moneyThe goods which form the subject of contract of sale may be either existing goods or future goods.
- 4) **Money consideration: Price:** The consideration for a contract of sale of goods must be money, called the price. Where the property in goods transferred for any consideration other than money
 - that will not be a contract of sale.
 - but an exchange or barter.In other words, where goods are exchanged for goods, that is not a contract of sale.

- 5) **A valid contract:** A contract of sale must be a valid contract
 - i.e. all the essential elements of a valid contract must be present in it.

Sale	Agreement to Sale
Definition: Where under a contract of sale the property in the goods is transferred from the seller to the buyer so that the seller ceases to be the owner of the goods and the buyer becomes the owner, the contract of sale is called a sale.	When under a contract of sale the transfer of property in the goods is to take place - at a future time - subject to some condition thereafter to be fulfilled the contract of agreement is called an agreement to sale.
Transfer of Property: In case of sale there is an immediate transfer of the property in the goods from seller to the buyer.	Here, it takes place either in future or subject to be fulfillment of some condition. Thus, there is no such immediate transfer of the property from the seller to the buyer.
Nature of Contract: A sale is something described as an executed contract of sale.	An agreement to sale is sometimes described as an executory contract to sell.
Nature of Undertaking: A sale is absolute, pure and simple transferring the property absolute to the buyer.	It is conditional. Conditions are incorporated by mutual consent of the parties.
Nature of Rights: A sale effects a transfer of the general property to buyer i.e. the buyer acquires all the property rights with reference to the goods. In other words, a sale creates a jus-in-rem	In agreement to sell there is no transfer of property but it gives either party a remedy against the other for any default in fulfillment his part of the agreement. In other words it creates a jus-in-personam
Future goods: Future goods cannot be the subject matter of sale.	They may be the subject of agreement to sale.
Risk: In the absence of any special contract, when the property in the goods is transferred to the buyer of the goods all at the buyer's risk whether the delivery has been made or not. In other words risk prima facie passes with property. Thus, in case of a sale the risk is with the buyer.	Where a seller is still being the owner of goods runs all the risk.
Seller's Refusal: If the seller commits a breach, the buyer has not only a personal remedy against the seller but also the remedies which an owner has in respect of goods themselves, such as suit for conversion.	Here, if the seller commits a breach, the buyer has only a personal remedy against the seller i.e. to claim for damages.
Buyer's refusal: If the buyer fails to pay for the goods, the seller may sue for the price by way of specific performance.	Here if the buyer fails to accept and pay for the goods, the seller can only sue for damages.
Conversion: Here such a question does not arise.	An Agreement to sale becomes a sale when the elapses or the conditions are fulfilled subject to which the property in the goods

	is to be transferred.
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Subject matter of Contract: GOODS:

Kinds of Goods:

- A) **Existing goods:** Goods owned and possessed by the seller at the time of making a contract of sale are called existing goods. Where the seller is the owner, he has the general property in them. Where a seller is in possession (as an agent or pawnee) he has a right to sell them.
- 1) **Specific goods:** Goods identified and agreed upon at the time of making of contract of sale are called specific goods.
 - 2) **Unascertained goods:** The goods which are not specifically identified at the time of formation of contract of sale are known as unascertained goods or Generic goods. They are defined by description or by sample.
 - 3) **Ascertained goods:** The goods which are identified subsequent to the formation of contract of sale are known as ascertained goods. As a matter of fact when the ascertained goods are identified and agreed upon by the parties, they are called ascertained goods.
- B) **Future Goods:** Future goods means goods to be manufactured or produced or acquired by the seller after the making of contract of sale. They are not in existence at time of formation of contract of sale. They may be the subject of agreement to sell but not that of sale.
- 1) **Contingent Goods:** Goods, the acquisition of which by the seller depends upon the contingent which may or may not happen are known as contingent goods. They may be subject of agreement to sell but not that of sale.

Destruction / Perishing of goods:

- 1) **Goods perishing before making of contract:**
 - Where there is a contract for the sale of specific goods.
 - the goods without the knowledge of the seller have (at the time when contract was made) perished or become damaged as no longer to answer their description in the contract, the contract of sale is void.
- 2) **Goods perishing before sale but agreement to sell:** Where there is
 - an agreement to sell
 - specific goods and
 - subsequently the goods without any fault to the part of the seller or buyer
 - perish or become so damaged as no longer to answer their description in the agreement
 - before the risk passes to the buyer,the contract of sale is there by avoided.

Price:

Definition: The price in a contract of sale means the money consideration for a sale of goods.

Modes of Fixation of Price (Ascertainment of Price):

- 1) **By mutual agreement:** The price in a contract of sale may be fixed by mutual agreement of the seller and buyer.
- 2) **By prescribed (agreed) Manner:** The price in a contract of sale may be fixed in a manner agreed upon between the seller and the buyer, such as market price prevailing on a particular date. (Regular + Consistent)
- 3) **By course of dealing:** The price in a contract of sale may be fixed by the course of dealing between the parties such as usual manufacturing cost.
- 4) **Reasonable Price:** Where the price is not determined in accordance with the above mentioned method, the buyer shall pay the seller a reasonable price.
- 5) **By valuation of third party:** Where there is an agreement to sell goods, the price may be fixed by the valuation of the third party, if provided by the terms of contract. In case of non-fixation of the price by the valuation of third party, the following consequences follow:
 - Where the third party is unable for any reason to value the price.
 - Where the third party is not willing to value the price
the contract of sale is avoided provided the goods are not delivered to the buyer
 - However where the goods are delivered to the buyer before the price is valued, the buyer is liable to pay to the seller for the goods delivered.
 - Where the third party is prevented from valuing the price as a result of the fault of the seller or buyer, the party in fault is liable to pay damages to the party not in fault.

Condition	Warranty
Definition: A condition is a stipulation “essential” for the main purpose of the contract.	A warranty is a stipulation collateral to the main purpose of the contract.
Nature of Term: A condition is the very basis of the contract which goes to the root of the performance of the contract.	A warranty is merely a subsidiary promise.
Breach of Term: In case of breach of condition by the seller, the buyer has following remedies: - He may refuse to accept the delivery of goods - He may terminate the performance of contract. - He may sue the seller for damages for breach of condition.	In case of breach of warranty by the seller, the buyer can neither subject the goods nor repudiate the contract. His only remedy is to sue the seller for damages for breach of warranty.
Conversion: A condition may be treated as warranty.	A warranty can not be converted into condition.

When condition to be treated as warranty:

- 1) **By Waiver:** Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition. If he does so waive, he cannot afterwards insist on its fulfillment. A buyer can accept either defective goods or beyond stipulated time. Waiver may be express or implied.
- 2) **By election:** Where a contract of sale is subject to any condition to be fulfilled by the seller and the seller commits a breach of condition, the buyer may terminate the performance of contract and refuse to accept the delivery of goods. However the buyer is not bound to do so. He may accept the goods and treat the breach of contract as a breach of warranty. In such a case, his only remedy is to sue the seller for damages for breach of warranty.
- 3) **By estoppel:** Where a contract of sale is indivisible and the buyer has accepted the goods or part of them, the breach of any condition to be fulfilled by the seller can be treated as a breach of warranty. In such a case he is not entitled to reject the goods unless there is a term of the contract in this respect, his only remedy is to claim damages for breach of warranty.

Remedies in case of breach of warranty (by the seller):

- 1) **Diminution or Extinction of price:**
 - The buyer may claim a deduction from the price if the loss caused by the breach of warranty is less than the price.
 - He may refuse to pay the price altogether if the loss equals the price.
 - If the loss exceeds the price he may not only refuse to pay the price but also claim the excess.
- 2) **Suit for Damages:** The buyer may pay the price in all these cases and sue the seller for damages for breach of warranty.

Exclusion of Implied Terms:

- 1) **By express agreement:** Any right or liability arising under a contract of sale by implication of law may be negated or varied by express agreement between the parties. There is no rule of law to prevent parties from making any bargain they please.
- 2) **By course of dealing:** Implied terms may be excluded by the course of dealing between the parties. However the course of dealing must be quite clear and unambiguous.
- 3) **By usage of Trade:** The usage of trade may control the mode of performance of the contract and in this way implied terms may be excluded.

Caveat Emptor (Let the buyer be aware): Caveat Emptor means the buyer must take care.

- 1) It applies to the purchase of specific things for e.g. a horse, a picture upon which the buyer can and usually does exercise his own judgement.
- 2) It applies also whenever the buyer voluntarily chooses what he buys.

The sale of Caveat Emptor belongs to the terms when nearly all sales takes place in the open market. The buyer and seller came fact to face. The seller displayed his goods. The buyer examined them and bought them if he liked. But as trade grew and assumed global dimension it becomes difficult for the buyer to examine them before hand. Most transactions being made by correspondence further on the account of complex structure of modern goods, it is only the seller who can assure the content and the quality of the goods. For these reason it became necessary to restrict the rule of Caveat Emptor by making a few exceptions upon its scope.

Exceptions of Caveat Emptor / Implied Conditions as to quality or fitness:

- 1) **Fitness for buyer's purpose:** There is an implied condition on the part of a seller that the goods delivered under a contract of sale or reasonably fit for the purpose for which they are bought if the following requirements co-exists:
 - a) The buyer makes known to the seller the particular purpose for which goods are required.
 - b) The buyer relies on the seller skill or judgement.
 - c) The goods are of a description dealt in by the seller whether he be the manufacturer or not.

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

- 2) **Merchandise Quality:** Where
 - the goods are bought by description
 - from a seller who deals in goods of that description, whether he be the manufacturer's or not.there is an implied condition on the part of the seller that the goods shall be Merchantable Quality.

Exceptions: Examination of goods: If the buyer has examine the goods, there is no implied condition with reference to defects which such examination ought to have revealed. (i.e. the patent defects). In such a case the implied condition protects the buyer only from a latent defect.

- 3) **Terms annexed by usage of Trade:** An implied term as to the quality or fitness for a particular purpose may be annexed by the usage of trade.

- 4) **Express terms:** It is open to the parties to incorporate any term by their mutual agreement in the contract. Generally an express term does not negate an implied term unless inconsistent therewith.
- 5) **Disclosure of Latent objectives:** In the absence of any special contract, the seller is under an obligation to disclose to the buyer of any defect in the goods sold at the time of contract.

Implied Conditions:

- 1) **Condition as to the title:** 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 sale he has a right to sell the goods, and
 - 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.
- 2) **Sale by Description:** Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.
- 3) **Sale by sample as well as by description:** If the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
- 4) **Fitness for buyer's purpose:**
- 5) **Merchantable quality:**
- 6) **Condition annexed by usage of trade:**
- 7) **Sale of sample:** In the case of a contract for sale, by sample there is an implied condition
 - a) **Correspondence with sample (Same Quality):** That the bulk shall correspond with the sample in quality.
 - b) **Right of Inspection (Reasonable Opportunity):** That the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
 - c) **Free from defect (Latent Defects):** That the goods shall be free from any defect, (making them unmerchantable) which would not be apparent on reasonable examination of the sample

Implied Warranties:

- 1) **Quiet Possession:** In a contract of sale (unless the circumstances of the contract are such as to show a different intention) there is an implied warranty, that the buyer shall have and enjoy quiet possession of the goods.
- 2) **Free from Encumbrance:** In a contract of sale there is an implied warranty that the goods shall be free from any encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

- 3) **Warranty annexed by usage of trade:** Any implied warranty as to the quality or fitness for the particular purpose may be annexed by the usage of trade.

Transfer of Title (sale by non-owner): As a general rule, no man can sell the goods and give a good title to them unless he is the owner. Therefore the person, however innocent, who buys goods from one not the owner obtains no property in them whatever. Thus – “No one can transfer a better title than he himself possesses”. This is expressed by the maxim “Nemo Dare Polest Quad Nor Habet”. (No man can give that which he has not).

Exceptions:

- 1) **Title by estoppel:** Where goods are sold by a person
 - who is not the owner of them
 - who does not sell them under the authority, with consent of owner, the buyer acquires the better title to the goods provided the owner is estopped by his conduct from denying the seller’s title to it.
- 2) **Sale by Mercantile agent:** A sale by mercantile agent passes a good title to the buyer
 - if such agent is in possession of goods or of documents with the consent of the owner.
 - if the sale is made by him when acting in the ordinary course of business of a mercantile agent.
 - if the buyer acts in good faith and has no notice at the time of contract of sale that the seller has no authority to sell.
- 3) **Sale by Person in possession under a voidable contract:** Where the seller has obtained possession of goods under a voidable contract, the buyer acquires a good title to the goods provided,
 - the contract has not been rescinded at the time of sale
 - the buyer buys them in good faith and without notice of the seller’s defective title.
- 4) **Sale by one of joint-owners:** A sale by one of several joint owner’s of goods passes a good title to the buyer if the following requirements are fulfilled:
 - such owner is in sole possession of goods by permission of his co-owners.
 - the buyer acts in good faith
 - the buyer has no notice at the time of making a contract of sale that the seller has no authority to sell.
- 5) **Sale by seller in possession after sale:** Where a person has sold goods but continues in possession of them or of the documents, if he sells them to a third person and,
 - if such person obtains, delivery of them in good faith
 - without notice of the previous salehe gets a good title to them although the property in the goods has passed to first buyer.

- 6) **Sale by buyer in possession before sale:** If the buyer obtains possession of goods (before the property in them has passed to him) with the consent of the seller, if he sells the goods to a third person
 - if such person obtains delivery of them in good faith.
 - without notice of any right (such as lien) of the original seller in respect of the goods, he gets a good title to them

- 7) **Sale by finder of goods:** A sale by finder of goods passes a good title to the buyer if the following requirements are fulfilled:
 - the thing is commonly the subject of sale.
 - the owner cannot be found with reasonable diligence.
 - if found he refuses to pay the lawful charges of the finder and wither
 - the goods are in danger of perishing or losing their value.
 - the lawful charges of the finder amount to a $\frac{2}{3}$ rd of their value.

- 8) **Sale by Pawnee:** A sale by pawnee passes a good title (of goods pledge) to the buyer provided
 - he gives a reasonable notice of sell

- 9) **Sale by unpaid seller:**

Rights of Unpaid Seller:

RISK:

General Principle: Risk prima facie passes with property

The general principle is that the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer, the goods are on the buyer's risk whether delivery has been made or not.

Exceptions:

- 1) **Special Agreement:** If there is something specially mentioned in the contract regarding the risk then general principle would not apply.

- 2) **Fault of either party:** Where the delivery has been delayed through the fault of either the buyer or seller, the goods are at the risk of the party in fault as regard any loss which might not have occurred but for such fault.

- 3) **Sea transit:**

Rights of Unpaid Seller:

Definition of Unpaid Seller:

The seller of goods is deemed to be an unpaid seller:

- When he is wholly unpaid
- When he is partly / partially unpaid

- Price not tendered by buyer
- When negotiable instrument has been delivered is subsequently dishonoured.

Rights:

- 1) **Right of Lien:** Where the seller has not parted with the possession of the goods for delivering of them to the buyer, he has right to retain possession of the goods until tender or payment of price in the following cases:
 - a) **No stipulation as to credit:** Where goods are sold and nothing is set as to the time of delivery or the time of payment, the seller is entitled to retain possession until the price is paid.
 - b) **Sale on credit:** Where the goods have been sold on credit but the term of credit has expired.
 - c) **Insolvency of buyer:** If the buyer becomes insolvent before the price is paid and the seller is in the possession of the goods, he is entitled to retain possession even if the goods are sold on credit and the term of credit has not expired.

Comments:

Seller is in possession as agent or bailee of the buyer

- lien may be exercised

The right of lien of unpaid seller extends only to the price. It does not extend to warehouse or other charges for keeping the goods because they are kept against the bill of the buyer.

The unpaid seller's right of lien is exercisable provided the property in the goods has passed to the buyer because an owner cannot have a lien on his own goods.

- 2) **Right of stoppage in transit:** The unpaid seller may resume the possession of the goods as long as they are in the course of transit and may retain them until payment or tender of the price if the following requirements are fulfilled:
 - a) The seller must be unpaid
 - b) The seller must have parted with the possession of the goods
 - c) The goods must be in the course of transmission to the buyer
 - d) The buyer must be insolvent
 - e) The buyer must not have acquired possession of the goods

The right of stoppage in transit is an extension of the right of lien.

- 3) **Withholding of Delivery (Quasi Lien):** It is the case when the property in the goods has not passed to the buyer and the buyer becomes insolvent before the price is paid. Here the seller being still the owner can have no such right as a lien because a man cannot have a lien on his own goods.

This right is analogous to the right of lien and is sometimes called quasi-lien.

4) **Right of Re-sale:** Where the property in the goods has passed to the buyer, the unpaid seller may resale the goods in the following cases:

- a) **Perishable Nature:** Where the goods are of a perishable nature, no reference to the buyer is needed.
- b) **Right reserved:** Where the seller expressly reserves a right of resale in case the buyer should make default and on the buyer making default.
- c) **Resale after notice:** Where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer which is unattended on the part of the buyer.

5) **Right of Suit for Price:**

- a) **Sale:** Where under the contract of sale, the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods accordingly to terms of the contract, the seller may sue him for the price of the goods.
- b) **Agreement to sell:** Where under the contract of sale, the price is payable on a certain day irrespective of delivery to the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in goods has not passed to the buyer.

Termination of Lien: Lien is linked with possession and is lost when possession is lost.

Modes:

- 1) **By payment or tender of price:** Where the buyer tenders price for the goods, the seller ceases to be an unpaid seller and therefore cannot claim the right of lien.
- 2) **Delivery to buyer:** The right of lien is lost when the goods are delivered to the buyer or his agent. Where the goods are delivered back to the seller for specific purpose such as a repair of a machine sold, that does not revive seller's lien.

However the seller's lien is not defeated where the buyer has obtained possession without the consent of the seller, for e.g. by some wrongful act or for a temporary purpose such as a trial. The buyer has to obtained possession lawfully and under the contract.

- 3) **Delivery to carrier:** Delivery of the goods to a carrier for the purpose of transmission to the buyer operated as a delivery to the buyer himself and therefore the right of lien is thereby lost.

Delivery to the carrier puts an end to lien but the seller still has a right of stoppage in transit. If the seller regains possession of the goods from the carrier by exercising his right of stoppage in transit, his right of lien revives.

- 4) **By Waiver:** The right of lien is attached to every contract of sale for the benefit of the seller by implication of law. Therefore the seller may if he so likes waive his right of lien. Waiver may be express or implied from the conduct of the seller.

An implied waiver takes place when the seller's guilty of some wrongful acts with reference to the goods such as dealing with the goods in a manner inconsistent with the mere right to have possession of them as by wrongfully selling or consuming them.

- Lien not destroyed by decree for the price.

Rules as to Duration of Transit:

1) **The commencement of transit:**

Delivery to carrier: Goods are deemed to be in the course of transit from the time when they are delivered to the carrier for the purpose of transmission to the buyer until the buyer takes delivery of them from such carrier.

- 2) **Interception / Anticipation by buyer:** The transit ends when the buyer takes delivery of the goods from the carrier before their arrival at the appointed destination.

It may be wrongful for the carrier to deliver the goods to the buyer before their arrival at the appointed destination and the carrier may be held liable in damages for depriving the seller of his opportunity but transit ends with that.

- 3) **Acknowledgement by carrier:** When the goods are arrived at their appointed destination and the carrier acknowledges to the buyer that he is now holding the goods on his behalf, the transit is at its end.

It is immaterial that the goods are still with the carrier or that the buyer has indicated further destination.

- 4) **Rejection by buyer:** If the goods are rejected by the buyer and the carrier continues in possession of them the transit is not at an end. This will be so even if the seller has himself refuse to take back the goods.

- 5) **Delivery to ship chartered by buyer:** Where the goods has delivered to a ship chartered by the buyer, it is a question of fact that in each case whether the carrier is acting independently or as agent of the buyer.

- 6) **Wrongful refusal (to deliver) by carrier:** Where the carrier wrongfully refuses to deliver the goods to the buyer the transit is at its end.

It is obvious that the goods should have arrived at their destination because otherwise the carrier has the right to refuse to deliver them.

- 7) **Part Delivery:** Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery

has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

Effect of Sub-Sale:

General Principle: The unpaid seller's right of lien or stoppage in transit is not affected by any sale or other deposition of goods which the buyer have made.

Exceptions:

- 1) **Seller's Consent:** If the seller has signified his assent to the act of the buyer regarding deposition of goods then the right of lien or stoppage in transit of unpaid seller is defeated.
- 2) **Sub-sale under transfer of document of title:**
 - Where a document of title of goods has been issue or lawfully transferred to any person as buyer or owner of the goods, and
 - that person (sells) transfer the document to a person who takes the document in good faith and for considerationthe unpaid seller's lien on stoppage in transit is defeated.
- 3) **Pledge under documents:** Where the transfer of documents to a person is by way of pledge or other deposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the right of transferee / pawnee.

However, the unpaid seller may require the pawnee to have amount secured by pledge satisfied in the first instance, as far as possible, out of any other goods or securities to the buyer in the hands of pawnee and available against the buyer.