

## 6. Contract of Sale of Goods

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### 6.1 Meaning of Contract of Sale of Goods

A sale of goods is the transformation of ownership of goods for a price from a seller to a buyer. It is a transaction performed between the parties on the basis of contract of sale of goods. In a Contract of sale of goods, there must be a change of ownership of goods or property. Ownership is a legal right of a person over the goods. Sale and an agreement to sale both are included in the contract of sale of goods that may be performed in the present or future. Contract of sale of goods is also a contract, so, it needs all the essential elements of valid contract, like capacity of parties, free consent, lawful objective, lawful consideration, intention to create a legal relationship etc.

A contract of sale of goods is also a special contract. We have not separate laws, but some provisions are incorporated under the chapter 7 of Nepal Contract Act, 2056. Similarly, Indian sale of goods Act, 1930 has made various provisions in context of India which closely follows the English sale of goods Act. Goods are the fundamental factors in a Contract of Sale of goods.

The term goods include every kind of movable goods or property, except money and actionable claim. Indian Sale of Goods Act, 1930 Section 2(7) stated that; the term good means movable property which may be sold or purchased. Thus, the goods that are movable include shares, patents, designs, copyright, car, crops, grass etc. Immovable property means which are not separated from the earth.

According to Nepal Contract Act, 2056 Section 40; *'Where a seller agrees to transfer any goods immediately or in future against the price of that goods, there is a contract of sale of goods.'*

On the summing up of above discussion, we can define; A contract of sale of goods is a contract whereby the seller transfer or agree to transfer the property in goods to the buyer for a price.

### 6.2 Features of Contract of Sale of Goods

On the basis of its' meaning and definitions, the contract of sale of goods has some specific features or essentials. They are given below:

- a. **Two Parties:** There must be two parties to form a contract of sale of goods as the seller and buyer. The party, who agrees to sell goods, is called seller and the party who buys such goods is called buyer. Under this contract, the good has to pass from seller to buyer under their free consent.
- b. **Transfer of Ownership:** Ownership of goods must be transferred from seller to buyer according to the contract of sale of goods. Only transfer of possession is not a transfer of ownership. Generally, the owner has right to sell his property but in some exceptional case, the Bailee and finder of lost goods also can sale the goods in some extent.
- c. **Goods:** Goods means every kind of movable property except money and actionable claim. Like; furniture, vehicles, clothes etc. The goods are the subject matter of the contract of sale of goods, so it is an important essential of this contract.

- d. Price of goods:** The price plays significant role for determination of consideration in the contract of sale of goods. It is determined by money or money is a consideration for a sale of goods that is why the price is another important essential features.
- e. Sale and agreement to sell:** The terms sale and agreement to sell is the different matter. When the goods are transferred from the seller to buyer immediately such contract is called the sale. But where the transfer of goods is to take place at future time or subject to some condition there after to be fulfilled such contract is called the agreement to sell.
- e. Express and implied:** The contract of sale of goods can be formed in expressed or implied both mode.
- f. Terms of Contract of sale:** The contract of sale of goods may be absolute or conditional. Place of delivery, place of payment, mode of payment or delivery of goods, time of payment or delivery may be the terms or conditions under the contract of sale of goods.
- g. Essential elements of valid contract:** Contract of sale is the special contract, so there must be the essential elements of valid contract.

### 6.3 Types of Goods

There are many types of goods such as movable and immovable goods and like wise, with the view point of sale of goods they are classified in the following main types.

#### 1.1.1 (1) Existing/present goods

Existing goods means goods either owned or possessed by a person while making a contract of sale. There is no doubt on the selling capacity of the seller to the goods owned and possessed by him because such goods are regarded as his own property.

- (a) **Specific goods:** Goods identified and individualise at the time of forming contract of sale are called specific goods. Example, One cycle selected by buyer among the 20 cycle is the specific goods.
- (b) **Ascertained:** Goods identified or which become ascertained subsequent to the formation of the contract of sale.
- (c) **Unascertained or generic goods:** The goods which are not identified and agreed upon at the time of contract of sale are unascertained generic goods. Example, Nataraj pen is ascertained goods but table is unascertained goods because it can be change into any kinds of table after making a contract.

#### 1.1.2 (2) Future goods:

In contract Act, 2056, there is no any definition about the future goods, but in Indian sale of goods Act, 1930 section 2 (6) has defined about the future goods. Future goods means, goods to be manufactured or produced or acquired by the seller after the making of the contact of sale.

#### 1.1.3 (3) Contingent goods:

This is one of the forms of future goods. The goods come into existence only after meeting particular event of future. According to section 6(2) of the Indian sale of goods Act, 1930 "contingent goods are goods the acquisition of which by the seller depends upon a contingent which may or may not happen." Example, 'A' agree to sell 1000

bags of imported rice to 'B' provided the ship which is bringing the same, reaches the port safely. This is an agreement for the sale of contingent goods.

#### 6.4 Difference between Sale and Agreement to Sale

The differences between sale and agreement to sale are as follows;

Sale	Agreement to sale
1. Where ownership of the goods is transferred immediately at the time of contract, there is a sale of goods or an executed contract.	1. Where there is an agreement to transfer the ownership of the goods in future there is an agreement on sale of goods.
2. This is current selling contract.	2. This is the agreement to sell the goods in future.
3. Ownership of goods is transferred at the time of contract.	3. Ownership of goods is transferred in the future.
4. Ownership or possession lies with buyer.	4. Ownership lies with the seller.
5. The seller may file a suit against the buyer for price.	5. Buyer may file a suit against the seller for indemnity.
6. After payment the goods in possession of the seller can not be sold.	6. The seller can sell the same goods again to another buyer.
7. The seller can sell specific and existing goods.	7. The seller can sell future contingent and unascertained goods.
8. The buyer will be responsible for the loss of goods after the sale.	8. The seller will be responsible in case of a loss of the goods.

#### 6.5 Transfer of Title and Risk of Loss

The general rule is that only the true owner is entitled to sell the goods. Hence, a seller can sell any goods belonging to him but can not sell the goods belonging to others or the goods possessed or owned by other. If the sellers' title to the goods is defective, the buyer's title will also be defective, though the buyer has acted bonafide and has paid for the goods. This rule is based on Latin maxim "*Nemo dat quod non habet*" The English version of this phrase is "*no one can give what he does not have had himself.*"

The Contract Act, 2056 has not directly recognized this rule. But the Supreme court of Nepal has recognized it through its' judicial decision that no one can pass the better title than he acquired. But Indian sale of goods Act, 1930 has clearly defined about this doctrine. According to Section 27 of that Act has defined as "*Where goods are sold by a person who is not the owner of the goods and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods.*"

The general aim of this doctrine is to protect the interest of society and to secure the right of the true owner of goods. Main intention of this rule is only the true owner can pass a better title of the goods.

### 6.5.1 Transfer of title by non owner

But there are some exceptional circumstances on which a seller or non-owner can give or pass a better title of goods to the buyer.

- Sale by mercantile agent.
- Transfer of title by estoppel.
- Transfer of title by a co-owner.
- Sale of goods in possession under a voidable contract.
- Sale of goods in possession of a buyer after an agreement to sell.
- Sale by an unpaid seller.
- Sale under other laws like; pledge, finder of lost goods, official receiver.
- Purchase in free market.
- Doctrine of 'Caveat Emptor'

The term 'Caveat Emptor' is a Latin expression, the English version of this expression is "let the buyer beware". It means that the buyer must take the precaution before to buy the goods. This doctrine stress on that to supply goods whether fit or not suitable for a particular purpose of the buyer is not the duty of the seller. In other words the buyer himself must take care of his own purpose while purchasing the goods. The central intention of this doctrine is that the buyer must be careful while purchasing the goods. He must inspect all the facts about the goods before purchasing the goods.

### 6.5.2 Exception of the rules

The Indian sale of goods Act, 1930, the contract Act, 2056 of Nepal has also accepted some exceptions to this doctrine under the several concerned sections. These are as follows:

- (1) Disclosure of particular purpose: Where the buyer makes known to the seller the purpose for which he is purchasing the goods, the seller must supply the goods to meet such purpose of buyer. In case of the unfit goods supplied to meet that purpose, the buyer is entitled to reject such goods. In such case, due to the disclosure of purpose the doctrine of caveat emptor doesn't apply.
- (2) Misrepresentation by seller: In the case, where the seller makes misrepresentation about the goods sold and buyer purposes the goods relies upon that misrepresentation, the doctrine of caveat emptor doesn't apply
- (3) In case of concealment of defect: If the seller knowingly consuls the defects, which cannot be discovered on a reasonable inspection, the doctrine of caveat emptor doesn't apply.
- (4) In case of sale by description: The goods sold by description must correspond with the description. If the seller sells the goods by description but the goods supplied by him do not correspond to the description, the doctrine of caveat emptor doesn't apply.
- (5) In case of sale by sample: Another case where the doctrine of caveat emptor doesn't apply is that if the seller sells the goods by sample but the goods supplied by him do not correspond to the sample.

## 6.6 Conditions and Warranties

### 6.6.1 Meaning of Condition:

The terms which are essential or root element of contract of sale are regarded as condition and any secondary or assisting terms of sale are regarded as warranty. Both the condition and warranty play an important role in the contract of sale of goods. It is necessary to fulfill both the conditions and warranties before the performance of such contract, otherwise performance of contract becomes impossible and the contract can be terminated.

A condition is the major term of the contract of sale of goods. It relates with the main purpose of the contract of sale of goods. The term 'condition' has not been defined under the Nepal Contract Act, 2056 but in this respect, Indian sale of goods Act, 1930 Section 12(2) has made clear definition of condition. According to Section 12(2) of Indian sale of goods; *"A condition is a stipulation (agree to the term in the contract) essential to the main purpose of the contract; the breach of which gives the aggrieved party a right to repudiate (to refuse or to reject) the contract itself."* In addition, he may maintain an action for damages for loss suffered, if any, the whole contract is broken.

On the basis of above definition, we can conclude some of major terms of contract of sale of goods are called conditions. By virtue of the violation of those conditions contract can be repudiated.

### 6.6.2 Types of Conditions

**a. Express Condition:** A condition may be either express or implied. Conditions, which are inserted in clear words in the contract, are called express conditions.

**b. Implied Condition:** Implied conditions are those, which are not expressly incorporated in clear words in the contract by the parties at the time of forming. The implied conditions are stated as below:

- If sale by description.
- Condition as title of goods.
- Sale of sample.
- Merchantable quality of goods.
- Condition as usage of trade.
- Sale by sample and description etc.

## 6.7 Meaning of Warranty

A warranty is a kind of stipulation or terms. It is the secondary stipulation to the main purpose and to support the main purpose of the contract.

The Contract Act, 2056 is silent even about the term "warranty". But the Indian Sale of goods Act, 1930 has defined the term clearly. According to Section 12(3) of Indian Sale of goods Act, has stated; *"A warranty is stipulation collateral to the main purpose of the contract; the breach of which gives the aggrieved party right to sue for damage only, and not to avoid the contract itself."* In another word; some are minor terms and the stipulations, which may insert under the contract of sale of goods, are called warranties.

### 6.7.1 Types of Warranty

**a. Express warranty:** As like the condition of contract of sale of goods, the warranty also may be either express or implied. Express warranties are those which clearly mentioned in such contract and the parties are agreed upon those at the time of formation of contract.

**b. Implied warranty:** Implied warranties are those which the law presumes to have been incorporated in the contract of sale inspite of fact that the parties have not expressly incorporated then in the contract of sale. They are as follow:

- Warranty of quite possession of buyer: The buyer have enjoy quite possession of the goods. In the case of breach of warranty the buyer is entitled to claim damages from the seller.
- Warranty of freedom from any encumbrances or charges:
- Warranty of use of trade.
- Fitness of goods those are required for a purpose.

**c. Warranty of disclosing the dangerous nature of goods to the ignorant buyer:** In case the goods sold are dangerous nature he must warn the ignorant buyer of the probable danger. If there is breach of this warranty the buyer is entitled to claim compensation for the injury caused to him

### 6.8 Differences between Conditions and Warranty

The differences between condition and warranty are as below:

Condition	Warranty
1. A condition is a stipulation, which is essential to the main purpose of the contract. It is valuable.	1. A warranty is a stipulation which is collateral or auxiliary to the main purpose of the contract.
2. The aggrieved party can repudiate the contract of sale of goods.	2. The aggrieved party can claim damage for the loss only.
3. Breach of conditions may be treated as a breach of contract.	3. Breach of warranty may not be treated as a breach of contract.
4. There are more liabilities for the parties created by the conditions of contract.	4. There are fewer liabilities for the parties created by the warranty of contract.
5. In repudiation of the contract, the aggrieved party should be discharged from his liability.	5. In repudiation of the contract, the aggrieved party can not be discharged from his liability without fulfilling the obligations.

### Transfer of ownership

A sale is a transfer of goods for price from seller to buyer. Ownership is a legal and the ultimate rights over the goods of a person. It is a transferred by the contract the sale. When ownership of goods is transferred to buyer he becomes the owner of the goods. It is different from transfer of possession when implies the custody or control of goods. Likewise a person may have possession of the goods but he may not have ownership. Therefore in the case of sale of goods ownership of the goods must be transferred.

### Rule regarding transfer of ownership

The parties are free to fix the time for the transfer of ownership from the seller to the buyer. The ownership of goods or property in goods may pass at once, or at a future time or on the performance of condition. In this regard there are certain rules of ownership are as follows.

- (1) Transfer of ownership of specific or ascertained goods when there is contract for sale of specific or ascertained goods which are in a deliverable stage the ownership is transferred to the buyer at the time of contract. Where the seller has to do something to make the goods deliverable, it is not possible to deliver the goods. If there is still something to do for delivery, there is no transfer of ownership. Where the seller has to do the act of measurement of the goods to be delivered, if he fails to do so there is no transfer of ownership.
- (2) Transfer of ownership of unascertained goods: The goods which have not been particularized but described only by name they are called unascertained goods. This kind of sale is not actual sale. It is an agreement to sell when goods are ascertained after the act of deliverable stage or necessary measurement than transfer of ownership will be actual.
- (3) Transfer of ownership after approval or acceptance of goods: When goods are delivered to the buyer on approval on sale or return or on other similar terms, the ownership is regarded as follows. If he do sent signify his approval or acceptance to the seller he returns the goods prescribed time or reasonable time.
- (4) Buyer can inspect the goods: The buyer has right to inspect the goods delivered. He should have reasonable opportunity to inspect the goods to ascertain whether the goods correspond to the mentioned terms in the contract or not, until the goods are inspected and accepted by the buyer the ownership is not transferred to them.
- (5) Send the bill and related document to the buyer: The seller has to send the bills and other related documents with the goods delivered the ownership of goods shall not to have been transferred after their sale until basic documents connected with their ownership are also handed over by seller to the buyer.
- (6) Duty of seller must be done.

### 6.9 Performance of Contract of Sale of Goods

The term 'performance' is the fulfillment of the promise. The performance of the contract of sale of goods means the performance of the respective duties of the seller and the buyer as per the terms and conditions of contract. Thus, the performance of the contract of sale implies delivery of goods by the seller and acceptance of the delivery of goods and payment for them by the buyer in accordance with the contract. The parties are free to provide any terms in their contract about the time, place and manner of delivery of goods, or acceptance of goods and as well as time and mode of payment of the price.

Delivery of goods from by the seller and payment of price for them by the buyer is the performance of contract of the sale of goods. There are reciprocal promises in the contract of sale of goods. There are three main processes of the performance of a contract of sale of goods.

- a. *Transfer or delivery of goods.*
- b. *Acceptance of the goods by the buyer.*
- c. *To pay a price for the goods.*

## 6.10 Unpaid seller

The value of the goods hand to hand is not always possible in the mercantile transaction. So, the question of unpaid seller arises, but it arises mainly under credit sale. A seller becomes unpaid seller when he fails to get the whole payment from the buyer in time or when the bank dishonors the negotiable instrument received by him for payment.

The Contract Act, 2056 has not defined the term unpaid seller. Section 45(2) of Indian Sale of goods Act, 1930 has defined the term as "*the seller is deemed to be unpaid seller; a. when the whole of the price has not been paid for or tendered, or b. when a conditional payment was made by a bill of exchange or other negotiable instrument, and the instrument has been dishonored*". Thus the seller becomes unpaid seller as soon as he does not get cash value for his goods from the buyer within the prescribed time in the contract.

### 6.10.1 Characteristics of Unpaid Seller

The Characteristics of unpaid seller are as follows:

- The seller must not have yet got the price of the goods as prescribed in the contract.
- The seller must not have got the price either the wholly or partly.
- The seller must not have received the payment due to dishonor of negotiable instrument. e.g Cheque, Bill of Exchange, Promissory note etc. from bank or other related party.
- When the whole or partial price is not paid on the due date or in time.

### 6.10.2 Rights of Unpaid Seller

A seller who fails to get cash value for his goods from the buyer in time is said to be an unpaid seller. Such unpaid seller has some rights which are as follow:

#### 1.1.4 a. Right against the goods:

An unpaid seller has the following rights against the goods.

- **Rights of lien:** The unpaid seller has the right to hold the goods and keep them until the price paid.
- **Rights of stoppage of goods in transit:** When the buyer becomes insolvent or unable to pay, the unpaid seller can stop the goods on the way or transit.
- **Right of resale:** On the situation of insolvent or unable to payment of buyer unpaid seller can resale the goods.

#### 1.1.5 b. Rights against the buyer:

An unpaid seller has the following rights against the buyer.

- **Right to suit for price:** When goods are passed to the buyer but the latter buyer does not pay the price at the prescribed time, unpaid seller can sue against the buyer for the price.
- **Right to suit for damages or non performance of contract:** When the buyer wrongfully neglects to receive or refuses to accept the agreed goods, the seller may demand the damage by filing a suit.
- **Right to suit for special damages and interest:** The unpaid seller can demand special damage or interest on the price of the goods from the buyer by filing a suit.

#### 1.1.6 Short Answer and Questions

1. What is caveat emptor? Are there any exceptions to its application to the sale of goods? [4+6]  
2055
2. What are essentials of a valid contract for the sale of goods? [10]  
2057
3. Define the goods and explain the rights of an unpaid seller. [4+6]  
2059
4. Explain briefly the implied conditions and warranties in a contract of sale. [10]  
2061
5. Define the term goods. Distinguish between specific and unascertained goods. [3+7]  
2062
6. Define the term goods. Distinguish between specific and unascertained goods. [3+7]  
2063
7. Distinguish between conditions and warranties in a contract of sale. [10]  
2067
8. Explain about the rules regarding the performance of contract of sale of goods. [10]  
2068

#### 1.1.7 Comprehensive Answer Questions

1. 'No one can give what one has not'. How does this principle apply in the case of sale of goods? Discuss. [20]  
2055
2. What are implied conditions in a contract of sale of goods? Discuss with illustrations. [20]  
2056
3. Who is an unpaid seller? Discuss the rights of the unpaid seller. [8+12]  
2057
4. Who is an unpaid seller? What are the rights of unpaid seller against the goods and the buyer? [10+10]  
2058
5. Who is an unpaid seller? Discuss the rights against the goods and the buyer. [5+15]  
2062
6. Define the term 'Delivery'. Discuss the rules regarding delivery under the contract of sale of goods. [5+15]  
2064
7. Who is an unpaid seller? Discuss the right of unpaid seller the goods and the buyer. [4+16]  
2065

8. When can a seller who is not the owner goods transfer the ownership of goods to the buyer of goods?  
Discuss.

[20]

2066

