

1. Explain with exceptions any one of the following-

(a) Doctrine of 'caveat emptor'

(b) 'Nemo dat quod non habet'

Ans- (a) Doctrine of 'caveat emptor'

The rule of Caveat Emptor [Sec. 16]

Sometimes the goods purchased by the buyer may not suit the particular purpose for which the buyer wants them. The question which in such a case arises is, whether the buyer can reject the goods or he is supposed to take the risk of the goods turning out not suitable for the required purpose. 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. It is incorporation of the rule contained in the maxim caveat emptor, which means buyer be beware. 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.**, the buyer ordered for hessian cloth without specifying the purpose for which he wanted the same. It was in fact 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.

Exceptions :

Section 16 also incorporates the following two exceptions to the rule of caveat emptor, which are two further implied conditions.

1) Implied Condition as to Quality or Fitness [being first exception to the rule of Caveat Emptor-Sec. 16(1)] As discussed above, the general rule is that there is no implied condition or warranty as regards the quality or fitness of the goods for any particular purpose. To this rule there is an exception. If the following requirements as mentioned in Sec. 16(1) 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 impliedly, 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 supplied are of such a description which it is in the course of the seller's business to supply.

If the buyer tells the seller the purpose for which the goods are required by him and reliance is placed on the skill and judgment of the seller, the rule of caveat emptor does not apply and it becomes the seller's duty to supply the goods suitable for the purpose mentioned by the seller. Thus, if in the case of **Andrew Yule & Co.**, 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.

No implied Condition when the sale under Patent or Trade Name- Proviso to Sec. 16(1) :

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 undertaking is that the goods shall be of the same trade name as demanded by the buyer.

2) Implied condition of Merchantable Quality [being second exception to the rule of Caveat Emptor-Sec. 16(2)] Sec. 16(2) contains another implied condition which is by way of exception to the rule of caveat emptor. It has been noted above in Sec. 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-sec., there is a further implied condition in such a case and that is that the goods supplied shall be of merchantable quality. Where

(1) The goods are bought by description,

(2) 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 terms 'merchantable quality' has not been defined in the Act. 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.

Condition Negatived when the goods Examined by the Buyer-Proviso to Sec. 16(2)

Sec. 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.

According to the proviso to Sec. 16(2) where the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. It means that the implied condition of merchantability will be excluded when the buyer has examined the goods and the defect in the goods was a patent one. In case of latent defects, the buyer is still protected inspite of the fact he has examined the goods.

Implied Conditions in a Sale by Sample - Sec. 17

A contract of sale is by sample when there is a term in the contract, express or implied, to that effect.³ 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. Exhibition of the sample does not always imply that the sale is by sample because sometimes a sample may be shown simply to give a rough idea to the buyer about the kind of goods to be supplied. It becomes a sale by sample only when the understanding between the parties is that the sample constitutes a true representative of the kind of goods to be ultimately supplied under the contract. The sale may be one by sample either when the contract expressly so provides or the same can be inferred from the contract or usage of trade.

(b) 'Nemo dat quod non habet'

Nemo dat quod non habet-Sec. 27

When the seller himself is the owner of the goods which he sells or he is somebody's agent to dispose of the goods, he conveys a good title in the goods to the buyer. Difficulty arises when the seller is neither himself the owner nor has he any such authority from the owner to sell the goods, e.g., a person finds goods lying on the road and sells them, or a thief sells the goods after he has stolen them, or a person purchases the goods on credit or hire purchase basis and disposes them of, or a person continuing in possession of the goods which he has already sold resells the goods. The question which in such cases arises is: Should the rights of the owner of the goods be protected and he be entitled to recover back the possession of the goods from one to whom they have been sold, or, should the buyer, who might have bought them in good faith and for value be protected and allowed to retain the goods defeating the rights and the title of the real owner?

In regard to the above question, the general rule contained in Sec. 27 is as follows:

Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof 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 than the seller had...

Section 27, as a general rule, tries to protect the interest of the true owner when it provides that where the goods are sold by a person who is not the owner thereof 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 than the seller had. This rule is derived from the maxim "**nemo dat quod non habet**", which means that nobody can give what he himself has not got, i.e., a seller cannot convey a better title than that of his own. If the title of the seller is defective, the buyer's title will also be subject to the same defect. This rule does not imply that buyer's title will always be a bad one. What it means is that the buyer cannot acquire a superior title to that of the seller. If a thief disposes of stolen goods, the buyer of such goods has the same title as the seller had. Similarly, where a person taking goods on hire-purchase basis sells them before he had paid all the instalments, the owner can recover the goods from the transferee, on default of payment, in the same way as he could have recovered them from the person to whom they had been given on the hire-purchase basis.

Exceptions to the rule

The abovestated general rule contained in Sec. 27, as stated in the opening words of the section itself, is "subject to the provisions of this Act and of any other law for the time being in force." Various exceptions to this rule have been mentioned in this Act and the Indian Contract Act and in those exceptional situations, the seller of the goods may not be having a good title to the goods, yet the buyer of the goods gets a good title to them. The exceptions are :

1) Transfer of Title by Estoppel-Sec. 27 Generally, the owner of the goods can question the title of the transferee by contending that the seller did not have a right to sell the goods. Sometimes the law of estoppel may apply against the owner of the goods and he may not be allowed to deny seller's authority to sell. The closing words of the rule contained in Sec. 27 are as under :

Unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

2) Sale by a Mercantile Agent-Proviso to Sec. 27

Sale by a mercantile agent constitutes an exception to the rule contained in Sec. 27. If a mercantile agent has an authority to sell the goods and he does so, no difficulty arises because according to the general rule, an agent having the authority to sell them can convey a good title. The difficulty arises when the mercantile agent disposes of the goods without having an authority to do so. Proviso to Sec. 27 states that when a mercantile agent is in possession of the goods or of the document of title to the goods with the consent of the owner, a sale made

by him conveys a good title to the buyer provided the buyer acts in good faith and without notice that such a mercantile agent did not have an authority to sell.

3) Sale by one of the Joint Owners-Sec. 28.

Sale by one of the joint owners constitutes another exception to the rule of **nemo dat quod non habet**. According to Sec. 28, if one of the several joint owners is in sole possession of the goods with the permission of the other co-owners, a sale by him will convey a good title to the buyer who buys in good faith and at the time of buying has no notice of the fact that such a joint owner has no authority to sell.

4) Sale by a person in possession under a Voidable Contract - Sec. 29

According to Section 19 and 19-A of the Contract Act, if the consent of a party to the contract has been obtained by coercion, fraud, mis-representation or undue influence, the contract is

PGS NATIONAL COLLEGE OF LAW

CONTRACT-II

UNIT-3

voidable at the option of the party whose consent has been so obtained. Section 29 provides that if a person has obtained the possession of some goods under a contract which is voidable under Section 19 or 19-A of the Contract Act and he sells those goods before the contract has been avoided by the party entitled to do so, the buyer of such goods acquires a good title to them. It is, however, necessary that such a buyer must have purchased the goods in good faith and without notice of the seller's defect of title.

This section does not apply to a contract which is void and not voidable, or where the seller has no title at all, for example, he has obtained the goods by theft.

5) Sale by the Seller in Possession-Sec. 30(1)

If a seller has sold the goods and the property in the goods has passed to the buyer, the seller cannot deal with such goods. If he is still in possession of the goods and deals with them, the buyer can sue him for the tort of conversion. Sec. 30(1), however, provides that if a seller having sold the goods is still in possession of the goods or of the documents of title to them, the delivery or transfer of the goods or of the documents of title under any sale, pledge or other disposition thereof by the seller or by a Mercantile Agent on his behalf will a good title to the buyer provided the buyer has been acting in good faith and he has no notice of the previous sale.

6) Sale by the Buyer in Possession-Sec. 30(2)

Section 30(2) deals with a case where the buyer is in possession of the goods but the property in them has not passed to him. This section says that if a buyer has obtained the possession of the goods or the documents of title to them with the consent of the seller, any sale, pledge or other disposition thereof to any person will convey a good title to the transferee provided the person receiving the goods was acting in good faith and without any notice as regards any lien or other right of the original seller in respect of those goods.

7) Resale by an Unpaid Seller-Sec. 54(3)

According to Sec. 54(2), if an unpaid seller has exercised the right of lien or stoppage in transit and the buyer does not pay him, he may resell the goods after a notice to the buyer. If such a notice is not given, the seller is neither entitled to claim from the buyer any loss if the goods bring lower than the contract price nor can he retain the benefit if the goods are sold at a higher price. Absence of such a notice does not, however, effect the title of the new buyer. According to Sec. 54(3), when an unpaid seller has exercised his right of lien or stoppage in

transit and resells the goods, the buyer acquires good title thereto as against the original buyer, notwithstanding that no notice of the resale has been given to the original buyer.

8) Sale by Finder of Goods-Sec. 169, Indian Contract Act

According to Sec. 71, Indian Contract Act, the finder of goods is subject to the same responsibility as the bailee. He is to take due care of the goods while they are in his possession and also to return them when their owner has been found. According to Sec. 169 of the Indian Contract Act, however, if the owner cannot with a reasonable diligence be found or if he refuses upon demand, to pay the lawful charges of the finder, the finder may sell the goods,

(1) when the thing is in danger of perishing or of losing the greater part of its value, or, (2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value. When the finder of goods sells them under the circumstances stated above, the buyer of such goods gets a good title to them.

9) Sale by Pawnee-Sec. 176, Indian Contract Act

Normally, the pawnee of the goods is under a duty to return them if the debt secured by such goods is paid back to him. He may regain such goods until the debt and interest thereon and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged are paid to him. According to Sec. 176, Indian Contract Act, if the pawnor makes a default in the payment of the debt, the pawnee may either sue him for the debt or may sell the goods pledged on giving the pawnor reasonable notice of the sale. Upon such a sale being made by the pawnee, buyer of such goods acquires a good title to them. the

10) Sale in Market Overt

English Law recognises an exception to the rule according to which on the sale of goods in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. Such sale means sale in the open market by a person who generally deals in such goods. The buyer's title is protected in case of such a sale though the seller may be liable for the tort of conversion.

2. Explain with exceptions the rule of buyer be aware by citing relevant provisions and decided cases.

Ans- The rule of Caveat Emptor [Sec. 16]

Sometimes the goods purchased by the buyer may not suit the particular purpose for which the buyer wants them. The question which in such a case arises is, whether the buyer can reject the goods or he is supposed to take the risk of the goods turning out not suitable for the required purpose. 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. It is incorporation of the rule contained in the maxim caveat emptor, which means buyer be beware. 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.,** the buyer ordered for hessian cloth without specifying the purpose for which he wanted the same. It was in fact 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.

Exceptions :

Section 16 also incorporates the following two exceptions to the rule of caveat emptor, which are two further implied conditions.

1) Implied Condition as to Quality or Fitness [being first exception to the rule of Caveat Emptor-Sec. 16(1)] As discussed above, the general rule is that there is no implied condition or warranty as regards the quality or fitness of the goods for any particular purpose. To this rule there is an exception. If the following requirements as mentioned in Sec. 16(1) 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 impliedly, 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

PGS NATIONAL COLLEGE OF LAW

CONTRACT-II

UNIT-3

seller's skill or judgment; and (ii) the goods supplied are of such a description which it is in the course of the seller's business to supply.

If the buyer tells the seller the purpose for which the goods are required by him and reliance is placed on the skill and judgment of the seller, the rule of caveat emptor does not apply and it becomes the seller's duty to supply the goods suitable for the purpose mentioned by the seller. Thus, if in the case of **Andrew Yule & Co.**, 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.

No implied Condition when the sale under Patent or Trade Name- Proviso to Sec. 16(1) :

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 undertaking is that the goods shall be of the same trade name as demanded by the buyer.

2) Implied condition of Merchantable Quality [being second exception to the rule of Caveat Emptor-Sec. 16(2)] Sec. 16(2) contains another implied condition which is by way of exception to the rule of caveat emptor. It has been noted above in Sec. 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-sec., there is a further implied condition in such a case and that is that the goods supplied shall be of merchantable quality. Where

(1) The goods are bought by description,

(2) 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 terms 'merchantable quality' has not been defined in the Act. 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.

Condition Negatived when the goods Examined by the Buyer- Proviso to Sec. 16(2)

Sec. 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.

According to the proviso to Sec. 16(2) where the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. It means that the implied condition of merchantability will be excluded when the buyer has examined the goods and the defect in the goods was a patent one. In case of latent defects, the buyer is still protected inspite of the fact he has examined the goods.

Implied Conditions in a Sale by Sample - Sec. 17

A contract of sale is by sample when there is a term in the contract, express or implied, to that effect.³ 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. Exhibition of the sample does not always imply that the sale is by sample because sometimes a sample may be shown simply to give a rough idea to the buyer about the kind of goods to be supplied. It becomes a sale by sample only when the understanding between the parties is that the sample constitutes a true representative of the kind of goods to be ultimately supplied under the contract. The sale may be one by sample either when the contract expressly so provides or the same can be inferred from the contract or usage of trade.

3. What are the implied conditions and implied warranties under the sale of good act.1930?

Ans- Implied Conditions and Warranties

Parties may expressly provide any conditions or warranties in their contract. Apart from what may be provided by the parties in the contract, certain conditions and warranties, as provided in Sections 14 to 17, are impliedly there in every contract of sale of goods. The implied conditions and warranties provided in the Act are binding in every contract of sale unless they are inconsistent with any express conditions and warranties agreed to by the parties. The implied conditions and warranties recognised by the Act are being discussed below.

Implied Conditions

1. Implied Condition as to Title-Sec. 14(a)

In every contract of sale, unless the circumstances 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 in them 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 price has not been paid till then. In **Rowland v. Divall**, the plaintiff if the 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 as consideration had totally failed. Similarly, if the buyer having bought the goods from a seller takes the delivery of the same but is compelled to pay the price to the true owner, he is not bound to pay the price to his seller, who sold the goods without having a right to sell the same.

Implied condition in Sale by Description-Sec. 15

When the goods are sold by description, there is an implied condition that the goods supplied shall correspond with the description. In case the goods are not in accordance with the description, there is a breach of implied condition and the buyer has a right to reject them. He has, however, an option under Section 13, to accept the goods by treating the breach of condition as a breach of warranty and claim damages.

Implied condition in Sale by sample as well as Description [Sec. 15]

When the goods are sold by sample as well as 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.

The rule of Caveat Emptor [Sec. 16]

PGS NATIONAL COLLEGE OF LAW

CONTRACT-II

UNIT-3

Sometimes the goods purchased by the buyer may not suit the particular purpose for which the buyer wants them. The question which in such a case arises is, whether the buyer can reject the goods or he is supposed to take the risk of the goods turning out not suitable for the required purpose. 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. It is incorporation of the rule contained in the maxim caveat emptor, which means buyer be beware. 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.**, the buyer ordered for hessian cloth without specifying the purpose for which he wanted the same. It was in fact 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.

Exceptions :

Section 16 also incorporates the following two exceptions to the rule of caveat emptor, which are two further implied conditions.

1) Implied Condition as to Quality or Fitness [being first exception to the rule of Caveat Emptor-Sec. 16(1)] As discussed above, the general rule is that there is no implied condition or warranty as regards the quality or fitness of the goods for any particular purpose. To this rule there is an exception. If the following requirements as mentioned in Sec. 16(1) 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 impliedly, 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 supplied are of such a description which it is in the course of the seller's business to supply.

If the buyer tells the seller the purpose for which the goods are required by him and reliance is placed on the skill and judgment of the seller, the rule of caveat emptor does not apply and it becomes the seller's duty to supply the goods suitable for the purpose mentioned by the seller.

Thus, if in the case of **Andrew Yule & Co.**, 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.

No implied Condition when the sale under Patent or Trade Name-Proviso to Sec. 16(1) :

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 undertaking is that the goods shall be of the same trade name as demanded by the buyer.

2) Implied condition of Merchantable Quality [being second exception to the rule of Caveat Emptor-Sec. 16(2)] Sec. 16(2) contains another implied condition which is by way of exception to the rule of caveat emptor. It has been noted above in Sec. 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-sec., there is a further implied condition in such a case and that is that the goods supplied shall be of merchantable quality. Where

(1) The goods are bought by description,

(2) 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 terms 'merchantable quality' has not been defined in the Act. 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.

Condition Negatived when the goods Examined by the Buyer-Proviso to Sec. 16(2)

Sec. 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.

According to the proviso to Sec. 16(2) where the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed. It

means that the implied condition of merchantability will be excluded when the buyer has examined the goods and the defect in the goods was a patent one. In case of latent defects, the buyer is still protected inspite of the fact he has examined the goods.

Implied Conditions in a Sale by Sample - Sec. 17

A contract of sale is by sample when there is a term in the contract, express or implied, to that effect.³ 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. Exhibition of the sample does not always imply that the sale is by sample because sometimes a sample may be shown simply to give a rough idea to the buyer about the kind of goods to be supplied. It becomes a sale by sample only when the understanding between the parties is that the sample constitutes a true representative of the kind of goods to be ultimately supplied under the contract. The sale may be one by sample either when the contract expressly so provides or the same can be inferred from the contract or usage of trade.

Nemo dat quod non habet-Sec. 27

When the seller himself is the owner of the goods which he sells or he is somebody's agent to dispose of the goods, he conveys a good title in the goods to the buyer. Difficulty arises when the seller is neither himself the owner nor has he any such authority from the owner to sell the goods, e.g., a person finds goods lying on the road and sells them, or a thief sells the goods after he has stolen them, or a person purchases the goods on credit or hire purchase basis and disposes them of, or a person continuing in possession of the goods which he has already sold resells the goods. The question which in such cases arises is: Should the rights of the owner of the goods be protected and he be entitled to recover back the possession of the goods from one to whom they have been sold, or, should the buyer, who might have bought them in good faith and for value be protected and allowed to retain the goods defeating the rights and the title of the real owner?

In regard to the above question, the general rule contained in Sec. 27 is as follows:

Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof 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 than the seller had...

Section 27, as a general rule, tries to protect the interest of the true owner when it provides that where the goods are sold by a person who is not the owner thereof 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 than the seller had. This rule is derived from the maxim "**nemo dat quod non habet**", which means that nobody can give what he himself has not got, i.e., a seller cannot convey a better title than that of his own. If the title of the seller is defective, the buyer's title will also be subject to the same defect. This rule does not imply that buyer's title will always be a bad one. What it means is that the buyer cannot acquire a superior title to that of the seller. If a thief disposes of stolen goods, the buyer of such goods has the same title as the seller had. Similarly, where a person taking goods on hire-purchase basis sells them before he had paid all the instalments, the owner can recover the goods from the transferee, on default of payment, in the same way as he could have recovered them from the person to whom they had been given on the hire-purchase basis.¹

Exceptions to the rule

The abovestated general rule contained in Sec. 27, as stated in the opening words of the section itself, is "subject to the provisions of this Act and of any other law for the time being in force." Various exceptions to this rule have been mentioned in this Act and the Indian Contract Act and in those exceptional situations, the seller of the goods may not be having a good title to the goods, yet the buyer of the goods gets a good title to them. The exceptions are :

1. Sale under the implied authority of the owner, or transfer of title by estoppel (Sec. 27).
2. Sale by a mercantile agent (Proviso to Sec. 27).
3. Sale by one of joint owners (Sec. 28).
4. Sale by a person in possession under a voidable contra (Sec. 29).
5. Sale by the seller in possession of goods, the property in which has passed to the buyer [Sec. 30(1)].
6. Sale by the buyer in possession of the goods before the property in them has passed to him [Sec. 30(2)].
7. Re-sale of the goods by an unpaid seller after he has exercised the right of lien or stoppage in transit [Sec. 54(3)].
8. Sale by finder of goods (Sec. 169, Indian Contract Act).
9. Sale by a pawnee when the pawner makes a default in payment (Sec. 176, Indian Contract Act).
10. Sale in market overt-exception recognized in England.

Implied Warranties :

1. Implied Warranty of Quiet Possession-Sec. 14(b)

In a contract of sale unless the circumstances of the case show 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.**, the sellers had consigned tins of condensed milk bearing the labels "Nissly Brand" which was the trade mark 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 a breach of the condition that the seller has a right to sell the goods, there was also a breach of implied warranty of quiet possession and, therefore, the sellers were bound to compensate the buyers.

Implied Warranty against Encumbrances-Sec. 14(c)

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 a charge 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

Sec. 62 of the Act provides that those rights, duties or liabilities which might arise under a contract by implication of law may be negated 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

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." 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. That means that when the parties expressly agree to such stipulation and the same are 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 negated. **Ward v. Hobbs** explains a similar provision of English law, where the

liability was negated 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. Fundamental breach of contract.

The courts insisted that the giving effect to an exemption clause should not result in the fundamental breach of contract. If a clause resulted in fundamental breach of contract, the same was not given effect to. Strict interpretation of exemption clause

The courts have also devised the method of strict interpretation of exemption clause, to counter an attempt by the seller to exclude his liability through exemption clause. In *Wallis v. Pratt*, there was a contract to supply "English sainfoin seeds", but the seller supplied an inferior variety, known as "Giant sainfoin seeds". In an action by the buyer, the seller relied on an exemption clause in the agreement stipulating that "The sellers give no warranty, express or implied, as to growth, description or any other matters." It was held that the exemption of liability could be only in respect of a warranty, but in this case there was a breach of implied condition as the goods were not of the description given in the contract. The seller was, therefore, held liable for the breach of the condition.

Strict interpretation of exemption clause

The courts have also devised the method of strict interpretation of exemption clause, to counter an attempt by the seller to exclude his liability through exemption clause. In **Wallis v. Pratt**, there was a contract to supply "English sainfoin seeds", but the seller supplied an inferior variety, known as "Giant sainfoin seeds". In an action by the buyer, the seller relied on an exemption clause in the agreement stipulating that "The sellers give no warranty, express or implied, as to growth, description or any other matters." It was held that the exemption of liability could be only in respect of a warranty, but in this case there was a breach of implied condition as the goods were not of the description given in the contract. The seller was, therefore, held liable for the breach of the condition.