CHAPTER VII

SALE OF GOODS BY DESCRIPTION AND SAMPLE

I

Specific goods and goods sold by description:

At Common Law, the most usual instance of sale of goods by description was sale of unascertained or future goods of a certain description i.e. class or kind. An authoritative work says that the term warranty is constantly applied to descriptions given of subject matter of the sale in case, where the sale is not of specific article, but only of a certain description of article. In such cases the property cannot pass by bargain. The compliance with the so called warranty is a condition precedent to the purchaser's liability to accept or pay, and if the article does not correspond with the given description, the purchaser is entitled to reject it, and if has paid for it, to recover the price as money received to his use.

At common law specific goods could also be sold by description. But the intention had to be ascertained from the terms of contract and other surrounding circumstances. As a general rule, a contract for the sale of specific goods was a contract for that article as such. The property in such good passed at the time of making the contract and any description of the goods was merely a representation having no legal effect except where it was fraudulent and if so the buyer was liable for damages only and there was no implied warranty of fitness in such cases. Lord Plowden says:

Prae-Sentia Corporis Tollit Errorem

Nominis And Veritas Nominis Tollit Errorem

Demonstration Is - "Another certainty put to another thing which was of certainty enough before, is of no manner of effect". Lord Bacon also says:

"There be three degrees of certainty, presence, name, and demonstration of reference, where of the presence, the law holdeth of greatest dignity, the name in the second degree and the demonstration of reference in the lowest and always error or falsity with less worthy shall not control nor frustrate efficient certainty and variety in

3. Robertson v. Amazon Tug Co. (1881) 7 Q.B.D. 598
the more worthy...."

**Common Law distinction between Representations and Contractual Terms:** On plain reading of the Section 15 of S.C.A. it may appear that it oddly declares that whatever is expressly mentioned must impliedly be performed. However, the case law on the point states that there is distinction between mere representations and contractual terms. In **T & J. Harrison v. Knowles and Foster** and **Oscar chess Ltd. v. Williams**, the court held that this only amounted to a mere representation and not a term of contract, whereas, it was held in **Darley v. Ship, Beal v. Taylor**, **Taylor v. Combined buyers Ltd.** and **Dick Bently Ltd. v. Harold Smith Ltd.** that the descriptive statement did not amount to mere representation but it constituted as a term of contract. If we compare the facts of **Dick Bently Ltd. v. Harold Smith Ltd.** with **Oscar chess Ltd. v. Williams** supra, it will be evident that the facts of both the cases resemble each other but still the decisions differ. Atiyah says that

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5. Refer, for a vehement criticism, Stoljar "Conditions, Warranties and Description of quality in Sale of Goods I" 15 Mod. L.R. 425 and 16 Pod. L.R. 174
6. (1918) 1 K.B. 608 (seller representing the ship as of 460 tons dead weight capacity whereas; the ship supplied was of only 360 tons)
7. (1857) 1 W.L.R. 370 (the seller describing his car as "1948 Morris" which was 1939 model)
8. (1900) 1 C.P. 513
9. (1957) 1 W.L.R. 1193
11. (1965) 2 All E.F. 65
perhaps where the seller is a private dealer, the courts have a lenient view of the terms of contract under sec. 13 of E.A. (corresponding to Section 15 of S.G.A.) and if they find that the seller is a dealer in those goods, then the term is strictly construed and declared as part of contract description. 11a

Though the term description usually refers to a particular class of goods yet "it also includes the statement which may be essential to the identity of the goods as contracted for e.g. as to quality or fitness, place of origin or of shipment, time of despatch or delivery, mode of packing etc." 12

Goods are sold by description where the buyer enters into contract of sale in reliance on description of goods given by or on behalf of the seller. There may be sale by description although the goods are specific. 13

13. 29 Halsbury, 62. Benjamin states, while commenting upon Sec. 13 of E.A. (corresponding to sec. 15 of S.G.A.) that the rule applies to a contract for sale by description either of a specific chattel or unascertained goods (Benjamin on Sale, 8th Ed., P. 609). Further, Pollock & Mulla state that specific goods may be sold by description and the stipulation, as in case of unascertained goods, may amount to condition and "provision relating to sale of specific goods, whatever its precise effect, will only apply to those cases in which the buyer does not rely upon the description". (Sale of goods and Partnership Acts III Ed. P. 65) The authors further state under heading "Sale of specific goods by description" as follows:
It was observed in *Grant v. Australian Knitting Mills* that a thing, although specific, may be sold by description so long as it is sold not merely as a specific thing but as a thing corresponding to a description. So in *Warley v. Whip*, where the subject matter of sale was specific goods and the buyer had not seen it but relied upon the description given by the seller, it was held that he was entitled to reject it as it did not correspond with the description.

Unascertained or future goods are invariably sold by description. In cases of sale of specific goods, it is a question of fact whether the goods are sold as such or they are sold by description.

In a contract through correspondence, the goods must be given some verbal description. Even in a contract effected in a shop, the goods may be sold by description. In *Grant v. Australian Knitting Mills Ltd.*, it was observed that there is a sale by description even though the buyer is buying something displayed before him on the counter. A thing is sold by description, even though it is specific, so long as it is sold not merely as specific thing but as a thing corresponding to a description e.g. woolen under-garments, a hot

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This usually applies to a contract for the sale of unascertained or future goods, but it may apply to sale of specific goods, also, if the buyer contracts in reliance on that description.

14. AIF 1936 F.C. 34 at 41
15. (1900) 1 C.B. 513
16. However, refer the rulings of *Howell v. Coupland* (1876) 1 Q.B.D. 258 where sale of future goods was treated as sale of specific goods.
17. (1936) A.C. 85 at 100
water bottle, a second hand reaping machine, to select a few obvious illustrations.

The Dictum of Dixon J. of Australian High Courts is based upon inherent fiction that buyer did not select the stock but rather the sales assistant identified the goods. His Lordship observed that the identity of goods may certainly be established, the parties must, since the intention is expressed or communicated, refer in some way to the goods. They must use some 'description' to refer to them. A difficulty, therefore, will arise in determining as to when the sale is 'by' the description and when not. Apparently, the distinction is between sales of things sought or chosen by the buyer because of their description and of things of which the physical identity is all important.

"When the ground upon which the goods are selected and identified in their correspondence to a description and when therefore, it may be said that the buyer primarily relies upon their classification then, notwithstanding that they are bought as specific goods ascertained and identified, the goods are bought by description. In the ordinary course of a sale over the counter by a shopkeeper to a customer, who calls for an article of a given description, inspects the specimens produced, and buys one; the transaction is a sale by description".18

18. Australian Knitting Mills Ltd. v. Grant (1933) 50 C.L.R. 387 at P. 417-18
Williston does not agree that in a situation like Grant's case, the sale may be sale by description. He is of the view that the term should be confined to cases where the indentification of goods sold depends on description, that is, the goods cannot be indentified without it. However, he concedes that the term may be extended to all the cases where the buyer relies upon the descriptive words.

The goods should not only be described but contracted under that description. It was observed in David Jones Ltd. v. Williams that whenever the buyer describes the goods to place reliance to a substantial degree upon those words as well as upon the identity of those goods, it is sale by description. All sales must be sales by description unless they are sales of specific goods. Numerous thorough inspections of an article may mean that a specific article is subject matter of sale and descriptive words used are only meant for identification. The aforesaid dictum had

19. Williston on Sale, Rev. Ed. Section 224 P. 573 et seq. Prosser is also of the same view. See his remarks in (1943) 21 C.R.R. at PP. 470-2


21. (1934) 52 C.L.R. 110 at P. 119


created a difficulty in acceptance of the proposition whether sales in self-service store, where the customer himself selects the article, constitutes a sale by description. The observations of Molony Committee are that retail establishments cater the goods for the selection by the customer himself unaided by sales assistants. "It is questionable whether these sales are by 'description' and if not, the customer has no shred of right in law to complain of a defective purchase." 24

To resolve over this controversy, the supply of goods (Implied Terms) Act, 1973 has added, vide section 2, a clause under section 13 which reads:

"A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer".

II

NON CONFORMITY WITH DESCRIPTION AND REMEDIES OF THE BUYER

The provision is strictly construed and if there is non-compliance with its term, the buyer is entitled to

reject the goods. However, it is controversial as to when do the goods do not conform with the description.

It is an accepted principle that trivial inconfir-
mity gives no ground for rejection. But otherwise, the buyer is entitled to reject even though the goods are merchantable and commercially sound.

In Jornal Kastur Chand v. Haemanali Khanhrai, 76 lbs. were packed in a case against 80 lbs stipulated in the contract. Even though the marking on cases corresponded with the marking mentioned in the contract, it was held that the buyer was entitled to reject. The markings of cases were immaterial and the mode of packing was material as it related to nature of contract. It is noted from law reports that the buyer suffered no loss from such packing, still he rejected the goods on the ground of non-conformity with description. It is submitted that the law should take into account the conflicting claims of parties and bring about justice in a way which may not operate harshly upon

the seller. The proof of loss or damage by the buyer
must be demanded and the inconvenience to the seller may
also be taken into consideration. However, in a full
bench decision of Punjab High Court, where the contract
related to supply of solidified fuel in containers of
certain specification, their Lordships held that the
inspector rejecting the goods on the grounds of improper
packing was not entitled to do so for the reason that the
instrument of authority did not empower him to reject.

From the terms of contract, it could not be construed that
the packing in suitable container formed part of contract
description of the goods. Their Lordships observed that
in the case of solidified fuel, packing must be a very
important feature in a contract for supplying that commodity.

In such event, it would of course be open to buyers namely
government to insist that the packing to be taken as part
of the commodity itself. The contract in the present
case could well have been specified to be contract for
supply of solidified fuel in a container of a particular

29. Id. at 214
One of the terms of contract read:

"The store is required to be packed in new or well-cleaned hermetically sealed four gallon tins of the Kerosine oil type and each tin shall contain 30 lb nett. Two such tins shall be repacked in a strong trade wooden case iron hooped, steel strapped or wired. The packing shall be sufficiently strong to withstand rough handling during transit by road, rail or sea and shall conform to the 30 requirement of Railway and Pamphlet No. 14."

From the facts of the case, it appears that the contract was formed on 30th June 1943 and the authority of the inspector to reject on the ground of faulty packing was augmented by amending the terms of original contract on 1st September 1943.

What is evident in the light of above facts is, that their lordships appreciated the fact that solidified fuel should be packed in special containers, and the buyers had actually made such provision. The inspector rejecting the goods on the ground of non-conformity with the specifications of packing was government official and a representative of buyers. The position of the official is that of an agent. The intention of the government was that goods must be properly packed and authority to reject on ground of improper packing was conferred by the government at a later date. Hence, whatever may be technicalities of law and

30. Id. at p. 213
31. Id. at p. 215
the rule of interpretation, it is submitted that the
decision appears to be strange and not in consonance
with equity and good conscience.

Antony Thomas v. Ayyunni Mani suggests that
descriptive words relate to quality of goods. The time,
place, route of shipment may be part of the description
and non-conformity with it will give the buyer, the right
to rescind.

In V.K. Kumar Swamy Chattiar v. Karuppu Swami Mooppanar
on delivery in July, the buyers refused to accept the goods
as they did not conform to the description i.e. were not
supplied by mills in August. The buyers were held liable
for breach of contract. Their Lordships observed that it was

32. AIR 1960 Kerala 176 (Buyer entitled to reject as bad
cashewnut exceeded 20%. See also Vimble Sons & Co. v.
Lillico & Sons (1922) 38 T.L.R. 296 (Sale of cotton cake
containing 40% protein and 10% oil was sale by description)

33. Montague L. Meyer Ltd. v. Oskey Carelin Timber Co. Ltd.
(1930) 36 Com. Cas. 17, Kwei Tek Chen v. British Traders
And shippers Ltd. (1954) 2 K.B. 459, 472 California
prune & Apricot Growers Inc. v. Baird & Peters (1926)
1. D.L.R. 314; Macpherson Train Co. Ltd. v. Howard Ross &
& Co. (1917) 2 K.B. 348, Bowes v. Shand (1877) 2 A.C. 455

34. AIR 1953 Mad. 380

35. The main stipulation read "Description-20 1/2 x 10 Harvey
Mills Yarn, Despatch August 1943. Cash before delivery
subject to terms and conditions above the Mills,
Fadura godown delivery."
immaterial whether the goods were supplied in July or August, if there was no difference in the quality of goods produced in those months by the mills. It was found that the buyers wanted to evade their obligations in order to gain in price ceiling fixed by textile commissioner (to be effective from 15.8.1943) which was less than the contract price. It was further observed, in the light of cardinal rules of construction, that the date of delivery did not form part of contract description.

Where the contract of sale specifies certain brand or mark that forms part of description to the goods, any omission will entitle the buyer to reject. However in Hopkins v. Hitchcock, the contract related to sale of iron bars with marks "S. & H. Crown". Snowden & Hopkins two partners manufactured these goods under the above trade marks. After retirement of Snowden, the firm's name was changed and marks on goods when delivered were altered to "H & Co. Crown". The buyers rightly rejected the goods on the ground that they did not conform to the contract description. In an action by the seller for rejection, it was held that it was a proper tender, as the quality of the goods remained the same. It is submitted that in

37. 143 E.R. 369, (1863) 14 C.B. (N.S.) 65
contract of sale of goods, first, they must conform with the description. Then the second question will be whether the goods are of right quality. In Niblett v. Confectioners' Materials Co. Ltd., the goods were of right quality but after stripping off their labels, they had to be sold on a low price at a loss. It must be noted that the trade-description of the goods is part of goodwill of a business. It is acquired in course of time. The customer relies upon trade mark and he purchases the goods, having relied upon it. The article may be standard one. Bata Shoes are very costly in comparison to other shoes. But their goodwill is so high that people do not mind paying the price demanded. But if the same shoes are sold under trade name "Telco" no one may like to purchase them, or may purchase on a low price. Hence the buyer purchasing the goods for re-sale will find it hard to get customers on the price which could be fetched under trade description, "S.H.& Crown". Under these circumstances, damages should have been awarded by the court if no rejection was allowed. When the goods do not correspond with their description, the seller may "cure" the deficiency by supplying the right type of goods, if he could do so within the delivery schedule specified under the contract of sale. The buyer may rescind the contract and claim damages. All these rights of the buyer have been discussed at length under Chapter IV.

38. (1921) 3 K.B. 387
There are two views in this regard. First is a narrow view not going beyond the classification of goods i.e. the seller must supply peas not beans, chalk not cheese and that quality and fitness do not form part of description. Second view is a broader view and it regards details of measurement, time of delivery, shipment, fitness quality etc. as part of contract-description. In the recent case of Ashington Diggeries v. Christopher Hill Ltd., herring meal was contaminated with a substance, known as D.M.N.A. the addition of which rendered the goods harmful and as a result thereof, the minks died. Their Lordship of the House of Lords observed that description only concerned with identifying the goods contracted and would not include "fair average quality of the season" under contract description.

39. (1972) A.C. 441; (1971) 2 W.L.R. 1051
40. For a Criticism of this view, refer Annual Survey of Common Wealth Law (1971); Ingrid Patient "More Lore on section 14" (1970) 33 Mod., L.R. 565 and "Ruminating on Mink Food", 34 Mod. L.R. 557 at 557-59
It is submitted that the decision is open to objection, in so far as it affirms that (1) the goods correspond with their description and the addition of D.M.N.A. in small quantity did not change the description, and (2) the "fair average quality" did not form the description but it related to quality of the goods.

It may be recollected that in *Pinnock Bros v. Lewis and Peat Ltd.*, C purchased from D a quantity of Copra Cake under terms "the goods are not warranted free from any defect rendering them unmerchantable which would not be apparent on reasonable examination". It was discovered later on that the copra cake was adulterated with castor beans which rendered it poisonous. Roche J. held that the exemption clause did not protect the sellers as the goods did not correspond with their description. The admixture of castor beans in copra cake rendered it totally a thing of different description. In *Ashington Pinneries* case, the compounders suggested certain changes in the formula provided by the buyers. One was that herring meal, instead of fish meal should be used. It may be pointed out that D.M.N.A. was used as a substitute to a salt which was previously used in preparation of mink food. This was obviously a new substance, though

41. (1923) I.K.B. 690
used in very small quantities in preparation of mink food. Can then we say that if the small addition of a substance changes quality of goods, it amounts to supplying the goods of different description. It is not the quantity that matters but the potential danger inherent in that. In Wilson v. Rickatt Cockerell & Co. Ltd., an explosion was caused in a consignment of coal, when placed on fire by the buyer. This happened due to presence of an explosive substance present in the coal. The buyer would have succeeded on this ground had he pleaded that the addition of an explosive, even in small quantities rendered it a thing of a different description.

There is a very interesting case of unusual occurrence, decided by Calcutta High Court in which certain hessian cloth, required for packing food stuff, was rejected by the buyer for the reason that it gave a bad smell because of "particular batching process". Ameer Ali J. said that what amounts to description of goods is a mixed question of fact and law. In the contract, the goods were described as "Fort Gloster, Standard Mills Make, quality, weight and size as per margin". Against quality, was mentioned hessian

42. (1954) 1 C.B. 598  
43. In Re Andrew Yule & Co. AIR 1932 Cal. 879  
44. id at p. 881
cloth. This was construed as referring to the nature of cloth or fabric. Now the question was whether the smell in the cloth rendered it other than the "Standard Mill Make". This was a question of fact. From the fact of the case, he drew the inference as follows:

"Smell is undoubtedly a quality which can form the part of the description of the goods. Obviously if there was a contract for odourless parafin oil, goods carrying smell would not conform to the description. So if the standard make of parafin oil of certain manufacturer is odourless and there is a sale of X's standard make parafin oil, parafin oil manufactured by X but carrying smell would disconform".45

It may be noted that smell is important in the case of packing of food stuffs. The arbitrators had found that hessian cloth was largely used for packing food stuffs. Hence the inference drawn was that "standard make" denotes inter alia standard as to quality of smell" and hence the goods did not conform to the description. In Bostock & Co. v. Nicholson & Sons, the contract related to the sale of goods, manufactured free from arsenic. In a new manufacturing process, goods were

45. id.
46. (1904) 1. K.B. 725; 9 Camp. Cas. 200
manufactured, involving the process of arsenic and on supply, they bore such traces. It was held that these goods were not free from arsenic. Section 15 is very relevant to the quality and fitness of goods, if not usually, at least sometimes. If the contract mentions the goods for a certain purpose that purpose may become part of contract-description. Thus in a New Zealand case, buyer bought "a pure bred polled Angus Bull". To the knowledge of the seller, the bull was wanted for breeding purposes, but due to certain physical disabilities it was incapable of breeding. It was held that the sale was a sale by description and that the description "a pure bred polled Angus bull" conveyed the meaning that "the animal might be used to get this class of stock". 48

If we turn to the remarks of Lord Abinger in Chanter v. Hopkins, that if a man orders copper for sheathing ships, which is a specific type of material, the seller will not be supplying the goods as per description, if he supplies the copper of a different type. In Isahan-Europe Company Ltd. v. Bolton "Tractor Ltd., Diplock J. remarked that "the description of the goods which is dealt with by Sec. 13

47. Cotter v. Luckie (1918) N.Z.L.R. 811
48. id. at p. 813
49. (1838) 4 M & W 399
50. id. at p. 405
51. (1968) 2 C.S. 546
52. Corresponding to Section 15 of S.C.A.
may well be with reference to the particular purpose for which the buyer requires them. But Davies L.J., reading the Judgment of the Court, in Ashington Piggeries' case, remarked that in the opinion of the court, it would have made no difference if the word "mink food" were used as contract-description, for this would mean that the food was intended for mink, but not that it was suitable for mink. It is submitted that if such were the interpretation then the very purpose of describing is defeated. Can't we classify the seller's obligation to supply the goods of right quality under more than one section?

In a case decided by Madras High Court, the subject matter of sale was Damangan Tour Dal which was recognised of best quality. The dal was loaded in rain and after having soaked water, it could not be described as best quality. It was held that the dal supplied did not conform to the description. Also in case of In Re Feheri Lal Baldeo Frasad, it was observed that the sale

53. Supra note 51 id. at 549
54. Refer Ingrid Patience, supra n. 40 Id at 566
55. Shivlingappa Shankarappa v. Balkrishna Chettiar & Sons AIR 1962 Mad. 426
56. AIR 1955 Mad. 271 (Sale of dry peas dal superior without broken or denkie. On supply chaff was found to be of inferior quality-dankei, broken and with husk) (p. 271).
of goods by description may have reference to the quality of the goods. Where food stuffs are purchased by description, an implied condition to their fitness and quality may also arise. The question of reasonable fitness of the article can be settled through its description itself as well. It was held that the seller was bound to supply goods in conformity with the contract and of merchantable quality.  

In Malli & Co. v. V.A.A.R. firm, it was observed that in order that goods are immediately salable in the market, they should conform to the description laid about their quality. In the case of Bombay Burmah Trading Corporation v. Agha Mohd. Khalnel Shirazi, it was held that the goods supplied were not as per contract description (specification) and hence they were unmerchantable and not fit for particular purpose as railway sleepers. In another case of the same High Court, it was observed that "The term that the goods shall be of merchantable quality, is fulfilled, when they do not differ from the normal quality of the described goods, including under the term 'quality', the state or condition, as required
by the contract. There are a number of cases decided in India to the same effect. Atiyah also conceded that if the contract calls for goods of a certain quality, this may itself become a part of contract description.

**RELATIONSHIP BETWEEN DESCRIPTION AND QUALITY OR FITNESS:**

Section 16 of S.G.A. deals with Implied Conditions as to quality and fitness in a case where goods are sold by description. Under this section, goods may be fit for a particular purpose and may be of merchantable quality, yet they may not correspond with their description. It may also happen that the goods correspond with their description but they are either unfit for the particular purpose for which they are sold or they are of unmerchantable quality.

It may be pointed out that sub-sections 16(1) and(2) are applicable to those cases where the goods are sold by a seller dealing in goods of that description. The requirement of seller being dealer in the goods of that description is not applicable under Sections 15 and 17 of our Act. In other words, private sales are also included and in this respect, the scope of latter section is wider than that of the former.

61. Id. at PP. 42-43
62. Bansilal Ram Nath v. Fam Chand Tolaram, AIR 1930 Lahore 843(N); Baretto v. Pruce AIR 1939 Nag. 19; Peermohammad v. Dallo Ram, AIR 1919 Mad. 728
63. Atiyah P.S. Op.cit supra n. 11a at p. 77
64. Arco Ltd. v. E. A. Fonasen & Son, supra n. 25
65. Ashington Pioneers Ltd. v. Christopher Hill Ltd. Supra n. 39, Grant v. Australian Knitting Mills, supra n. 14
SALE OF GOODS BY SAMPLE AS WELL AS BY DESCRIPTION

This provision means that where there is sale of goods by Description and Sample as well, it is not enough that the goods correspond with the sample if they do not correspond with the description also. Use of sample or inspection of bulk do not exclude the implied condition that they shall correspond with description as well. However, if the goods correspond with the sample as well as description, there is no room to reject them by the buyer, even though the mistake is bilateral and is of fundamental nature, according to one of the parties.

It was observed in Moody v. Cresson that there are a class of cases under sale by sample in which goods are bought by specified description. In such cases, it is an implied term that the goods shall reasonably answer that description in their commercial sense. The sample in

67. Harrison and Jones Ltd. v. Punton & Lancaster Ltd. (1953) 1 All E.R. 903; (1953) 1 C.B. 646
68. (1868)L.R.4 Ex.49 Defendant had contracted to sell grey shirtings, according to sample, each piece to weigh 7 lbs, sample contained 15" china clay which was inserted to make up the weight, rendering the goods unmerchantable.
such cases is looked upon as a mere expression of the quality of the article, not of its essential character, and notwithstanding the bulk be fairly shown, or agree with the sample, yet, if from adulteration or other causes, not appearing by inspection of sample, though not known to the seller, the bulk does not reasonably answer the description in a commercial sense, the seller is liable.

Effect of mistake on sale of goods by sample as well as by Description: *Harison & Jones v. Runten & Lancaster* is quite contrary to the general basic principles of the law of contract i.e. where both the parties are under mistake as to a matter of fact essential to the subject matter of contract, the agreement is void for want of consent ad idem.


70. Supra n. 67. The parties agreed in writing to buy and sell 300 bales of cotton "Calcutta Kapok Sree" brand. There was guarantee of quality "to be equal to standard sample marked "Sree" brand in our possession" from the sellers. Subsequent to the contract, a sample was sent to the buyers which they found unsuitable for their factory. The reason of unsuitability was that the Kapok contained an admixture of bush cotton. However, this fact was unknown to both the buyers and sellers. But the fact remained that such admixture made it Calcutta Kapok "Sree" brand. Hence the goods were held to correspond with the sample as well as description.

It was held that the buyers had no ground of relief for their contractual liability even though they honestly believed that the goods of a known trade description had particular composition and the sellers also shared such erroneous belief. Though the decision does not appear in conformity with the fundamental principles relating to law of contract, yet the judgment is on the merit of facts quite justified. However, had there been a guarantee of suitability for their factory purposes, the buyers stood a fair chance of rejecting the goods.

SALE BY SAMPLE

"A contract of sale is a contract for sale by sample where there is a term in the contract express or implied, to that effect." The mere fact that a sample has been shown is not sufficient. But further, there must be agreement to the effect that the sample will set the standard for the goods contracted. Unlike Sections 14 to 16 which imply certain conditions under specific fact situations, the test of sale by sample is a question of law. A sale at which a specimen of goods has been exhibited is not necessarily a

72. Section 17(1) of S.C.A.
sale by sample for the buyer may rely upon description alone. Ameer Ali J., in a Calcutta Case, decided that where samples are transformed into formula after analysis, the sale may still be a sale by sample.

The seller may show a sample and yet decline to sell by it but may ask the buyer to inspect the bulk and form his own judgment about the goods. In a number of cases, where samples are displayed, sale by description from such samples. However, in cases of goods like wheat or flour, where sample is produced, sale is more likely to be by sample.

Williston observed that sample is simply a way of describing the subject matter of bargain. The same rules which govern sale by description and agreement to sell are applicable here. Where the contract mentions delivery by instalments, sample, forming part of one bargain, may operate

73. Gardiner v. Gray (1815) 4 Camp. 144, 16 R.R. 764
74. Payer v. Fverth (1814) 4 Camp. 22; 15 R.R. 722
75. Lalchand v. Balkinath (1937) 63 Cal. 736; 169, I.C. 128; AlF. 1937 Cal. 140
76. Gardiner v. Gray, Supra n. 73 Cameron v. Shitzkin Pty. Ltd. (1923) 32 C.L.R. 81

76. Williston on Sales (Revised Ed.) Vol. 1 S. 250 P. 665 "Verbal description may be used (1) as a means of identifying the goods or (2) as a means of describing the quality of existing goods which are otherwise identified, or (3) as a means of describing non-existing goods. The same principles are applicable where the description is by means of a sample".
as a 'condition' in subsequent transactions but not in case of future goods.77

Lord Macneaghten in *James Drummond v. Van Ingen* said:

"The office of a sample is to present to the eye the real meaning and intention of the parties with regard to subject matter of the contract which owing to the imperfection of the language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which buyer belongs, using due care and diligence, and appealing to in the ordinary way and with the knowledge possessed by the merchant of that class at the time."

'Sale by sample' must be distinguished with 'sale by sample as well as by description'. In the former, the sample only refers to the quality of goods but the latter deals with its quality plus essential character. Thus in *Nichol v. Godte*, where the sale related to "Foreign refined rape oil", warranted only equal to sample, the seller was held liable for supplying such oil with an admixture of hemp oil, though such defect existed in sample as well.

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77. *Re Faulkners Ltd.* (1917) 38 D.L.R. 84; *East Asiatic Co. Inc. v. Canada Rice Mills Ltd.* (1939) 3 D.L.R. 695
78. (1887) 12 A.C. 284 at 297
79. Supra n. 66
Where the descriptive words in the written contracts are unintelligible or have no definite trade meaning, extrinsic evidence will be allowed to ascertain the meaning of the descriptive words. Under such circumstances, evidence of exhibition of samples will be admissible, in order to show as to what was the real intention of the parties behind these descriptive words. In an Australian case, L.C. Thorne & Co. Pty. Ltd. v. Thomas Roodwick & Sons Ltd., where the written contract had no reference to sample, it was held that parol collateral contract may be proved if the goods were warranted as equal to sample.

A mistake in the sample which has been shown may prevent the formation of a contract e.g. where the sample is drawn from a bulk different than the specific one intended and expressed to be sold. But the party at mistake cannot take the benefit of his own wrong.

80. Sharp v. Thompson (1915) 20 C.L.R. 137
    In Cameron & Co. v. Slutskin Pty. Ltd. (1923) 32 C.L.R. 81, sellers sold "matchless No. 247539/40 white voile" under a written contract. It was held open to buyers to refer to sample, even though there was no mention of such sample in the contract.

81. (1956) 56 S.R. (N.S.W.) 81

82. Menaw v. Holloy (1878) 2 L.R. Ir. 530 (C.A.)
    Scott v. Littledale (1858) 8 E.& A. 815
VI

PAROL EVIDENCE RULE

Where there is contract of sale by sample but the parties, while reducing the contract to writing, have not recorded any reference to it, then parol evidence, rule will prevent them from giving oral evidence to the effect that it was sale by sample. However, evidence of usage or custom of trade may be given that a sale was by sample, even though the contract in writing was silent. Further, where the written contract does not refer to any sample but the order on which such sale is made refers to it, then also, it shall be treated as a sale by sample.

83. Meyer v. Everth (1814) Supra n. 73
Cardiner v. Gray, supra n. 73, Ginner v. King (1890) 7 T.L.R. 140. In an Australian case, L. G. Thorne & Co. v. Thomas Porthwick & Sons (Asia) Ltd. (1950), 56 S.R. (N.S.W.) 81, B had purchased fifty drums of neats foot oil, under a written contract, with a considerable degree of particularity in the details of the agreement. Majority of the judges of New South Wales Full Court held that as the contract was complete on the face of it, parol evidence was not admissible. Street C.J. observed "If the contract is reduced to writing after the sample has been shown and makes no reference to this fact, then the written contract, if it be a complete contract, cannot have the added term incorporated in it" (P. 87).
Similar view was taken by Panigrahi J in Mahadev Gangad v. Couri Shankar AIR 1950 Orissa 42 where the written contract was silent about sample though the plaintiff alleged that the samples were shown at the time of making the contract but they were not retained by the buyer.

84. Syres v. Jones (1848) 2 Ex. 111: 154 E.R. (F.P.) 426
85. Lamson Paragon Ltd. v. Spicers (Australia) Ltd. (1953) S.A.S.R. 297
Law Commission in its preliminary report on Section 15 (1) of E.A., advocated for its amendment, in order to circumvent the parol evidence rule. However, this idea was abandoned by the Commission on the ground that the amendment should be made after having thoroughly examined the issue "within the framework of a comprehensive study, directed to the respective merits of written and parol evidence and not... in relation to one particular section of one particular statute."

From the remark of the Law Commission, it appears that they were convinced with regard to the fact that the parol evidence rule operates harshly upon the parties transacting their affairs under this section. At present, we are not concerned with examining the parol evidence rule as a whole but to the extent it affects transactions relating to sale by sample. The author has traced down the history of the rule through original case reports which are not easily available. Hence facts of the cases, where the parol evidence rule was applied are given briefly, in order to apprise the readers of the actual circumstances of its application. From the reports in the following pages, it

86. Corresponding to section 17(1) of S.G.A.
will be discerned that this rule has been applied as a dogma or sacred principle, resulting into sheer miscarriage of justice. The first case, where this parol evidence rule was indulged into sale by sample is Meyer v. Everth, wherein the plaintiff's contention was that the sugar was of inferior quality and not one equal to the sample which was shown to him before such delivery. Lord Ellenborough stated that in such cases, remedy was for an action of deceit by wilful misrepresentation.

It may be shown by evidence that:

"at the time of sale, a sample was fraudulently exhibited to deceive the buyer, whereby the plaintiff has been induced to purchase the commodity, which turned out of greatly inferior quality and value. But when the sale note is silent as to the sample, I cannot permit it to be incorporated into contract. This would be contrary to Mere v. Ansell (3 wills 275) and would amount to an admission of parol evidence to contradict a written document."

From the above, it is clear that his lordship conceded that the sample was shown at the time of entering into contract but he was unable to treat it as a sale by sample for the simple reason that it would be contrary to

88. Supra n. 83, considered in M. Mullen v. Kelberg (1878) 4 L.R. 194 Referred to Kain v. Old (1824) 2 B & C 627 Allan v. Lake (1852) 18 L.B. 660
the rule laid down solely in *Meres v. Ansell* in which the defendants contended that it was orally agreed that grass of Millcroft was also to be taken away along-with that of Boreham's field and hence he entered the farm whereupon, a suit for trespass was brought by the plaintiffs. The attesting witness, when called by the plaintiff, deposed that at the time of making the written agreement, it was orally agreed by Meres and partners to give away the grass of both the farms and not only one of them (as in writing). The matter was referred to the Jury who found for the defendant. Lord Mansfield accordingly gave the verdict for defendant.

In appeal, retrial was ordered under the rule that "parol evidence shall not be admitted to contradict an agreement in writing".

89. (1971) 3 Wills, 275. Meres and partners had occupation of land called Boreham's field and Millcroft. Ansell and partner owned a copper Mill and all the four agreed by memorandum in writing and attested by Mathews (a witness) to exchange the Copper Mill for grass and vesture of hay off Boreham's Meadow. There was no mention of Millcroft. The facts are based upon the English Report (Full Reprint) 95 E.R. 1052
So far as the rule in *Marre v. Ansell* is concerned, it is a good rule but any absolute rule without an exception, causes, at times, great hardship, resulting into injustice to the parties. The human nature being what it is, (that is to err is human), exceptions should be made out in favour of cases where circumstantial oral evidence strongly suggests contrary to the written contract. It may be noticed that the attesting witness bore testimony about the oral agreement and the Jury also came to the same conclusion. Under these circumstances, Lord Mansfield, a legal luminary, gave the verdict for the defendant, by sacrificing a principle for Justice. The legal rules are framed for promoting Justice and if they result into injustice, they should be disregarded, and discarded.

90

In *Syree v. Jones*, tobacco was bought as per sample. But it could not be treated as sale by sample for the simple reason that the bought notes did not mention that fact.

91

In another important case, *Cardiner v. Gray*, the plaintiff brought an action for breach of implied warranty.

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90. Supra n. 84

as to sample. Lord Ellenborough observed that as the sample was not referred in the written agreement, "I cannot allow it to be superadded by parol testimony. This was not a sale by sample". 92

In Nichol v. Godts, the Jury found that the buyer knew the fact that he was being given Rape Oil, mixed with hemp, but his Lordship still said "that a written contract cannot be contradicted by evidence of meaning which the parties allege that they themselves attach to its words". 93


92. 4 Camp. 144-45, 171 E.R. (F.R.) 46 at 47

93. Supra n. 66. There was "Sale of foreign Refined Rape Oil warranted only equal to sample". The oil was adulterated with hemp oil. Defendant refused to take residue. The plaintiff gave evidence to the effect that defendant knew the fact of mixture and had agreed to take it as per sample.

94. id. 412 per Pollock C.B.
From the above, it may be noted that in all the cases, the finding of the court and jury were to the effect that the transaction was based on sample. But as it was a written document hence nothing inconsistent with that could be imported through oral evidence. The only folly of the parties was that the document was in writing. Had it been oral, everything was permissible. The reports lead us to the conclusion that this pernicious rule has done no good to the parties but has only made the courts as helpless spectators, in bringing Justice to the parties aggrieved.

It operates harshly upon an ordinary man in the sense that apart from purchasing the goods according to sample, he must also refer to them in his written contract. It is not a realistic and practical approach. People may, sometimes, as has happened in a number of cases, not refer the sample on the written contract, under the impression that sample will speak for itself and hence it needed no writing or reference. Very often goods displayed are of standard quality but those supplied are not of the same standard or quality though they are merchantable and fit for the purpose under section 16(1) & (2).
Sometime, the person writing the contract may not be aware or may not fully appreciate the implications of parol evidence rule. At other, his writing may not cover all the aspects of contract. Oral evidence should also be accepted with regard to the value of bargain. Hence, in the interest of Justice, an explanation should be added at the end of Section 17 which may read "Notwithstanding the rule of parol evidence, a strong circumstantial evidence may displace the term of agreement in writing".

VII

IMPLIED CONDITIONS UNDER CONTRACT OF SALE BY SAMPLE

Once it has been ascertained that contract of sale is a sale by sample, certain conditions are implied under the Act. The first of them is that the bulk shall correspond with sample in quality.

95. Section 17 (2)
96. Section 17(2) (a)
I - Correspondence of bulk with the sample:

The older authorities speak of the term as Warranty. But E.A. calls this term as condition and S.C.A. has copied that. However, the parties may treat the breach of this condition as breach of warranty either under the agreement or subsequently, quality, includes the state or condition of the goods. But it confines to such qualities as are apparent on an ordinary examination of the sample, carried out in any particular trade. However, there is no reason to believe as to why it should not include the intrinsic quality of the goods, apart from labelling etc. In the light of decision

97. Parker v. Palmer (1821) 4 F & Ad. 387 at P. 391
98. Also refer U.C.C. Section 2-213(1)(c) which reads "Any sample or model which is made part of the bargain creates an express warranty that whole of the goods shall conform to the sample or model".
99. Section 15(2)(a) following Benjamin on Sale (4th Ed.) P. 936
100. Chapman & Co. Ltd. v. Waller & Co. Ltd. (1948) 2 All E.F. 724
102. Section 2(12)
103. Hookway v. Alfred Issacs & Sons (1954) 1 Llyod; Rep. 491
104. Niblett v. Confectioner's Material Co.Ltd., Supra n. 38
In Ruben v. Fair Bros & Co., it is evident that the breach of this condition has taken place even though the defect in bulk is easily remediable by some act of the vendee. However, the implied condition as to correspondence with sample is not broken if there are differences of minor nature, not affecting the "quality". Under a C.I.F. contract, though the payment is made against shipping documents, still there is a right to reject under this clause, if the bulk does not correspond with the sample in quality.

It is a question of fact as to whether bulk corresponds with sample or not. However, under the contract, the

105. (1949) I.K.B. 254, Hilbery J., observed that it was no compliance with a contractual obligation for an article to be delivered which is not in accordance with the sample but which can by some simple process, no matter how simple, be turned into an article which is in accordance with the sample on which the contract was made" (at p. 260).

106. See Frankel v. Foreman & Clarke Inc. (1929) 33 F. 2d, 83. It has been observed that where, from the nature of goods, some variation is necessarily to be expected, it amounts to sufficient correspondence, if the quality of bulk is same as that of sample. Lockwood Jr. Inc. v. E. Cross & Comp., Inc. (1923) 122 A. 59.

parties may agree that in case of dispute, the decision of an arbitrator shall be binding upon them. Leaving apart the decision of a third party, the contract may provide that one of the parties may have power to decide the matter. Where a suit is brought for damages for non-acceptance and the vendor proves that the sample came from the same bulk, the onus to prove contrary is shifted on the buyer. If the buyer alleges breach of this clause but does not allow the seller to inspect the goods and verify the fact, it will create a doubt about the bonafides of the claim of the buyer.

In the light of observation of Lord Macnaghten, it was held in Hookway v. Alfred Issacs & Sons that the buyer could not escape liability to accept the goods by demonstrating that in some unusual respect, they did not

108. Priscoe v. Victorian Fly, Commissioners (1907) V.L.R.521
112. James Drummond v. Van Innem, supra n. 78
113. Supra, no. 108 id.
correspond with the sample. With due respect, it is submitted that under the circumstances of that particular case, the observation of the noble law-lord was correct and the plaintiff was allowed relief on the ground that defect being latent, the plaintiff was not expected to discover them by ordinary examination. The sample and bulk corresponded with each other. There was no difference in composition or make of the fabric. But in Hookway's case, supra the analysis of the standard sample revealed that the bulk of shellac, when supplied, was not equal to the sample, at least in one respect. But Davlin J. did not accept the contention of the buyer on the ground that "quality" referred to "such qualities as are apparent on an ordinary examination of the sample as usually done in the trade". It is submitted that this observation is not in accord with any cannon of construction. When the usage of trade is inconsistent with the provisions of any law, the law will prevail. Here the rule is that the bulk must correspond with the sample in quality. Quality should refer to intrinsic quality as well. It is not the end of the matter that outer look of the goods accords with the sample but the goods must also be intrinsically the same as the sample represents. Hence the buyer was entitled for relief.

114. id. at 511
115. Oppenheimer v. Attenborough (1908) I.K.B. 221
At the end, it is concluded that the provision of section 15(2)(c) is satisfactory but the word quality should be interpreted in liberal manner so as to enable the buyer to avail maximum benefit under the provision. The contrary may subject him to fraud.

2. Reasonable opportunity to compare the bulk with the sample:

This provision is based upon Lorymer v. Smith, wherein the buyer was entitled to rescind the contract on the failure of the seller to grant him reasonable opportunity to compare the bulk with the sample. Under this clause, the buyer has, as a matter of right, to be afforded reasonable facilities for inspecting the bulk, independent of any local custom or usage of trade. Atiyah is of opinion that this clause is not happily worded as it does not discuss a more fundamental obligation of delivering the goods. Without delivery, there is no question of inspection. It is submitted that a reasonable opportunity of comparing the bulk with the sample is independent of the provisions of Section 41 of S.G.A.

116. Section 17(2)(c)
117. (1822) 1 B. & C. 1 (buyer contracted to purchase two parcels of wheat. Out of which, the seller refused to show him one of the parcels).
118. Lorymer v. Smith, supra n. 117
120. Corresponding to Section 34 of E.A.
It is not essential that the seller should deliver them to the buyer under this clause. The buyer may inspect them on the premises of seller. This disposes of the query of the learned author. Right to inspect under this section is different and independent of right to inspect on delivery. Prima-facie, the place of delivery is the place for comparing the bulk with the sample. But this presumption is liable to be rebutted by evidence and a contract to the contrary. It implies that if the buyer has been granted a reasonable opportunity to compare the bulk with the sample and, on inspection he finds that the bulk does not correspond with the sample, he may return them there and then on the hands of seller, in case the place of inspection is different from the place of delivery or time of inspection is subsequent to the delivery.

The right to compare the bulk with the sample may be excluded by an express contract. So where the agreement states that the price is payable in exchange for a shipping document, this right stands waived but the buyer still retains the right to inspect and reject on delivery, if the

121. Lorymer v. Smith supra n. 117
122. Section 41 of S.G.A.
goods do not conform to the contract.

3. Goods to be free from any defect rendering them unmerchantable not apparent on reasonable examination of the sample.

This statutory provision is based upon the decision in James Drummond v. Van Ingen. If the defect is patent, the seller fulfils his contract by delivering defective goods corresponding to the sample. So far as latent defect is concerned, the seller is not absolved from liability to supply goods of merchantable quality even though the same defect was present in the sample itself.

The principle laid down in the section is special application to the rule "that the seller's duty to furnish merchantable goods answering the description in the contract is paramount to any particular condition or warranty.

Before passing of E.A. there was a divergence of opinion whether a merchant was responsible for latent defects in the goods, if he was not a manufacturer or producer, even if the same was present in the sample but was not detectable by any reasonable examination. But the same has now been set at rest.

125. Castle v. Sworder (1860) 5 H & N 281
126. Section 17(2)(c) of S.C.A.
127. (1887) 12 A.C. 284
129. James Drummond v. Van Ingen, supra n. 127
130. Pollock & Mulla "Sale of goods & Partnership Acts" (3rd Ed.) p. 80
131. Parkinson v. Lee (1802) 2 East 314
    overruled by Randall v. Neuson (1877) 2 Q.B.D. 102
Distinction between Sections 16(2) and 15(2)(c):  

The proviso to former applies where the buyer had actually inspected the goods, whereas, of the latter applies even though the buyer had not inspected them. What is essential is to prove that the defect was patent and was liable to be detected by ordinary or reasonable examination. In a sale by a sample, the presumption is that the buyer will examine the sample and discover those defects which could be detected by ordinary examination. An analysis of the above mentioned sub-clauses will reveal that though both are worded differently, "there can be little doubt that they are intended to carry the same meaning, in other words, the defects contemplated under Section 16 are those apparent on reasonable examination within the meaning of Sec. 17".  

132. In Houndsditch Warehouse Co., Ltd. v. Waltetex Ltd.; (1944) 2 All E.F. 518, it was observed that a defect exists in the sample which renders the goods unmerchantable and the buyer with the knowledge of such defect chooses to take the delivery of goods, corresponding with the sample, he has no cause for complaint (Per Stable J.P. 519).  

133. Per Venkatasubba Rao Off., C.J. in Agha Mirza Nasar Ali Khoyee v. Gordon Woodroffe & Co. Supra n. 60 id. Also refer the observation in In Re Firm Behari Lal Ballabhdaas, Supra n. 56 at p. 273, where Ramaswami J. observes that right of examination in the Act is giver under Sections 16, 17 and 41. Even if the buyer has examined them, but the defect being latent, if he could not discover it, he has a right to reject them later on.
However, in the case of Niblett v. Confectioner's Material Co. Ltd., it was observed that the sale involved the violation of statutory right of a third party. The condensed milk had to be sold by removing the labels and hence implied conditions as to Title and Merchantable quality were affected. One may say that the defect in the milk was latent and could not be discovered by ordinary examination. Supposing the milk would have been sold by sample, then also the same situation would have arisen and the buyer would have succeeded in the same manner. Atiyah, while commenting on the above provisions, in the light of Niblett's case, says that too much reliance should not be placed upon "quality", appearing in Section 14(2), as Section 15(2)(c) does not contain this word at all. But the word "defect" appears therein and this should be treated at par with quality and it "should be given a wide enough interpretation to ensure that the requirements of the two clauses remain the same, in other words, that defective goods includes goods in such a state that their sale can be prevented by legal process". It is submitted with due regard to the learned

134. Supra n. 38
135. Corresponding to Section 16(2) of S.C.A.
136. Corresponding to Section 17 (2) of S.G.A.
137. P.S. Atiyah Op.cit. supra n. 63 at p. 80
author that such apprehension is uncalled for. In the Niblettes' case, if the goods were rendered unmer­chantable due to removal of labels on tins, they were also unmerchantable due to latent defect which was not detectable by ordinary examination. The latent defect comprised of the unlawful use of someone's propriety rights in violation of the law of Trade Marks. This particular aspect, that the goods were rendered unmer­chantable under the proviso to section 14(2) of E.A. was not considered by their lordships, most probably for the reasons that the ends of Justice were met without going too far. If we refer to the proviso, it mentions the word "defect" like Section 15(2)(c) of E.A. The word "defect" is closely connected with examination under both the provisos and there is no likelihood of confusion in both the sub-sections. This has been settled long back in England.

In nutshell, the combined effect of Sections 15, 16 and 17 of S.C.A. is that the goods must correspond with the sample and description and should be of merchantable quality minus patent defect.

138. James Drummond v. Van Ingen & Sons, supra n. 127
Grant v. Australian Knitting Mills, supra n. 14
"Reasonable" does not mean practicable. This phrase was explained by Lord Macnaghten in *James Drummond v. Van Ingen*. In other words, whatever can be found out from the sample by a buyer, using ordinary care and diligence will amount to reasonable examination. This principle was applied in a case to reject the claim of a buyer where a visual test was not carried out but the results were based on scientific analysis of the sample.

139. *Codley v. Perry* (1960) 1 All E.R. 36: "... the act speaks not of a practicable but a 'reasonable' examination" (Per Edmund J. at p. 41).

140. For observation refer, supra n. 84

141. *F. Hookway & Co. Ltd. v. Issacs*, supra n. 108