CHAPTER 1

INTRODUCTION

The modern era is a harbinger of ultra modern, highly complicated and sophisticated technology, trade and industry. It is an age of industrial revolution. The philosophy of nineteenth century has been replaced by the technology of Twentieth century. The existing old laws relating to consumer's protection, conditions and warranties under the Sale of Goods Act, 1930 (hereafter mentioned as S.G.A.) which are based upon the English Sale of Goods Act, 1979 (hereafter to be mentioned as E.A.) cannot cope up with the problems experienced of a well organised and modernised society of today. The buyer of a horse 'in market overt' in the city of London in ancient times was much more different than the vendee of this sputnik age. That was the time when the horse was the fastest means of communication. But now the supersonic jets have taken the place of pride and the horses are left far behind in the race.

This thesis exhaustively deals with the Express and Implied Conditions and Warranties under S.G.A. and is divided into the following chapters whose introduction is briefly given hereunder.

Chapter II entitled as 'History of Conditions and Warranties' deals with the historical aspect of the Conditions and Warranties. The first part of the chapter is devoted to the developments at common law. One view, with regard to their
origin, is that they originated as an action in Tort. The other view is that warranties at first originated in contract. The thrust of the thesis is that they are hybrid between Tort and Contract. Second part of this chapter deals with statutory provisions of Conditions and Warranties and the third part has been devoted to origin and development of terms "specific goods" and "goods sold by description".

Chapter III entitled as 'Definition of Conditions and Warranties and rules relating to acceptance of goods' deals with the problems relating to Conditions and Warranties. So far as the use of word "main" in the definition of conditions and "collateral" in that of warranties are concerned, they are not suited to modern modes of marketing the goods.

The distinction between Conditions and Warranties is an area where the boundaries between the two are blurred. A stipulation may be termed as a warranty, but it may be interpreted as a condition.1 This recalls us to the pre-code development era in England when the law relating to these two vital terms was in very confused state. This confusion is reflected in E.A., itself from where it has crept in S.C.A.

So far as remedies relating to conditions and warranties are concerned, they are peculiarly unusual. The basis of such remedies lies in the annals of antiquity and there is rationale

1. Section 12 (4)
behind them. It is said that if there is a breach of condition, the remedies for such breach may be repudiation of contract and or damages. But if there is a breach of warranty, the buyer’s right is only to claim damages and not to repudiate the contract even though there may be very pressing reasons for that. Even in cases of breach of condition, the right to repudiate the contract is lost where the seller has accepted the goods or part thereof, if the contract of sale is not severable.

So far as the meaning and construction placed upon the terms acceptance and non-severable contracts are concerned, they are not free from ambiguity and anomaly. Further, once the buyer has accepted the goods, there is no room for revoking his acceptance. The circumstances under which the acceptance was procured by the vendor from the vendee are completely disregarded.

The problems, mentioned herein-above have been discussed at length and suggestions have been made to find a solution for them.

Chapter IV, entitled as 'Representation- types and problems of construction' deals with the definition of Representation. The difference between representation and promise

2. Section 12 (2)
3. Section 12 (3)
and statement of fact amounting to warranty and statement of opinion is also mentioned.

It is not every misrepresentation which is actionable but only that which causes inducement to and is relied upon by the misrepresentee. However, sometime grave injustice has resulted to the parties through the courts- the lens of justice- by declaring that such representations did not form the terms of contract and hence gave no cause of action. The rules of construction in this regard are very uncertain. Realising the hardships in such cases, English Courts and parliament have enacted laws which go a long way in remedying the situations mentioned above. In the United States of America, the uniform commercial code (hereafter mentioned as U.C.C.) has laid down rules by which representations of all type, including those in Berry v. Peck are remediable.

At the end, the rules of interpretation, with regard to the fact whether a representation forms an integral part of contract of sale or not has been discussed.

Chapter V is entitled as 'The Implications of Trivity Rule, Law of Consideration and Exemption Clauses' - Our law is primarily designed to meet the requirement of commercial

4. Hopkins v. Tancurey (1884) 15 C.R. 130
5. Misrepresentation Act, 1967
6. (1856 - 1890). All E.P. Rep. 1
transactions, unlike American and German systems, where different sets of rule apply to transactions "between merchant" buyers and sellers and "private sale". Our present legal system envisages that in order to recover damages arising out of faulty products, one must be a buyer. This requirement covers a very limited class of persons who can claim relief as consumers. No member of the family of the buyer or his guest, sustaining injury or damage there from can claim relief. This is due to the rule of privity of contract.

The Molony Committee, in England, was constituted primarily to study the problems of consumer's transactions and protection and to suggest reform in this field of law.


8. Out of 104 sections in Article 2 of U.C.C., 14 sections lay down special provisions for merchants.

9. Sections 373-382 of German Commercial Code lay down special provision for those transactions in which at least one party is a merchant.

10. U.C.C. 2-104(3) defines as "between merchants" "means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants" and U.C.C. 2-104(1) defines it as "Merchant" "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill requisite to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill".

11. Sale between persons none of whom is a merchant has been called as "private Sale". Fefer (1969) 85 L.R. 74 at 90.
The committee submitted its final report in the year 1962, but the result was not encouraging. It confined its definition of "consumer" to that of buyer. It is a matter of regret that the Law Commission of India, which submitted its eighth report in 1958, while suggesting amendment in the S.C.A. fails even to touch the problem of radical reform needed in this field of law.

There is also the problem of apportioning the loss arising due to faulty products. Under the present system, it is the seller who has to bear the loss for injury or damage arising even due to faulty manufacture of goods. Here, also the rule of privity of contract intervenes, though ultimately, in the line of chain action, the manufacturer may be liable. This method works hard on the seller and is not in the public interest. Apart from it, the mode of sale in the 20th century has radically changed. The advertising, packaging, labelling etc. are directly undertaken by the manufacturer, who uses sale inducing devices. The modern buyer does not rely upon the "skill and judgment" of the seller but on the representations of the manufacturer, through above media.

The well organised sellers and manufacturers are trying to squeeze out the unorganised buyers in numerous ways. One of the methods which they so employ in exploiting them is

12. Melony Committee(1962) defines Consumer as "One who purchases (or hire purchases) goods for private use or consumption". (Command, 1781) para 2.
14. Section 16(1) and (2) corresponding with section 14(1) and (2) of E.A.
by contracting out their liabilities for implied conditions and warranties under the Sale of Goods Act and other laws for the time being in force.

The purpose of this Chapter is to examine and ascertain as to how far, the present system works correctly. If it does not, then what changes in this field of law should be incorporated in the light of experiences gained by United States of America, under U.C.C. with certain modifications.

Chapter VI entitled as 'Implied Undertaking as to Title Quiet Possession and Freedom from Encumbrance' deals with sec.14 of S.G.A. The rule of Caveat Emptor is a dominant feature of the law relating to sale of goods in England. This has eclipsed the Indian law relating to condition as to title to the goods. As a result thereof, it is said that in absence of fraud, the vendor is not liable for any defect in the title to the goods which are the subject matter of sale. The problem, therefore, is whether the seller can get rid of his liability to confer a good title on the buyer where he has none and also whether he can retain the consideration money, thriving at the expense of the innocent buyer. The other problem relates to the interpretation of opening words of the section. Its exact meaning and scope are not clear. A liberal interpretation of these words may lead to the conclusion that the seller may contract out his liability to confer a good title upon the buyer. But is it reasonable to be so liberal to contract out the thing one is intending to trans-


16 Sec.14 "unless the circumstances of the contract are such as to show a different intention".
It is said that the phrase "unless the circumstances....
different intention" relate to Execution Sales by sheriff
resulting from the decree of Courts or the sale of a for-
feited pledge of a pawn-broker. This aspect has been fully
discussed and the rule of *Morley v. Attenborough*\(^{10}\) vehemently
criticised. Ultimately certain suggestions have been made.

In England, the rule of Market overt enjoys recogni-
tion in a statutory form. As a result thereof, the buyer
is protected in his rights as a purchaser even though his
transferor's title was defective or he had none to transfer.
But strangely enough this rule is missing from the Indian
Act. It will be discussed briefly and justification for its
introduction in our country will be given. There is no pro-
vision in the Act which may offer direct solution to the pro-
blem raised by selling the goods under circumstances which
may amount to infringement of Trade mark of a third party.
A part from it, the question of sale of limited interest needs
scrutiny. Under the modern conditions, there are justifica-
tions for sale of limited interest. It is also proposed to
deal with a case where the goods are sold by agents like
auctioneer and not the principals themselves. The case of
*Emuland v. Divall*\(^{22}\) has raised controversial problems. An

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20. Sec. 22 of E.A. "(1) where goods are sold 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".
21. Sale of Goods generally means transfer of absolute or
   general property(right of ownership)in the goods.
22. (1923) 2 K.B. 500
attempt has been made to solve these problems and certain legislative reforms have been suggested.

The other important matter in this topic i.e. warranties of Quiet possession and Freedom from Encumbrance have been discussed briefly. It is not clear whether, the seller can exclude these warranties expressly. This aspect of exclusion has been discussed and certain suggestions have been offered.

Chapter VII entitled as "Sale of Goods by Description and Sample" deals with the nomenclature mentioned above. It is controversial as to what amounts to sale of specific goods and goods sold by description. It has also become controversial as to what constitutes description, as will be seen in the light of the judgement in Washington D.C. v. Christopher Hill Ltd.

Sometimes the descriptive words are held to amount to "condition" and therefore the buyer has a right to reject. At other times, under similar circumstances, those descriptive words are not taken to be part of the contract description and hence they are not treated as condition. Consequently, no right accrues to the party aggrieved. It will also be noticed that at times, the buyer is entitled to reject the goods because they do not conform with description in the

23. (1971) 1 All F.R. 847 (1972) A.F. 441
strict term of the contract though he suffers no loss from
them. Under such circumstances the seller is put to tre-
mendous loss with no apparent gain to the buyer.

The descriptive words are very relevant to mer-
chantable quality of the goods. But it will be noticed
that though goods do not correspond with the description
still they are merchantable and vice versa.

So far as sale of goods by sample as well as by des-
cription is concerned, the provision of the Act is sound and
needs no amendment. As regards provision of S.R.A., relating
to sale of goods by sample, it is curious to note that if a
part of the contract is contained in a written document, no
oral evidence is entertained, to prove that the contract of
sale related to sale of goods by sample.

This chapter is devoted to sort out the above mentioned
problems and to suggest measures to bring legislative reforms
in this field of law.

Chapter VIII entitled as 'The Rule of Caveat Emptor
and its Exceptions' is devoted to the rule of Caveat Emptor
and its exception. The rule briefly means that in absence
of fraud, the buyer cannot hold the seller liable for defects
in the goods even though the vendor may be fully aware of them.

Laundyer & Co.Ltd. (1921) 7 K.B. 519
26. Arcoa Ltd. v. E.A. Fonassen & Son, Ltd.
27. Ashington Dicenries Ltd. v. Christopher Hill, Supra n.1
28. Section 17
It is said that the reason for retention of such rule is that it lessens litigation. Under Islamic Law, relating to sale of goods, a duty is cast upon the vendor to speak about the defects of the subject matter of sale and it is a better and fairer course of dealing. Hence its abolition has been suggested.

While coming to the exceptions of Caveat Emptor, words like "particular purpose" and reliance upon the skill and judgement of the seller have been discussed. It has also been mentioned that a partial reliance upon such skill and judgement may entail liability upon the vendor. "Seller's business" appearing under the existing provisions has met with criticism by the courts and its deletion has been advocated. The term "reasonably fit" has been elaborated and certain suggestions have been made on duration of fitness.

Proviso to section 16(1) has been fully discussed and its deletion has been suggested.

Part II of the chapter is devoted to "Merchantable quality". The meaning of the word, with its brief history, has been given and it has been pointed out by wading through case law, that the existing interpretation of merchantable quality is highly perplexing. In England, the Implied Terms (Supply of Goods) Act, 1973 has introduced a new definition of Merchantable quality, which, it has been submitted will not fulfill

29. Merchantable Law Commission, 1855, 2nd Report, P.10
30. Section 16(1) S.G.A.
31. New Section 62(1a) of E.A.
the need of merchantile community. Hence, another definition, based upon U.C.C. and certain Indian judgements has been suggested which will cope up with the present business problems. Apart from that, it has been discussed at length as to what should be the duration of merchantable quality, under different circumstances.

Part III deals with reformulation of sub-sections (1) and (II) of section 16, which may obviate the difficulties of interpretation of quality and fitness clauses in unrealistic manner.

Part IV of the chapter is devoted to the study of implied conditions by usage of trade. It has been pointed out that this provision is inadequate without that of 'Course of dealings between the parties'. Hence that should also be included along with it. At last sub-section (4) of section 16 has been discussed.

32. Section 2 - 314