CHAPITRE - 17

CONDITION AND WARRANTIES

Definition:

It is well recognised that all obligations are not of equal importance. There are some which go so directly to the core of contract that non-performance thereof may frustrate the purpose of making the contract. But there may be others, which may not be so important as to non-performance thereof may have such impact on it. The former are termed as "Conditions" and the latter are known as "warranties". The term "condition" has been defined as a stipulation "essential to the main purpose of the contract, the breach of which gives rise to a right to repudiate the contract", whereas the term "warranty" has been defined as "a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated".

WARRANTY AND CONDITION: CRITICISM OF THE DEFINITIONS:

The presence of the word "Collateral" in the definition of warranty is undesirable because of totally changed modern

1. Section 12 (2) of S.C.A.
2. Section 12 (3) id.
modes of marketing the goods. These days, manufacturers advertise their products for sale and the sellers give guarantee for their goods without any demand from the buyers, unlike sales in good old days. These guarantees form the integral part of the bargain. There is nothing "collateral" in such guarantees. Apart from this S.A. Stolgar points out that the term "Collateral" is used and understood in the following different senses which brings unusual uncertainty in its meaning:

(1) A Warranty is treated as "Collateral" in the sense that it may operate as an exception to the parol evidence rule and may therefore be given in those cases where the agreement is in writing.

(2) The word "collateral" may mean ancillary, secondary or dependent; whereas it may appear to be an independent promise.

(3) A Warranty may be "collateral" from the point of view of simple form. A asks P to sell his watch. B says "I will purchase it. But is it alright?" A says "I guaranty that it is in excellent condition". This is "collateral" in form.

(4) Warranty may be "collateral" in the sense that it entitles the plaintiff, for its breaches, only damages and does not entitle him to repudiate the contract.

(5) A warranty may be "collateral" from the point of view of the pleading, that is, the buyer being sued by seller, can plead for its breach by the seller. The seller is not bound to state affirmatively that he has committed any breach thereof.

(6) A warranty may be "collateral" in the sense that it is one of the agreed exceptions to the general rule of caveat emptor.

(7) A warranty is "collateral" in the sense that it is auxiliary to the "main purpose" of the sale.

(8) It may be "collateral" in the sense that it contains special agreement relating to sale of specific goods and not an integral part of the description of the goods.

(9) A warranty may be "collateral" in the sense that it is less important whereas condition is more important.

It is said that whether a stipulation under the contract of sale of goods amounts to condition or warranty depends upon the construction of the contract and it is immaterial to mention a stipulation as a condition if the same amounts to warranty or vice versa, under the facts of a particular case. This provision is based upon the rule of

5. This follows from the statutory definition of warranty under section 12(3)
6. Section 12(4) of S.C.A.
law laid down in a case decided in the year 1863 when the terms "conditions" and "warranties" were indiscreetly used for each other. But now when they are well defined, there is no question of their being used so by the parties to the contract.

The human nature being what it is, an analysis of the above statements will reveal that the conception of condition or warranty is liable to vary with the foot of the judge for two reasons. First, the conception of main and collateral itself is liable to vary with human nature and secondly the distinction between the two is artificial and may be carried through, disregarding the intention of the parties to the contract. Therefore, it seems desirable to amend the law on the point, bringing a certain amount of certainty and sensible distinction in the definition and notion of conditions and warranties. The term conditions and warranties were used in a confused manner till codification of law in 1894 and the decision in Penton v. Taylor Sons and Co. After the Act of 1894 in England, the meanings of these words became clear but the division was not exhaustive. It did not take into consideration those intermediate cases.

For a fuller discussion, refer Anson on Contract (13th ed.)
8. (1893) 2 Q.P. 193
stipulations which were neither conditions nor warranties strictly so called. They extended from *Ronne v. Eyre* to *Mersey Steel v. Naylor*. It could not be said that this division of conditions and warranties was intended to give good bys to these intermediate obligations. In a recent English Case, the matter was considered in detail and the rule of law laid down was that if the breach went to the root of contract, the other party was discharged from his obligation, but if it is not, This simple principle of law of contract must apply equally to cases relating to sale of goods.

In *Cehave N.V. v. Dromer*, certain quantities of U.S. citrus pulp Pellets were rejected on the ground that they were unmerchantable, though they were bought by the same rejecting buyers through auction sale. The question arose as to whether stipulations like "shipped in goods condition" was a condition or warranty. As the stipulation related to merchantability, it was termed as condition and hence the Board of Appeal held in favour of the buyer. The *House of Lord*, after having dealt with this matter exhaustively, came to the conclusion that stipulations relating to quality should not be termed as conditions as such. Rather they should be examined in the light of facts and circumstances

9. (1779) 1 Hy Fl. 273 n.
10. 9 App. Cas. 434
11. *Hongkong Fir Shipping Co., Ltd. v. Kawasaki Kisen Ltd.* (1962) 1 All E.R. 474
12. (1975) 3 All E.R. 739
of a particular case. In their anxiety to render relief and justice, their Lordship gave an interpretation which is quite contrary to the letters of law. It is a welcome interpretation but the deficiency of law should be removed by legislative enactment and no chances of any injustice should be allowed to exist.

Under the present system of law, if a stipulation amounts to condition, the plaintiff is entitled to repudiate such contract even if he does not sustain any damages. But if it amounts to warranty, then its breach will entitle him to claim damages, even though such damages are no consolation for the plaintiff. Repudiation of contract and rejection of the goods may be only appropriate remedy which is not available to the buyer under the present rule.

AMENDMENTS SUGGESTED

If we compare this sorry state of law with the one prevailing in the United States of America, we will see that there is no such superficial distinction between Conditions and Warranties. Williston, the author or framer of Uniform Sales Act, from where these provisions are borrowed under U.C.C. uses the term "warranty" not only to cover both "conditions" and "warranties" as used under Indian and English Acts, but also to cover Representations.

13. Arcos Ltd. v. E.A. Ronasen & Sons (1933) A.C. 470
which induced making of such contracts, ... the breach of such a warranty is remediable by rescission, rejection or damages.\textsuperscript{14}

Let us examine the definition of "Conditions" and "Warranties" as given under Uniform Commercial Code.

Section 2-313 of U.C.C. defines "Express warranties by Affirmation, promise, Description and Sample".

1. Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part or the basis of the bargain, creates an express warranty that the goods shall conform to the affirmation or promise.\textsuperscript{15}

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.


\textsuperscript{15} "Description" has been treated as express warranty under the U.C.C. This is an improvement over Sec. 12 of Uniform Sales Act.
As per section 2-313(2), use of formal words such as "warrant" or "guarantee" is not essential to create express warranty but mere commendation by the seller of the goods does not create warranty.

Though the definition of the Code is long, comprehensive and descriptive, yet it is profoundly simple clear and definite. Under the present system of Indian and English Law, the buyer may repudiate the contract even without any consequent damages under the circumstances of the particular case. But when the law will be amended in accordance with the provisions of Uniform Commercial Code, even the buyer will have to prove consequential damages. This will deter him to repudiate the contract on flimsy grounds and evade his obligations. This may save the seller of botheration to retake the goods and bear unnecessary hardships without any gain to the buyer. "Condition" has been defined by U.C.C. Section 2-507 as follows:

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or document of title, his right as against the seller to retain or dispose of them is conditional upon making the payment due.

16. P.S. Atiyah "The Sales of Goods" (Fourth ed.) P. 71
We will observe that U.C.C. confines the role of condition for a very limited purpose. It is a fact or event which limits the buyer's right to demand delivery of goods and their disposal and that of the seller to demand payment and withhold delivery of the goods. It is true that the buyer's promise to payment of goods is conditional to the seller's compliance with the terms of warranty and in this respect conditions and warranties have overlapping effect, yet no one can deny that the area of their operation is well demarcated.

II

TYPES OF CONDITION:

It may be broadly divided as follows:

(a) Express conditions and Implied conditions: Express Conditions are those stipulations which are agreed upon by the parties to the contract either orally or in writing and are to be performed in accordance with the term of the contract. However, sometimes it may not be so expressed. Under such circumstances, certain stipulation are implied e.g. in Taylor v. Caldwell the parties were discharged from

1. 3 B. & S. 826; 32 L.J. Q.B. 164. The Principle in the case was applied in Howell v. Coupland (1876) 1 C.R.N. 258 C.A. etc. and in India, the same principle was applied to the case of Sannidi Gundayya v. Illoori Subhaya, AIR 1927 Mad. 99: 99 I.C. 878
further performance of contract on destruction of music hall, as it was said that the existence of the subject matter of the contract was an implied condition for the performance of the contract. The Sale of Goods Act, enumerates certain types of implied conditions under sections 14 to 17 which have been discussed elaborately somewhere else.

(b) Conditions precedent and Conditions Subsequent:

The former is a type of stipulation which is strictly required to be fulfilled before demanding performance of contract by the promisee. Unless it is performed, the obligation of the other party remains suspended. It is a pre-requisite to pass the property in the goods from the seller to the buyer that the goods should be ascertained or kept in a deliverable state and the contract should be unconditional, or if the goods were specific, they were to be weighed or measured for ascertainment of price. Conditions precedent have been divided into Conditions precedent strictly and Concurrent Conditions. Pothier divides them into Potestative Casual and mixed conditions. So far as the latter is concerned, the parties are discharged from their obligation if a certain stipulation is not fulfilled or certain specified event does not occur. These

2. Section 18 of S.G.A.
3. Sections 20 and 22 of S.G.A.
are also known as Suspensive and Resolutive conditions, in the language of the continental lawyers. An example of the latter type may be an auction sale in which the property in the goods may pass to the highest bidder subject to the condition that it may revest in the seller, if the consideration money is not paid to the auctioneer within 24 hours.

Waiver of a condition precedent may be implied as follows:

(a) Where the promisor creates such a situation as to make himself incapable of performance.

(b) Where the promisee places hindrances for performance of contract by the promisor. Besides this, the promisor is excused from further performance where the promisee makes it impossible and the law implies a waiver. The rule, apart from direct and forcible prevention extends even to neglecting or providing to do anything which is essential for performance of the condition by the promisor. The case of a third party preventing performance falls under section 56 of Indian Contract Act.

5. Sections 34 and 39 of The Indian Contract Act, 1872
7. O'Meill v. Armstrong (1895) 2 CP 418; Planche v. Calburn, LR 14
8. Section 67 Indian Contract Act Roberts v. Bury Commissioners, LR 5 CP 310
(c) Where the promise accepts the goods either wholly or in part.
(d) Where the buyer makes himself incapable of returning the goods.
(e) Where either party to the contract repudiated it.

(c) Contingent Conditions and Promissory Conditions:

In the case of the former, the promise of the parties to the contract may be dependent upon the happening of an uncertain event or on the happening of a state of affairs at the time when performance is due. In the case of the latter, the obligation of one party depends upon the promise of the other to perform his contract. Here the promise of one party to perform or do something in future is a promissory condition. Its non fulfilment not only relieves the other party from further performance but may give him a right of action against the party at fault. Under the former class, the contract is still contingent even though such contingency is within the control of the promisor.

10. Section 13(2) of S.C.A.
11. Section 39 of Indian Contract Act, Gueret v. Andony 65 L.J. C.P. 633
Where a condition is inserted for the benefit of both the parties, it may be waived by mutual agreement. But if it is inserted for the benefit of one of the parties, it may be only waived by the party entitled for such performance.

(d) Positive and Negative Conditions:

The obvious illustrations of it are "if my horse wins the Derby" - "if my horse does not win the Derby".\(^{12}\)

III

Distinction between Conditions and Warranties:

The term "Condition" is equivalent of the old term "Dependent Covenant". While "Warranty" is equivalent to "Independent Covenant".\(^{2}\)

At common law, the distinction between conditions and warranties corresponded with the distinction between sale by description and sale of specific goods. In case of specific goods, every descriptive statement amounted to warranty and in case of sale of goods by description, it amounted to condition.

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12. Chalmers op. cit., n 4 id. at n 295
2. For the origin & Historical Development of these terms, refer Reynolds "Warranty, Condition & Fundamental Term" 69 L. Quar.
A condition may be defined as a stipulation which is essential to the main purpose of the contract whereas; a warranty is a term which is collateral or subsidiary to the main purpose of the contract. The breach of the former gives rise to a right to repudiate the contract and to claim damages, whereas the breach of the latter entitles the party aggrieved to only damages. Hence the former provides a higher form of remedy whereas; the latter provides a lower form of remedy.

Whether a particular stipulation amounts to condition or warranty depends upon the terms of the contract and the intention of the parties. Further, the buyer may elect to waive any condition or treat its breach as a breach of warranty. However, if the contract is unseverable and the buyer has accepted the goods or part thereof, he is bound to treat the breach of condition as a breach of warranty.

4. Section 17(2)(3), Fletcher Moulton L.J. in Vellis Sons & Wells v. Pratt & Haynes (1710) 2 K. & B. 1007, 1012 said that condition is a term which goes so directly to the substance of the contract or is so essential to its very nature, that its non-performance may fairly be considered by the other party as a substantial failure to perform that contract at all. Conversely a warranty is a term which is not so vital that a failure to perform it goes to the substance of the contract.

5. Section 13(1) of S.C.A.
6. Section 13(2) of S.C.A.
But by treating it as a warranty, condition does not lose its real character. Hence an exemption clause excluding the liability for a breach of warranty only will not affect the buyer's right to recover damages for breach of condition.

IV

Remedies of the buyer for Breach of Conditions and Warranties

(1) Right of Waiver - Meaning- A person is said to waive a benefit when he renounces or disclaims it. It may be express or implied, which may be inferred from the conduct of the promisee or implied by law. If, after having discovered a breach of condition precedent, the promisee affirms it by agreeing to proceed with the contract, he is deemed to have waived such condition. If, after breach of condition, he induces the promisor to believe that he is still bound by the contract, or that no strict compliance of the condition is essential, or allows the promisor to proceed with the performance of subsequent stipulation, he has thereby waived his right. He is also estopped from setting up the plea that he was not liable on contract as the

2. E. C. Dupont v. British South Africa Co. 18 T.L.P 24
3. E. C. Measures v. Measures(1914) 3 Ch. D. 248
promisee did not comply with his promise. If a promisee performs his part of contract, without insisting upon performance of a condition-precident by other party, he cannot rescind the contract later for such non performance.

Waiver of a condition: section 13 enumerates four situations in which a condition may either be waived or treated as warranty. Two of it are voluntary and depend upon the wish of the buyer, namely (1) where he waives a condition or (2) elects to treat the breach of condition as a breach of warranty. The other two, though against the will of the buyer, create an estoppel against him. Firstly the buyer is bound to treat the breach of condition as a breach of warranty where the contract is unseverable and he has accepted the goods or part thereof. Secondly, where the goods are specific and the property therein has passed to the buyer under the contract. In such cases the buyer is in the same position as if he had deliberately waived the performance of the condition, and can now only rely upon his right to claim damages from the seller. This rule is an example of general law that though a party to a contract can refuse to perform his promise, if the other party has failed to perform a condition upon which the right was made dependent, but if he has accepted a substantial part of what was to be

7. Shyamas v. Hera 26 Cal. 160
8. Cooverji Phonee v. P.N. Mookherjee, 36 Cal. 617
9. This particular provision has been deleted by Amendment Act of 1963.
performed in his favour, he can not refuse to perform his part for the reason that there is no total failure of consideration.

Voluntary waiver of condition:

The failure of a seller to fulfil a condition to be performed by him entitles the buyer to treat the contract as repudiated, and to refuse to accept the goods, and if he has already paid for them, to recover the price.

It is always open to a party to the contract to waive a condition which is for his benefit or may retain the goods and treat the breach of it as breach of warranty and be content with a claim for damages. This rule is based upon the general principle of a Latin maxim cui libit liceat renunciare juri Pro Se introducto (it is open to a party to waive a condition for his benefit).

The right of rejection by the buyer and his right to sue for damages are not cumulative remedies, if the goods are not delivered in accordance with contract description. The buyer may (1) reject the goods and obtain refund of the price if given in advance and may sue for damages for non-delivery or (2) may waive the condition and accept the goods and claim damage as if for breach of warranty. He will have

11. Puch & Co. v. Gordhandas Mauli, AIF 1923 Bom. 92
11. Mondel v. Steel (1841) 2 M & W, 858; 5A R.P. 890
to pay contract price minus any claim for set off for
loss due to breach of warranty.

The words "impossibility or otherwise" cover the
following cases of implied waiver of condition:
(1) Hindrance by the promisor of performance of condition.
(2) Refusal by promisor to perform his promise or
(3) disabling himself.

(II) (a) Acceptance: Acceptance means taking delivery of
goods by the buyer with the intention of becoming owner of
it. Taking delivery of the goods for the purpose of sale,
to avoid further loss does not necessarily amount to accept-
tance. Also merely receiving the goods for the purpose
of inspection or acknowledging receipt of it is not accep-
tance. It is essential that before acceptance the buyer
may have reasonable opportunity to examine them and see
whether they conform with the contract description. Put re-
tention of goods beyond a reasonable time will amount to
acceptance and the buyer will have no right to reject them
after lapse of such reasonable time.

12. Section 59 is not clear on the point as to how the
loss is to be computed. Sec. 53 of English Act is clear.
13. Section 13(3) of S.C.A.
(1913) 58 S.J. 48 F.C.
15. Cort v. Ambemate Fly, Co. (1915) 17 C.P. 127 Praithwait
v. Foreign Hardwood Co. (1915) 2 K.P. 543 C.A.
17. Saunders v. Torp (1849) 4 Exch. 39; Abbott & Co. v. Holsey
(1895) 2 C.R. 87
18. The Firm of Prabhujiial Pahwanimal v. Dina Nath Kanpur
AIR 1922 Lah. 127
An acceptance may be express or implied. It may be implied in the following cases:

(1) Where the buyer exercises the act of ownership, or

(2) he re-sells the goods; or

(3) he puts his marks on the good; or

(4) he keeps or appropriates the goods even though he does so in ignorance of the fact that they are of a different description.

(5) he incapacitates himself from returning the goods; or

he accepts benefit of part performance; or

(7) if he fails to give notice of rejection within a reasonable time from the date of receipt of goods or from the date when he gets a reasonable opportunity to inspect or test them.

It has been very well established that selling of goods by the buyer, or mortgaging them with another person amounts to acceptance, even though the buyer had not examined them and later on it was revealed that the goods did not conform to the contract description. This is an anomalous situation. How could the buyer be deemed to have accepted the goods when he is supplied with goods of wholly different

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Section 47 of S.C. A.

Charter House Credit Co., Ltd. v. Tolly (1963) 7 C.P. 683


Nagardas Mathuradas v. Velmahomed, 126 I.C. 312; AIP 1930 P 245

Vallis v. Pratt (1910) 2 K.B. 1003

Charter House Credit Co., Ltd. v. Tolly (1963) 7 C.P. 683

kind., e.g. a horse instead of a tractor? The court took a right decision in the case of *Suisse Atlantique* v. 26
*N.V. Rotterdamsche* when it held that the buyer was not precluded from rejecting the goods when the goods of proper description were not delivered to him under the original contract.

The phrase "and he does any act which is inconsistent with the ownership of the seller" is difficult of interpretation. The act of ownership will not amount to acceptance unless the buyer had reasonable opportunity for inspection i.e. if the acts of ownership had been exercised before the time and place for inspection has reached. However, if the goods were inspected, or the time and place for inspection had passed but the defects in the goods being latent, could not be detected on inspection, the particular act of ownership could not be deemed to be acceptance. 28

In the case of *Agha Mirza Nasar Ali Khoyee & Co. v. Gordon Woodroffe & Co. Ltd.*, when the leather was put to work, quite a large number was found to be completely worthless. But the buyers could not reject the goods as they were deemed to have accepted them, "for after the skin had been delivered

26. (1967) I.A.C. 70

27. Per Lord Hald at P. 40


29. AIP, 1937 Mad. 40
to them, they put them into work, an act inconsistent with the ownership of the seller. The findings of their lordship are to the effect that the defects were latent and could not be discovered without putting the skins to work. The sellers had expressly stipulated with regard to the suitability thereof. Under such circumstances, the act of the buyer with regard to their putting them on work should not be treated as an act inconsistent with the ownership of the seller. It is an inherent right of the buyer to test and examine the goods in whatever manner they could be tested. And, if, after that he retains them for an unreasonable time, without intimating the seller for their rejection, he should be deemed to have accepted the goods. Not otherwise, if we compare the observation of Ameer Ali J. in Calcutta case with the findings of Madras High Court case, we will come to the conclusion that the decision in the latter case is unreasonable. The act of the buyer should not be treated as an act of ownership under the circumstances of this particular case.

Revocation of acceptance: - It may be noted that once the court decides that a thing is deemed to have been accepted, there is no room for revocation of acceptance and rejection of goods.

30. id., at p. 44
31. Id.,
32. Kissen Doyal Jitra v. Askaran, 34 I.C. 297
33. In Re Andrew Yule & Co., AIF 1932 Cal. 879
under our present system. Once an acceptance is always an acceptance, even though the acceptance might have been induced by the seller with an assurance that there is nothing wrong with the goods or if there is any defect that shall be cured. But later on, the seller backs out his promise. There is no specific provision under our law to revoke acceptance of goods in those cases where they infringe the trade mark - a proprietary right of a third person. Also the buyer, after having accepted the goods, cannot revoke the whole or part of them even though the non-conformity of any unit may substantially impair the commercial value of them.

If we turn to the U.C.C., there are specific provisions by which revocation of acceptance is possible under the following circumstances: where a tender has been accepted (a) The buyer must within a reasonable time, after he discovers or should have discovered any breach, notify the seller of such breach or be barred from any remedy and (b) if the claim is one for infringement or the like ---- and the buyer sued as a result of such a breach, he must so notify the seller, within a reasonable time, after he receives

35. In Lallia, Son & Wells v. Pratt, (1911) A.C. 394 at 395 Lord Loreburn said that if a thing of different description has been accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it, but he may treat the breach of condition as if it were a breach of warranty.
notice of the litigation or be barred from any remedy for liability established by the litigation. Further sec. 2-608 deals with revocation of acceptance in whole or in part, and says that the buyer must revoke his acceptance of a lot or commercial unit whose non-conformity, substantially impairs its value to him, if he had accepted it—

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity, if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

Of course revocation of acceptance must take place within a reasonable time after the buyer discovers or should have discovered the defect and before any substantial change occurs in the condition of goods.

(b) **Severable Contracts:**

Where a contract of sale is not severable, and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty. The provisions of the above clause are simple. However, we must understand the meaning of the phrase "Non-severable" contracts.

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36. Section 2-607(3)
37. U.C.C. section 2-608(2)
38. Section 13 (3) of S.C.A.
Section 38(2) explains that instalment contracts can be treated as severable or non-severable as per the facts and circumstances of the case. Where there is an agreement for delivery by instalment but the price is made payable on complete delivery, the contract is treated as non-severable; though liable to be performed separately. Section 38(2) gives no clear-cut guideline as to how an instalment contract may be treated as severable or non-severable. The criteria laid down is that if the terms of contracts provide separate payment against delivery, they are to be treated as severable in so far as different instalments are concerned. "To suggest that there is something distinctive and unique about instalment contracts involving separate payment for each delivery is a most unfortunate piece of legislative drafting."

38. Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the case whether the breach of contract is repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

39. Honok v. Muller (1881) 7 A.R.D. 92 at p. 100
In *Jackam v. Fokas Motor and Cycle Co.* the buyer after having received unmerchantable goods wanted to reject the entire consignment of motor horns, received at various dates, except one case which he had already sold out. The Court of Appeal held that he was liable to pay for four cases received together, out of which one case was sold out by him, as it constituted a separate indivisible contract. It may be noted that the fact that goods have been received in a certain quantity at one time should cause no difficulty for the parties, so long as their prices can be ascertained. Hence it is submitted that the better and fairer course for the court was to allow the buyer to reject the whole lot except one case.

In a case, where the seller sends heavy machinery at different dates to the buyer, but all the deliveries comprise of components of same machine, can it be said that the contract is severable merely because a specific sum is to be paid by the buyer against each instalment? If the seller does not send one instalment comprising of certain components of the machine, should the buyer still pay for other instalments? The simple and a natural way of interpretation would be to treat such contract as non-severable even though on its face it appears to be an instalment contract. Hence, if out of 100 units of certain goods, 4 are accepted by the buyer and the rest are rejected, though

42. (1910) 2 K.F. 937
all were delivered to him at one time, he should be entitled to reject all but 4, in Jackson v. Rotax Motor Cycle Co., like situation.

(c) Acceptance of part of the goods delivered:

So far as this aspect is concerned, before the Amendment Act of 1963, the buyer had no right to reject those goods in which property had passed to the buyer. At present, he has no right of rejection where he is deemed to have "accepted" the goods even though without inspecting or testing them. Ameer Ali J., in a Calcutta case, was of the view that if the goods have been sold out by the buyer without inspecting them, the buyer is deemed to have accepted the goods and he can not reject any part of it even though the sub-buyers have rejected it. He must retain the whole lot whether wanted or unwanted. Is this not adding insult to injury?

His Lordship elucidates his aforesaid contention by telling that if a persons asks for a cake, he cannot eat half and reject half. Further, he says "what about the case of a dozen biscuits ...... Does it make any difference if you

43. Section 13(2) of S.C.A.
44. Hardy & Co. v. Hillern & Fowler (1923) 2 K.B. 490
    In Re Andrew Yule & Co., AIR 1932 Cal. 879
45. In Re Andrew Yule & Co. , Supra
ask for 12 plain biscuits and they give you 12 aniseed biscuits. His contention is that even though the customer is supplied with a different type of biscuit than what was ordered, he must either accept all or reject all.

It is a matter of common experience and this practically happens in day to day life that a person has aptitude and fondness for one thing more than other. In this case, if a different type of biscuit, other than what ordered, has been supplied, it is also biscuit. The buyer may like to have half out of it and reject other half. In this way both may be benefitted. The buyer may get something to eat and the seller may be able to sell. If the seller does not possess the goods ordered but despatches a substitute in the hope that the buyer may accept them on receipt, the buyer may accept a part of the goods but reject the other for the reason that there may be no good market for the substitute and he may not be sure of selling the whole lot. Now if he were faced with the problem "accept whole or reject whole", he cannot accept half of the substitute so delivered to him. Suppose, these are life saving drugs, his customer may be deprived of medicine so essential for his life, the buyer may be deprived of his profit on the sale of medicine and the

46. Id., at P. 884
seller may be faced with a bill of return freight plus loss of profit on their sale. There are hundreds of examples where, if a person is offered with a different thing than what is required by him, he may like to keep some out of it and reject the rest and pay for them on the basis of its price per unit. If he were to see whether contract is severable or unseverable, he will not be able to do so. If the seller is at fault, the buyer should have liberty to take the goods delivered to him as per his requirement.

Greer J. observed in the case of Hardy v. Hillerme 47 and Fowler, that there could not be acceptance of a part and rejection of the balance. This could be done only when a portion of it was in accordance with the contract and another was not. But if the same objection applied to the whole, there could not be acceptance of part and rejection of the rest. Ameer Ali J. differs with the above view, where the "good goods can be separated or are in fact separated from the bad goods." 48 So far so good. But his further observation that "I think even then the buyer loses his right to reject, if he accepts part under an indivisible contract is not correct. For this contention, he approves the statement of Farewell J in Jackson v. Rotax Motor & Cycle Co. 49 which has already been criticised.

47. (1923) 2 K.B. 490
48. In Re Andrew Yale & Co., AIR 1932 Cal. 879 at 885
49. (1910) 2 K.B. 937 = 80 L.J. K.B. 38
In J. Rosenthal & Sons Ltd. v. Esmall, the House of Lords had an opportunity to discuss the right of the buyer to reject part of the goods in a situation where all of them do not allegedly conform to the contract description and the contract is non-severable. The House ruled that whether the contract is severable or not depends upon the mode of performance of the contract and not merely upon the construction of the agreement.

Professor Atiyah says in a Note "Loss of Buyer's Right to Reject in Contract of Sale" that the provisions of section 30(3): E.A. apply to a situation where the seller delivers correct total quantity of the goods contracted for and also delivers goods in addition to the right quantity, not conforming to the contract description. In support of his contention, he quotes the wordings of subsection "where the seller delivers to the buyer the goods he contracted to sell", and says that they clearly indicate a situation where the seller has delivered whole of the contract goods. He further says that accepting half and rejecting half looks like breathing hot and cold together.

In order to fully appreciate the provision of section 30(3) of E.A. it is essential to quote the whole text which is as follows:

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50. (1965) 2 All E.R. 860
51. 81 L.Qurr Rev. 487 at 488-89
52. Corresponding with section 37(3)
53. Atiyah n. 51 id., at p. 489
"Where the seller delivers to the buyer, the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest or reject the whole."

From the text of the sub-section, it is crystal clear that its provisions are broadly framed and cannot be confined to a situation mentioned above. The opening words of the sub-section merely refer to supply of goods to the buyer according to the contract description. The total quantity of goods conforming to the contract and non-contract descriptions may be in conformity with the total quantity of goods contracted for or may accord with a situation as pointed out by the learned author. It may be noted that there may be very rare occasions where seller sends goods of a different description, over and above the goods of contract description. But it may happen frequently that he may send goods of contract description mixed with goods of non-contract description, in order to meet his contractual obligations. However, the provisions are broad enough to cover that situation also.

If the above interpretation is correct, then as a corollary to that, rejecting non-conforming goods and accepting those conforming with contract description is not like right to breathe hot and cold together but a paramount right of the buyer to accept goods in conformity with the contract description and to reject those which do not so conform.
However, if the goods delivered do not correspond with the contract description at all, then it is further right of the buyer to accept part, as per his requirement, and reject the rest. The seller should not be allowed to take advantage of his own fault. The above observation and contention is in accord with the provision of U.C.C, which says that if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole, or (b) accept the whole or (c) accept any commercial unit or units and reject the rest. Such provision is required to be incorporated under S.C.A.

(iii) Right to repudiate Contract:

Once a term is classified as condition, its breach does not automatically cause repudiation. Section 13(1) says that where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or treat its breach as a breach of warranty and not as a ground for treating the contract as repudiated. In case, there is a condition as to time of delivery and the seller inform in advance that he does not intend to deliver on time, the buyer must repudiate the contract. If he has not done so, he has waived the condition. Now he must accept the goods and be content by claiming damages.

54. U.C.C. Sec. 2- 601
There are broadly speaking, three situations in which the right to reject may be lost by the buyer:
(a) act of ownership such as sub-sale, shipment etc.
(b) delay in giving notice of rejection and  
(c) retention of goods.

In National Traders v. Hindustan Soap Work, it was observed that the passing of property in the goods is not the test of applicability of the right of rejection. If the goods do not conform to the description, there is no performance of the contract at all. In case, the goods turn unmerchantable, the seller has not delivered the goods bargained for. In both the cases, the default goes to the root of the transaction which affords an opportunity to the buyer to reject the goods. It is open to the buyer to accept the goods and sue as for breach of warranty.

The right of rejection, though a very potent weapon has been suitably hedged under U.C.C. with a proper safeguard, in order to avoid economic waste which appears to be the basic policy of that code.

55. In Re Andrew Tule & Co., AIR 1932 Cal. 879 at 883
56. AIR 1959 Mad. 112 at 116
57. Section 59
The U.C.C. mitigates the hardship created by section 2-601 which gives power of rejection to the buyers by authorising him to either accept or reject the goods in any manner he likes if the seller delivers non-conforming goods. This is sought to be done by giving a second chance to the seller to supply the goods of a correct description. This is known as right to "cure" a defective tender—a right unknown to English or Indian systems of Law. However, this could be done, within the time, specified under the original contract. Apart from it, the buyer is entitled to get a substitute, if the goods are not available. But he cannot reject them.

The code entitles the buyer to reject "if the goods or the tender of delivery fail in any respect to conform to the contract, but limitations on the right of rejection have been placed in various ways. Besides "cure" under instalment contract, an instalment can only be rejected if the non-conformity substantially impairs the value of the instalment. Further, if the goods contracted for are commercially impracticable of delivery, a substitute thereof, if available, must be tendered and accepted. The right of the buyer to reject is further curtailed by providing that failure to make effective rejection constitutes acceptance. Revocation of acceptance is permitted under certain specific circumstances.

59. U.C.C. Section 2-602 (2)
60. U.C.C. Section 2-614(1)
61. Refer U.C.C. Sections 2-607-2-608
A reform in the law relating to right of rejection of the buyer, coupled with the right to deliver the "substitute" and "cure" the defect in delivery will really be valuable additions and will ensure avoidance of economic waste.

Once the buyer rejects the goods, he cannot reappropriate them without the consent of the seller.

It is a settled law that even after the goods have been delivered into the actual possession of the buyer, the performance of the seller's duties may still be incomplete by reason of the breach of some of the conditions or warranties. In such cases, even if there be a breach of condition, if the seller elects to take delivery of the goods, he treats them as breach of warranty which entitles him to a diminution or extinction of the price. In such cases, he is entitled to all damages resulting as a natural and ordinary consequence of his breach of contract, in supplying a damaged article or an article of an inferior quality than the one contracted for.

While compensating the injured party, every effort of law would be to place him in the same position as if no default had occurred.

62. Section 13(1) of S.C.A.
63. Section 59(1)(a)
64. Section 53 of E.A., Bunting v. Tory, 64 T.L.R. 353
The true measure of damages for a breach of warranty is the amount which would put the plaintiff in the position in which he would have been if the contract had been fulfilled.

Where the goods, not answering the description contracted for are delivered to a buyer, he has a right to one of two alternative remedies (a) he may reject the goods, ask for refund of his money, if already paid and sue for damages for non-delivery or (b) he may waive the condition and accept the goods and sue for damages as if for breach of warranty. In the second alternative, he will have to pay the contract price minus any claim for the breach of warranty. The measure of damages in such cases would be the difference between the market price of the goods contracted and their actual value at the date of delivery.

In order to claim compensation for breach of contract, when the buyer discovers breach of condition at the time of delivery of goods, he must give notice of such breach, after having accepted the goods.

65. Mangilal Karya v. Shantibai, AIR 1956 Nag. 221, at 224
67. National Traders v. Hindustan Soap Work, AIR 1959 Mad. 112
68. Palaneappa v. Bullock Brothers, 14 I.C. 248
**Impossibility of Performance:**

Sub-section (3) of Section 13 is declaratory in nature and contains a general principle of law that performance of all conditions and warranties may be excused if the contract is rendered impossible of performance by reason of supervening illegality or physical destruction of subject matter of contract.

The performance of contract may be excused under the sub-section for the following reasons:

(a) Impossibility of fulfilment;

(b) Promisor's refusal to perform his promise;

(c) Promisor hindering performance of a condition to be fulfilled by the promisee; and

(d) promisor, incapacitating himself to perform his promise.

In a contract for sale of specific goods, the subject matter of contract might have ceased to exist at the date of formation of contract, or it might have been destroyed before performance of contract and passing of property from the seller to the buyer, but subsequent to the formation of the contract. As the fulfilment of contract is rendered impossible, the parties are excused from further performance.

In *Sattya Brata Ghosh v. Mughnaram*, it was observed that the word "impossible" has not been used in the sense of

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69. Section 7 of S.C.A.
70. Section 8 of S.C.A.
71. AIR 1954 S.C. 44
literal or physical impossibility. The performance may not be literally impossible, but it may be impracticable and if an unforeseen event or change of circumstances upsets the very foundation upon which the parties rested their bargain, it can be said that the contract is impossible of performance. The word impossible is to be attached a practical and not a literal meaning.

Benjamin states that the impossibility of performance, as a general rule is no excuse to the party bound to perform. But this statement is true in cases where the contract is absolute and is not subject to any condition express or implied.

"Impossibility" includes "legal impossibility":

A party may be excused from performing his promise, if subsequent to the formation of contract, (1) an Act of parliament has been passed, declaring performance of any contract as illegal or (ii) there is an Act of State or (iii) some event happens which makes the fulfilment of the condition or warranty as illegal.

Impossibility in fact:

The cases of impossibility in fact were classified as follows:

(a) where an enactment or the Act of State removes the specific subject matter of the contract from the

72. Benjamin on Sale, 8th Ed. P. 144
73. United States v. Relley (1897) 15 T.L.R. 166
74. Blackburn Bobbin Co. v. Allen (1918) 1 K.B. 540
scope of private obligation.

(b) If the specific subject matter of the contract has ceased to exist.

(c) If the specific set of facts, affecting the specific subject matter, have ceased to exist.

(d) If the administrative intervention by the State has directly interfered with the fulfilment of a particular project or contract and has changed the particular situation under which the contract was likely to be performed.

(e) Where a set of specific facts constituting the basis of the contract, has ceased to exist.

Impossibility caused by foreign law: Such impossibilities are treated at par with impossibility in fact. In such contracts the principle to be applied is that performance should be lawful at the place where contract is to be executed. Where, according to the intention of the parties, performance depends upon the continued existence of a given or thing or state of circumstances, it is impliedly excused on the destruction of such object.

75. Bailey v. Crespeny L.R. 4 P.B. 180
76. Scottish Navigation Co. v. Souter & Co. (1917) 1 K.B. 222
77. Metropolitan Water Board v. Dick Kerr & Co. (1917) 2 K.B. 287
78. Nickell & Knight v. Ashington Edridge & Co. (1910) 2 K.B. 126
In so far as physical impossibility is concerned, briefly stated, if the circumstances alter the position of one or both the parties to such an extent as to make the enforcement of an agreement unreasonable, there is frustration. Consequently both the parties are released from further performance. However, the doctrine of frustration does not apply to a situation where:

(a) the parties expressly stipulate subsistence of the contract with reference to the supervening event;

(b) the inability to perform arises due to the fault of one of the parties.

Does physical impossibility, frustrate the contract automatically or a notice of frustration is required to be given, in order to absolve the parties of further performance? Lord Wright stated that the rule of law was well settled that where there was frustration, a dissolution of contract occurred automatically. It did not depend upon the choice or election of the parties, like rescission on the ground of repudiation or breach of contract. So far as loss or destruction of the whole subject matter of the contract is concerned, no doubt, the above statement of law finds support from the decision of Taylor v. Caldwell. But for those contracts whose subject matters are destroyed partially the

80. Denny Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd. (1944) A.C. 265 at 274
81. All E.R. Rep. (1861-1873) 24 at 29. Lord Blackburn observed that "The principle seems to us to be that in contracts in which the performance depends upon continued existence of a given person or things a condition is implied that
The statement is to be understood in the sense that the contract is frustrated to the extent of the destruction of goods. The seller, agreeing to deliver the goods, cannot be compelled to deliver them fully, if the specific goods have been partially destroyed. But so far as the buyer is concerned, he is not bound to accept the goods, if not delivered as per the contract. If he accepts a smaller amount than what contracted, he is bound to pay for them on the basis of quantum meruit. The buyer can insist and the seller is bound to supply the goods available with him.

In H. P. & S. Sainsbury Ltd. v. Street, Mac. Kenna J. did not accept the plea of the seller who said that as the crop was damaged and much less was produced than what was contracted, the contract was frustrated and he was released from further performance. The buyer had option (which he exercised) to waive the condition that the seller should deliver the whole quantity. So the frustration of the contract was held to depend on the election of the disadvantaged party.

The impossibility of performance arising from the perishing of the person or thing shall excuse the performance. That excuse is by law implied, because from the nature of the contract, it is apparent that the parties contracted on the basis of continued existence of the particular person or Chattel.

82. Howell v. Coupland (1874) L.R. 9 A.B. 462
83. Barrow, Lane & Ballard Ltd. v. Phillips, Phillips & Co. Ltd. (1929)
84. (1972) 1 W.L.R. 834 1 K.B. 574 85. id. at 839 G.
86. Refer G.D. Goldberg, "Is Frustration Invariably Automatic" 88 L. Quar. Rev. 464
Government Control:

With regard to such controls, no general rule can be applied. Each case will depend upon its own facts and trade usage. Thus in a case, the sellers were bound to give notice of appropriation and to tender documents. Before the due date of notice, war broke out. An order of Council prohibited buying and selling of cereals outside the United Kingdom, without a licence. In an action against the seller, for non performance of contract, it was held that war did not frustrate the contract. The sellers were under duty to apply for licence for sale of cereals and it could not be presumed that had they asked for it, they would not have been granted the necessary licence. However, in another case, it was held that the buyers were under duty to apply for licence for sale of aniline oil and the Order-in-Council did not frustrate, the contract. In an Indian case, the goods were to be transported by railway wagons under the terms of contract. Subsequent control and restriction upon the movements of such wagons was held to have frustrated the contract and the parties were absolved from further performance.

87. Taylor & Co. v. Landauer & Co. (1940) 4 All E.R. 335
88. Brandt v. Morris & Co. Ltd. (1917), 2 K.B. 784
89. Sannidhi Gundavva v. Illoari, Subhaya, AIR 1927 Mad. 89