

Seller's remedies against buyer

The suits that may be instituted by the seller against the buyer under the Act can be roughly divided into two types

1. Suit for Price
2. Damages for non-acceptance

i. Suit for Price

Section 55

(1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

From the above section, it can be seen that except as provided by sub-section (2), the seller can only sue for the payment when the property has passed to the buyer. The passing of the property depends upon certain conditions, and if these conditions are not fulfilled, he cannot sue for the payment under this section.

Where goods are sold for a particular amount and the payment has to be made partly in cash and partly in kind, the default if made in kind entitles the seller to sue for the remainder of the price[i].

In the case of *Colley V. Overseas Exporters*[ii] there was a contract for the sale of some unascertained leather goods to the buyer f.o.b Liverpool. In this case, though the seller sent the goods, yet they could not be put on board as no definite ship had been named by the buyer. When an action was brought by the buyer against the seller, it was held that the seller was not entitled to pay the price as the goods had not yet moved into the possession of the buyer. In the absence of an agreement relating to the payment of price on a certain day, irrespective of the delivery, the seller is not entitled to sue the buyer for payment, but can bring about an action for damage.

Where there is a contract for sale wherein the price is payable on a certain date, irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price the seller may sue for the price even though the property has not been passed and the goods have not been appropriated to the contract. This can be seen in *Dunlop v Grote*^[iii], according to the facts of the case, there was a contract for the delivery of Iron between 3rd March and 30th April as per the requirements of the buyer. The price was to be paid on the 30th of April. However, only a part of the consignment was received by the buyer on April 30th as he did not require anymore. In the action brought by the seller, it was held that the seller could recover the whole price and was not required to show that the goods were appropriated to the contract.

ii. Damages for non-acceptance

Section 56

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

The damages are assessed on the basis of the principles contained in **sections 73** and **74** of the Indian Contract Act, 1872. According to **section 73** of the Indian Contract Act, when a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss caused to him thereby, which naturally arose, in the usual course of things from such a breach, or which the parties knew when they entered into the contract, to be likely to result from the breach of it.

Furthermore, in estimating the loss or damage caused by a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

The date at which the market price is to be ascertained is the day on which the contract ought to have been performed by delivery and acceptance as fixed by the contract or, where no time is fixed, at the time of the refusal to perform.

By virtue of the provisions of **sections 55** and **63** of the Indian Contract Act, where the time for the performance is fixed by the contract but it is extended and another date substituted for it by agreement between the parties, the substituted date must be taken as the date for ascertaining the measure of damages.

In the case of *Suresh Kumar Rajendra Kumar v K Assan Koya & sons*^[iv], the plaintiff sold, through the commission agents, the goods and claimed compensation from the buyer who had rejected them. While doing so the plaintiff had taken all the measures necessary to sell the goods urgently in the ordinary course of business. In the absence of any records to show that the sale was conducted in an improper manner, it was held by the court that the plaintiff was entitled to claim the difference between the price at which the rice was supposed to be sold to the defendants, and the price at which it was finally sold.

Where the goods are deliverable by instalments and the buyer has to accept one or the other or all the instalments, the difference in prices is to be reckoned with on the day that a particular instalment was to be delivered[v]. Where the military authorities refused to accept further supplies of cots in breach of their contract, the J&K High court allowed Rs. 4 per cot as the damages to the supplies as the profit which the supplier would have earned under his contract of supply[vi].

It has been seen that the seller has various remedies against both the goods and the buyer personally, and in many cases where those remedies exist he still has the option of availing himself of the remedy declared by this section[vii]; but where the property has not passed and there is nothing in the contract which enables him to resell the goods and charge the buyer with the difference between the contract price, and the price realized on the resale, or to sue for the price irrespective of delivery, or the passing of the property, the remedy provided by this section is the only remedy by which he can recover pecuniary compensation for the buyer's breach of contract.

Buyers remedies against the seller

The suits that may be instituted by the buyer against the seller can be roughly divided into three types

1. Damages for non-delivery
2. Remedy for breach of warranty
3. Specific Performance

i. Damages for Non- Delivery

Section 57

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

When the property in the goods has passed, the buyer, provided that he is entitled to the immediate possession, has all the remedies of an owner against those that deal with the goods in a manner inconsistent with his rights. If, therefore, the seller wrongfully re-sells them, he may sue the seller in trover, and also against the second buyer, though as against him the rights may be cut down by the provisions in **sections 30** and **54**.

In the case of non-delivery, the true measure of damages will be the difference between the contract price and the market price at the time of the breach. The market value of the goods means "the value in the market, independently of any circumstances peculiar to the plaintiff (the buyer)"[viii].

Where he, the seller, is guilty of breach of an agreement to sell, the following remedies may be available to the buyer:

- (i) The buyer may sue for damages for non-delivery under **section 57** of the Sale of Goods Act

(ii) In case the price has been paid by the buyer, he may recover it in a suit for money had and received for a consideration which has totally failed[ix].

Where however the buyer has failed to prove the alleged damages caused due to short supply of goods by seller and has also not served to seller a notice under **Section 55** of the Indian Contracts Act, the buyer cannot claim damages.[x]

In the case of pre-payment, the date for ascertaining the measure of damages must be the date of the breach, though it might be said in such a case, the buyer has not got the money in his hands and cannot therefore go into the market and buy; and in conformity with this idea it has been ruled at *nisi prius* that the date of the trial may be taken. However a more rational view is that even in this case the date of breach should be taken to calculate the difference between the contract price and the sale price, and the buyer can recover this amount, along with an interest[xi].

In a case where the seller failed to deliver Finnish timber, and the nearest substitute which the buyer could obtain was English timber which involved more expenditure, in cutting and also more wastage, it was held that the buyer was entitled to claim the extra cost since the buyer had acted reasonably in mitigating his claim[xii].

Where the seller failed to deliver timber, the market price of the timber, on the due date for delivery was taken as the basis for assessing damages. The Privy Council observed that “had the seller supplied the timber, the buyers would have made their profits and would have still had the other timber to sell upon which they were entitled to make such profits as they could.”[xiii] In order that the buyer may recover as damages an amount in excess of that which represents the difference between the market price and the contract price, it is necessary to prove facts which will bring the case within the second branch of **S. 73** of the Contract Act.

ii. Remedy for Breach of Warranty

Section 59

(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may-

(a) Set up against the seller the Breach of warranty in diminution or extinction of the price; or

(b) Sue the seller for damages for breach of warranty.

(2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

A breach of warranty does not entitle the buyer to reject the goods and his only remedy would be those provided in **s. 59** namely, to set up against the seller the breach of warranty in diminution or extinction of the price or to sue the seller for damages for breach of warranty. From the definition of warranty given in **s. 12(3)** it is clear that a breach of it gives rise to a claim for damages only on

the part of the buyer. It is also laid down by s. 13 that, even in the case of a breach of condition, if the buyer has accepted the goods, or, in the case of entire contracts, part of them, either voluntarily, or by acting in such a way as to preclude himself from exercising his right to reject them, he must fall back upon his claim for damages as if the breach of the condition was a breach of warranty[xiv].

This section declares the methods by which a buyer who has a claim for damages, in either case, may avail himself of it. It does not deal with the cases of fraudulent misrepresentation, which may enable the buyer to set aside the contract nor with cases where by the express terms of the contract the buyer may return the goods in case of a breach of warranty. Also, in cases where the buyer has lawfully rejected the goods, he must proceed not under this section, but under s. 57, and if necessary under s. 61, to recover the purchase price and interest.

It must be noted here that in such cases, damages are assessed in accordance with the provisions contained in **section 73** of Indian Contract Act, 1872. This was also observed by a division bench of the *Bombay High Court in City And Industrial Development Corporation of Maharashtra Ltd., Bombay v Nagpur steel and alloys, Nagpur*[xv];

“Remedies under Section 59 are not absolute and cannot be resorted to at any point or strategical point suitable to the buyer. He is duty bound to give notice of his intention. Its proper time, form and manner will, of course, depend upon the facts and circumstances of each case. To hold otherwise, would amount to placing the seller in an awkward and indefinite position — not warranted either by law or by equity.”

In the case of a warranty of quality, the presumption is that the measure of damages is the difference between what the goods are worth at the time of delivery, and what they would have been worth according to the contract which this must be ascertained by reference to the market price at the time[xvi].

In a majority of cases it is found that the warranty in question is not a warranty as defined in s 12(2), but a condition which falls under s 13(2) to be treated as a warranty. Very often it is the condition that the goods should correspond with the description by which they were sold, or should be fit for a particular purpose.

It is necessary that the buyer should rely on the warranty, and act reasonably, that is to say, he should take reasonable steps to minimize the damages. Where there is a breach of the warranty that the goods should be fit for a particular purpose, the rule again is that the damages should be such, as may naturally flow from the breach. This was seen in a case where the plaintiff’s wife died from the effects of eating tinned salmon which the plaintiff bought from the defendant, the plaintiff was held entitled to recover, as damages for the breach of the warranty, that the salmon would be fit for human consumption. Compensation was awarded for medical expenses, funeral costs, and the loss of her life.[xvii]

There may also be breaches of other conditions which can be treated as breaches of warranty, such as the warranty of title. In such a case also, the buyer may be involved in difficulties with sub-

buyers, for instance, he may buy a motor car from one who has no right to sell it and may resell it to a third person, from whom the true owner may recover it, or its value.

iii. Specific Performance

Section 58

Page | 6

Subject to the provisions of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the court, may, if it deems fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on the payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

This section may best be explained by an illustration; there was a contract to sell a ship to a German ship owner. The ship was an old ship but her engines and boilers were new, so as to satisfy the German regulations, and the buyer could have her registered immediately in Germany. In view of these facts and the price, the ship was of peculiar value to the buyer, and there was only one other ship on the market that would suit his requirements. The court granted specific performance of the contract[xviii].

Originally, the provisions relating to sale of goods were part of the Indian Contract Act, 1872 which as such did not provide for the equitable remedy of specific performance. Subsequently, a separate Act namely **Specific Relief Act, 1877**, was enacted to provide for equitable remedies including the remedy of specific performance.

The section provides a remedy to the buyer, and gives no correlative right to the seller. It is therefore only on application of the buyer when suing as plaintiff, that the contract of sale can be enforced specifically and the section only applies when the contract is to deliver specific or ascertained goods. It has been held that a seller is not entitled to enforce specific performance of the contract under **s. 58** because it deals with the case of a buyer of specific goods in respect of a contract to deliver specific or ascertained goods. ‘Specific’ here has the meaning which is given in **section 2(14)** while ‘ascertained’ means ‘identified in accordance with the agreement after a contract of sale is made’.[xix]

Section 58, as noted above, reproduces with some suitable changes **s. 52** of the English Act. Before passing of the Sale of Goods Act, 1930, there existed Specific Relief Act 1877, Chapter II of which dealt with specific performance of an existing contract. This is also why **Section 58** of the Sale of Goods Act, 1930 begins with the words “subject to the provisions of Chapter II of the Specific Relief Act, 1877”.

The court has wide discretion to impose conditions. In one case, specific performance of agreement to transfer shares was granted subject to a lien to protect the transferor against non-payment of the price of the shares.[xx] In another case, the House of Lords while ordering the specific

performance of a contract to sell shares put a condition that the buyer should pay interest on the purchase price which he had been entitled to retain pending the order.[xxi]

Remedies available to both seller and buyer

The suits that can be instituted by either the buyer or the seller are of two types

1. Suit for repudiation of contract before date or anticipatory breach
2. Interest by way of damages and special damages

i. Suit for repudiation of contract before date or anticipatory breach

Section 60

Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and use for damages for the breach.

This section, does not appear in the English act, and deals with anticipatory breach of a contract, that is to say, a manifested intention, by either party, to not be bound by the promise to perform that part of the contract when the time of performance arrives. Whether or not there has, in fact, been repudiation depends on the facts of each particular case.

The measure of damages is not fixed by date of the defaulting party's repudiation. It is decided, in case of goods for which there is a market, in accordance with the difference between the contract price of the goods and market price on that day. This is done in order to bring the plaintiff as near to the position as he would have been in, had the contract not been repudiated. In cases of contracts where no date is fixed, and a party refuses to perform the contract the principle of reasonable time is applied. In this case the date of repudiation is treated as the date on which the contract is broken, and damages are calculated on the basis of this date.

If the party not in default declines to accept the other party's repudiation, he keeps the contract alive for all purposes, as can be seen from *Frost v Knight*. Hence it follows that if, when the time for performance arrives, he himself is unable to perform or does not perform his contract, the position will be the same as it would have been if there had been no anticipatory repudiation by the other party and the latter may be discharged, and can also sue for damages.

If therefore, the seller after refusing to accept the buyer's anticipatory repudiation, when the time for performance arrives, tenders goods which are not of the contract description, or tenders documents under a CIF contract which the buyer is not bound to accept, the buyer may lawfully reject the goods or the documents and the seller will be without remedy; or the buyer may accept the goods tendered and treat the breach of condition as a breach of warranty and recover damages accordingly.

In *Hochster v De la Tour*[xxii] it was held that where one of the parties repudiates the contract before the time of the performance under the contract, the other party becomes entitled to sue for

damages for the breach before the date of performance of contract was due. In this case, the defendant had employed the services of the plaintiff, to go with him on tour. The service of the plaintiff was to begin from the 1st June, but on 11th May the defendant informed him that his services were no longer required. The plaintiff filed the suit to recover damages for breach of contract before the arrival of the time of performance of the contract.

ii. Interest by way of damages and special damages

Section 61

(1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case whereby law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the Court may award interest at such rate as it think fit on the amount of the price-

(a) to the seller in a suit by him for the amount of the price.- from the date of the tender of the goods or from the date on which the price was payable.

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller- from the date on which the payment was made.

This section preserves the right of a party to a contract of sale to recover special damages, that is to say, compensation for any loss or damage caused to him by either party's breach 'which the parties knew when they made the contract to be likely to result from the breach of it'.

These damages are contrasted with those which 'naturally arose in the usual course of things' from the breach. Generally speaking, the latter alone are recoverable by the plaintiff. However, his rule is subject to limitations where the breach has occasioned a special loss, which was actually in contemplation of the parties at the time of entering into the contract, that special loss happening subsequently to the breach must be taken into account.

In a case, the defendant agreed to sell and deliver a threshing machine to the plaintiff on 14 August. The plaintiff was a farmer and required the machine for threshing on August 14, a fact that was well known to the defendant. The defendant however failed to deliver it, all the while assuring the plaintiff he would deliver soon. On the basis of these assurances, the plaintiff did not hire another thresher. The plaintiff was therefore obliged to stack the wheat, and while stacked, it was damaged by the rain, and had to be dried in a kiln. The plaintiff was entitled to recover damages as the cost of stacking wheat, the loss due to its deterioration by stacking, the damage by rain and cost of drying, but he could not recover for the fall of the market price[xxiii].

Act 32 of 1839 provided for the payment of interest by way of damages in certain cases. Under the Act, the court could allow interest on debts or certain sums payable by an instrument in writing, from the time when the amount became payable where a time was fixed for payment, or when no

time was fixed, from the date on which the demand was made for payment in writing giving notice to the debtor that interest would be claimed.

In the case of *President of India v La Pintada Compania Navigacion SA*[xxiv], the House of Lords upheld the rule that common law does not permit interest being awarded by way of general damages for delay in payment of a debt beyond the date if it became contractually due. However, special damages may be awarded in respect of interest paid by the plaintiff as due to the defendant, if the rule of remoteness is satisfied.

Page | 9

It will be observed that the seller can only recover interest when he is in a position to recover the price. When he can only sue for damages for breach of contract, he is not entitled to interest under the provisions of this sub-section.

Similarly, the buyer too can only recover interest when he is entitled to recover the purchase price, that is to say, when he can sue for the price prepaid as money and received, by reason of total failure, for consideration. He cannot recover interest when his only remedy is to sue for damages, for instance for a breach of warranty, even though those damages may be sufficient to extinguish the price. Moreover, he is only entitled to interest in the case of a breach of contract, presumably by the seller. This limitation therefore, excludes cases arising under sections 7 and 8, and presumably other cases where the contract is dependent upon some condition inserted for the benefit of the seller, and is not performed owing to the non- fulfilment of that condition, or the contract is frustrated by circumstances over which the seller has no control, so that in law he would not be liable to an action.