

Advanced Contract, Tendering and Public Procurement
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Lecture 39: Special Contracts: Sale of Goods - Part 02

Sale



Sale

- Executed contract
- Contract plus conveyance
- *Jus in rem*
- Breach: Damages plus suit for conversion or wrongful detention
- As ownership is transferred, buyer can claim the goods even from a Court receiver
- If goods are lost by fire, buyer is liable to bear the loss
- If buyer becomes insolvent, ownership being transferred, seller may exercise only lien

Agreement to Sell

- Executory contract
- Contract pure and simple
- *Jus in personam*
- Remedy: buyer can ask seller pay damages as the ownership has not passed
- Possession of the goods remaining with the seller, he may dispose the goods as he likes
- Seller is liable as ownership is still with him
- Buyer becomes insolvent, seller may refuse to deliver the goods until paid for



Speaking about the difference between sale and agreement to sell, this slide will give some kind of an idea regarding the difference between these two legal contractual terms. Now, what is also important to understand that once sale occurs, the parties get right against the whole world that is what is called rights against “Just in rem” Whereas, when it is agreement to sell, it is “just in personem” which has legal validity, but between the parties. Just in rem means between the parties and just in personam means against the world.

However, what is important to understand is that the remedies though they are different, the legal enforceability of an agreement to sell is very much established in several case laws. This it has become a very important element of holding people accountable for fulfilling their contractual obligation. If they do not complete their contractual obligation, they shall be responsible or liable to compensate and pay damages as well. Critically, in this kind of risk that passes with sale, in an agreement to sell. To notice that if goods are lost by fire in a sale or after sale, then because the sale has occurred and the title has transferred, the buyer is liable to bear the loss of those things that occur due to the fire.

So, once the title passes in sale it is the buyers risk whereas in agreement to sell because title does not pass, it is the seller who will continue to be responsible as an owner and anything that happens to the goods due to fire or any other accident or incident than the seller continues to be responsible for the sale.

It is a critical juncture to understand because when talking about government contracts or tendering and procurement, there are several types and several stages in which contract is made. At this point of time a very interesting proposition to discuss the fact is that of selection of lowest bid (L1). The L1 declaration becomes a critical stage of contract making in government tendering contracts.

Once L1 is declared then the second stage is issuing of the letter of intent. The third stage is a stage where either the purchase order or work order issue or you will notice that there is an element of an agreement that comes into place where both the parties actually sign in that kind of agreement. These are the stages of a contract. However, the parties are confirmed with their contractual obligation as soon as the L1 declaration is made with the processes and procedures. Once L1 declaration is made it becomes a stage where the parties are locked in for the contract, they cannot exit the contract unless they with an obligation or liability towards each other.

What is sale?



- Sec. 4: A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price'.
- Agreement to Sale : sec. 4(3)



To understand what the sale is, sale is an intention of the party to undertake a transfer of property. Now, transfer of property is a critical element of the sale of goods act as well as the transfer of property act 1882. The intention to transfer the property is critical to sale, intention to transfer property. Now, property means title, property means possession, that the seller

said that goods belong to the buyer and whether the price is paid or not at that point of time or simultaneously does not matter

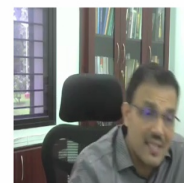
Now, in credit sales the intention to transfer property exists as soon as the sale takes place. However, the price to be paid from credit sales or it could be on equated monthly installments or what is called an EMI. So, the price is not the determination of the point of sale. What is determined is the intention of parties and that becomes very important. Sale of Goods Act actually states in section four of the Sale of Goods Act of 1930.

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Definition



- Sec. 2(7) Goods: "every kind of movable property other than actionable claims and money and includes stocks and shares, growing crop, grass and things attached to or forming part of the land which are agreed to be severed before sale".
- General Clauses Act: moveable property is property of every description except immovable property.
- Immovable property includes land, benefits arising out of land and things attached to the earth or permanently fastened to anything attached to the earth. [is dealt under T P Act]
- Art 366 (12): goods includes all materials, commodities and articles.
- Power of State Govt to levy Sales Tax on goods: Entry 54 of List II



It is at this point of time to understand certain definitions, which are very important and these have important bearings on the kind of contract in government and private sector. Now, the interesting aspect to look at is sale of goods, what does goods mean because this law covers only goods and not other kinds of contracts.

Section 2 (7) of the Sale of Goods Act of 1930 defines goods. It says goods means every kind of movable property other than actionable claims. So, movable property is good, but remember, the definition of movable property can be far broader than the definition of goods. But goods are not actually the case, it is very critical and important for all to understand with some examples what are actionable claims. They are definitely not goods other than actionable claims and money. However, goods include stocks and shares. So, shares are definitely movable property which is goods and hence, that can be sale of shares, that is covered under the Sale of Goods Act.

Growing crops, grass and things attached or forming part of land are also considered goods if they are agreed to be severed before the sale. For example, the trees are not goods, but timber is. So to make a contract for cutting of trees, it will be considered as sale of goods, because it has been agreed to be severed before the sale, but this is the traditional definition to find in Sale of Goods Act. And hence, to understand this because of several circumstances that are arising before the court of law is “what are goods” and where does the Sale of Goods Act actually, literally apply.

To look at critically there is a constitutional definition of goods. This was brought about by an amendment to the Constitution. One reads article 366, goods have been defined to mean and include all materials, commodities, and articles as well. It is important to understand, that the Constitution also defines goods. Why the Constitution has to define goods? What is the purpose? Why did an amendment bring into place or come into place is something that has to analyze at some point of time as well?

Since the critical component here is that one will have to appreciate that today in an era of the goods and service tax regime called for the GST regime. Why did the GST regime come into place? To think that the most critical aspects was the difficulty of defining model elements in goods or defining model contracts and trying to categorize them as goods. When sale of goods occurs constitutionally and even before the Constitution could come, the British government had decided to levy what is known as sales tax. The sales tax that is for sale of goods or where sale results in for transfer of title. Unless the contract or the element in the contract amounts to goods and sale, sales tax cannot be levied. Under the Constitution, levy of sales tax is the domain of the state governments.

The federal structure of taxation in India, the Constitution says that the state governments can levy sales tax on sale of goods, whereas the central government quite later on came up with what is known as the service tax regime. Those kinds of contracts that are categorized as services can be limited with service tax and that taxation goes to the central government, whereas certain sales tax goes to the state government.

The conflict of imposing sales tax has resulted in some very interesting cases before the Supreme Court of India and the various high courts across the country are trying to visualize and analyze the modern aspects of what can be considered as goods and what can happen to be the sale.

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Are the following Goods ?

- Human Organs
- Animals



whether the following amounts to goods or not. First and foremost, can be considered human organs as being goods, can they be considered as material, commodity or article, can they be considered as movable property. Human organs, can be commercial in nature some point of time in India, before passing in a legislation called the transplantation of human organs, things weren't very sure about the commodification of organs.

Today, human organs either can be gifted or donated but cannot be bought and sold. To encourage organ donation or blood donation because again whether blood is human organ or not is a debatable point. This is to be considered that is that has been some debate on the sale. To about donation of eyes, donation of vital organs like kidney and others, because we know commodification of these though they could be considered as movable property. Can

The medical colleges would want dead bodies for experiment and that is clinical trial. This is very crucial and critical to actually to research on the advance lifesaving drugs. So, these are Hospital Industry and called as the medical organizations, when they actually transfer, the human organs can be categorized them to be sale of goods.

The human organs can be movable property and not call them as goods because considering the commodification of human organs is against public policy to understand that though it may fit with the definition of movable property, transfer of human organs, say from the deceased family to the medical college, from the deceased family to in terms of organ transplantation to somewhere else, may be or not be a transfer of Goods.

Talking of title that is going to be transferred and of commodification, whether does it fit within the definition of sale of goods entirely. So, one will have to evaluate those kinds of movable property as beyond the ambit of the Sale of Goods Act of 1930. Discussing all of these if suppose the deceased family tries to give a human organ “eyes” but the eyes are not fit for consumption because the Sale of Goods Act says anything that is a commodity or goods that is to be sold must be fit for human consumption. There is something called as merchantability of the goods. Suppose the eyes are defective because it could be from old man who has died, he may have already undergone certain kinds of surgery to the eyes. Transplanting the eyes to another person, cannot certify the marketability of the sale. Sale of Goods Act talks about conditions and warranties. Conditions are those kinds of representations of stipulation that are essential to the contract.

This is like the description of the goods and organs cannot be described in any way. To certify that the organ is fit for human consumption of A quality or B quality. These are challenges and more importantly and public policy dimension in India is very clear not want to bring in trade and commodification or commerce as applicable to human organs. This is more in terms of the kind of need of humanity for medical organizations. we ought to keep these beyond contracts, commercial law, and beyond the Sale of Goods Act as well. So, those are justifications as to why these would not be categorized as good.

Further to evaluate whether animals can be considered goods, can animals can be considered as goods? There is a need to evaluate this for many reasons. The reasons being is the concept called chattel. It continues to be a concept today. During early days, slaves were considered sale of goods from Roman times, to modern times when slavery was practiced in some of the modern countries and slaves were actually imported to be sold. In many cases, slaves were even auctioned They were treated as chattel in one sense, movable property. The world economy has moved forward from slavery. To talk about animals, they can be bought and sold for example a rare breed of a dog. Animals again had to be divided into what is called domesticated animals, it could be a cow or it could be a buffalo, it could be a bullock, it could be a dog. These are domesticated animals. They are necessary for human endeavors, commercial activity, agricultural purposes and so on and so forth.

Not only that there are lot of animals that come within call as the consumption market of meat. It could be chicken; it could be any other kind of animal that is actually taken out for culling, for meat production and hence this is bought and sold in one sense. So, these kinds of

animals can be considered a sale of goods and to definitely accept animals as an integral part of the definition of goods which can be traded. A very famous case where animals were actually sold and those animals had typhoid fever. Who has to be blamed? If the animals have typhoid fever. In the fair, the animals being sold and pigs were on sale, it was a trade place for animals and the seller had surrounded pigs. And he said, these pigs are sold in acid virus condition, he also said that with all defects disclosed.

When a buyer comes and sees the pigs with the naked eye inspection, and bought these pigs and he took these pigs to his pig farm. And unfortunately, the pigs that he bought had typhoid fever. And the new pigs transferred the typhoid fever to the existing pigs and the entire pigs in the pig farm got infected. The buyer got angry and he went to the court. And he said that when these were not fit for sale, were not of merchantable quality. The seller is responsible for having sold these goods or these animals which are not of merchantable quality, it is a breach of the Sale of Goods Act.

Now, at that point of time, the animals have these kind of risks that we attached. Now, did the seller knowingly sell the pigs that had typhoid fever, if that can be proved because he said, that this was all his faults, as it was in bad condition. This could be a serious violation of the Sale of Goods Act. Apart from being a criminal offense, please note the seller would be responsible for violating the Sale of Goods Act for which the buyer can repudiate the contract.

But however, when this case was decided, the courts in England, were obsessed with this theory called the theory of caveat venditor which means let the buyer be that. They said look, this is the it is the seller's market. And if it is a seller's market, the buyer should have been, careful, assuming the buyer had checked what those faults? Should not the buyer had check has been a pig farmer does not he know whether pigs have typhoid or not. Could not he have done some kind of an inspection?

So, if the buyer was negligent in his own conduct, then he cannot repudiate the contract, he cannot return the pigs back and claim damages, he has to suffer some kind of injury out of his own negligence or fault. But today, you will notice as we speak today. The Sale of Goods Act has provisions which is called as the consumer interest provision or the provisions that go on to protect the buyers interest. Buyers interest is consumer interest, which means probably talking about the exceptions to caveat venditor.

In cases what is called as caveat venditor which means that “seller should be aware”. Any seller should not have offered these animals for sale in the first place, knowing that it had typhoid fever. He should have checked before making the sale? In the buyers’ market, the buyers need protection. There are several legislations passed by governments across the world trying to protect the buyers interest because the buyers unfortunately get exploited and cheated. The buyers unfortunately face a lot of unfair trade practices from the sellers. And hence to those extent, you will notice that we have legislations like the Consumer Protection Act, we have legislations like the competition law, which all want to protect the consumer interest. So, today, you will notice that the principle rule is caveat venditor. Let the seller beware. Today in India, the legislations regarding the food is the “Food Safety and Standards Authorities Act.” (FSSA Act) under which the food or it could be meat will have certain standards. If they do not meet those standards, they are not to be kept on sale. Under these legislations that have been brought in India, there is a requirement of labeling as well. For example, the simplest labeling requirement could be whether it is a vegetarian or a non-vegetarian food, the green versus the red dot. Labeling requirements could also mean whether they have Trans-fat whether they have any kind of nutritious value. These are the disclosures that are to be made.

Labeling also means, whether it is hazardous in any sense any good that is to be sold. So, there are different labels that have to be informed for example, one of the labeling requirements is whether it is environmentally friendly. So, there is something called earthen pot kind of eco mark that can be used by firms. So, these are different kinds of people that are introduced by governments. So, that the consumers have the right to information about what these goods are.

For example, the organic and non-organic groups also need to be debated. We are talking of trying to give consumers the choice, consumers information and it is the sellers duty to do that. And if the seller fails in disclosing the kind of quality of goods that he is selling, that the seller would have violated all of these legislations, as the case may be. When it comes to animals and meat, as the case may be, the sellers have to be bad and they have to disclose the faults in the goods. So, the goods have to be of merchantable quality, tradable quality and unless they are not fit for consumption, they cannot put it up on sale.

So, animals can be considered as goods, domesticated animals can be treated and meat is definitely part of the consumption of sale of goods. However, at this point of time, it is

critical to understand the legislations like the Wildlife Protection Act. Under the Wildlife Protection Act and schedule which was passed in 1972 after agreeing to an international convention where trade in certain kinds of animals are now prohibited.

The prohibition of trade in Tuskers or ivory is by the legislations. These animals were actually smuggled if they were killed illegally. They were poaching because the ivory was in lot of demand. Today, ivory has been a banned commodity. Certain kinds of animals cannot be the subject matter of sale. That these are wild scheduled animals, the animals that need protection, they are near extinction, they are endangered, they are threatened kind of species on planet Earth and hence not to be traded and any private person holding them is also something that is prohibited.

These animals can be part of a zoo. And in India, the concept of a private zoo has definitely taken traction. The buying and selling is definitely not something that is permitted. As these are protected animals. They are not part of the selling of goods process and they are protected under law, for which the sale of goods does not apply. Commercialization of the sale is definitely not permitted.