

SALE OF GOODS ACT, 1930 PERFORMANCE OF THE CONTRACT (SECTION 32 TO SECTION 40) IN RELATION TO E-COMMERCE AND ITS IMPLICATIONS

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Introduction-

Today E-commerce has become part and parcel of daily life and many business transactions worth millions are made through this ever booming, newly found industry. With initiatives like Digital India, the focus of traditional style of business is turned towards E-business which has comparatively lesser investment and bigger returns. Although this trend has been there since 15 years, this industry saw phenomenal growth of almost 50 % in last five years. This system can be divided under three heads- Consumer to Consumer (C2C), Business to Consumer (B2C) and Business to Business (B2B). We have to see how E-commerce is related to Sale of Goods Act, 1930, especially in relation to Section 32 to Section 40 of this Act which deals with delivery of products. This Act gives legal validity to the functioning of E-commerce and has different impact on it. Before the boom of E-commerce, Sale of Goods Act, 1930 was exclusively meant for traditional businesses but now, this Act is applied to virtual businesses, in order to establish legal sanctity. All electronic contracts are enforced through the principles laid down under Indian Contract Act, 1872. Also, Section 10 of Information Technology Act, 2000 provides validity to e-contracts. Section 3 of Evidence Act justifies electronic form of evidence. The Supreme Court in *Trimex International FZE Ltd. Dubai v. Vedanta Aluminium Ltd²⁶⁴*., held that e-mails exchanged between the parties regarding mutual obligations constitutes a contract. Consequently, the terms and conditions which are associated with an E-commerce platforms are of utmost importance in

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²⁶⁴ MANU/SC/0057/2010:2010 (1) SCALE 574

determining and ensuring that E-commerce transactions meet with the requirements of a valid contract²⁶⁵.

In order to identify the link between Performance of the contract (Sale of Goods Act, 1930) in relation to E-commerce, it is advisable that we look at them in reference to the laid sections given in the act. When we say performance of the contract, it means delivery of the goods. Now, Section 32 of this Act states- “Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange of the price, and the buyer shall be ready and willing to pay the price in exchange for the possession of the goods”²⁶⁶. The intention of this section shows that seller must be ready to supply or deliver the goods in exchange for a price and the buyer must be ready and willing to pay the price for the goods. Now, applying this issue to the transactions of E-commerce- A likes a product on B’s website and chose to purchase the same. Here, A can either opt to pay the price through online banking/card payment or can even opt for cash on delivery option which is quite popular with people. In either cases, B is bound to deliver the product to A’s doorstep even if he hasn’t collected the payment. While this Section 32 talks about “intentions” of both the parties, it does not explain the mode of payment and whether it has to be pre-paid or paid on delivery. It also says “Unless otherwise agreed” which gives independence to both the parties and chalk out negotiations on the same. *Section 32 has no relevance to the question whether there was a contract at all between the parties, but if a contract is shown to exist, the payment and delivery are concurrent conditions. It pertains to a condition which is to be implied, unless there is a provision to the contrary, in a contract*²⁶⁷. The section assumes the existence of a contract in respect of which such a term may or may not be read in²⁶⁸. In case merchant place of operation is different from the buyer’s place, the place of payment of price is not much of a consequence because as per Section 20 of Sale of Goods Act, in cases of unconditional contract for sale of specific goods in deliverable state, the goods passes on

²⁶⁵ Nisith Desai Associates, E-commerce in India, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/E-Commerce_in_India.pdf

²⁶⁶ Sale of Goods Act, 1930

²⁶⁷ Sir Dinshah Fardunji Mulla, The Sale of Goods Act and Indian Partnership Act, (10th Edition), Pg. 88

²⁶⁸ Claude-Lila Parulekar v. Sakal papers (P) Ltd., (2005) 11 SCC 73: AIR 2005 SC 4074

to the buyer when contract is made and it is immaterial that time of payment of the price or time of delivery of goods or both are postponed.

Section 33 states- “Delivery of the goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any other person authorised to hold them on his behalf²⁶⁹”. The first part of this Section deals with the mode of delivery. It can be made by doing anything which the parties agree shall be treated as delivery presents no difficulty. In respect of E-commerce, it could be understood by the given illustration- A purchases books from the merchant site of B and price for the product has been fully paid through net banking. Due to non-availability of A in the city that time, he asks the merchant site to keep his product with them only. This delivery will fall under “made by doing anything which the parties agree shall be treated as delivery”. Now, constructive delivery also operates in the same manner in E-commerce like it operates in a normal business world. By constructive delivery we mean that there may be a change in possession of goods without any change in their actual and visible delivery. In such cases, seller’s possession of goods may change after the sale and he may no longer hold the goods as owner but may hold the goods on account of his buyer or a bailee for a buyer. This was established in *Elmore v. Stone*²⁷⁰ where the horse was sold and seller kept it on the request of buyer. This can only be applied in cases of E-commerce where price for the delivery has already been paid and not valid on products which are for “cash on delivery” because till the time seller does not receive the amount, buyer cannot claim his right on those products. Also, in constructive delivery, both the parties shall agree to such arrangement and in cases where either party does not approve of it, such possession may be termed as illegal.

Section 34 says- “A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole, but a delivery of part of the goods, with intention of severing it from the whole, does not operate as a delivery of the remainder”²⁷¹. The common law rule applies that delivery of part may be a delivery

²⁶⁹ Sale of Goods Act, 1930

²⁷⁰ 127 ER 912

²⁷¹ Sale of Goods Act, 1930

of the whole if it is so intended and agreed but not otherwise and burden of proof seems to be on party affirming such intention²⁷². It operates as a constructive delivery only when the delivery of part takes place in the course of the delivery of the whole. Taking goods from the seller is the acceptance to the constructive possession of the whole. The other part of this section deals with the intention of severing the part of goods from whole, it won't be termed as complete delivery²⁷³. This section can be understood in light of the operations of any E-commerce. For instance, A places an order of five books from merchant site B. Due to stock delay and miscellaneous reasons, A receives three books during first week of placing the order and other two during the next week. A's acceptance of first three books signifies his acceptance through his action that part delivery is approved. In case he doesn't want part deliveries, he has the option of cancelling the order at any point of time. Also, if B has the intention of severing the deliveries from the whole, he will be negligent and may supply only one book at a time out of five which may attract legal action on him.

Section 35 says “Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery²⁷⁴”. This section is basically a reproduction of Section 93 of the Indian Contract Act, 1872. This explains that buyer has no cause of action against the seller if he has not applied for delivery and he must state that cause of action in his plaint²⁷⁵. The demand by a third party isn't valid and in cases where seller provides for notice of arrival of goods like invoice, the buyer will be under obligation to apply for the delivery²⁷⁶. Here, Section 32 of Sale of Goods Act, 1930 is applied- “Unless otherwise agreed upon, the buyer must be ready and willing to pay the price in exchange for possession of goods²⁷⁷. This can be understood in reference to the E-commerce as well. Big companies like Jabong has delivery partners who deliver the products to

²⁷² Per Lord Blackburn in *Kemp v. Falk* (1882) 7 App Cas 573, 586

²⁷³ *Dixon v. Yates*, (1883) 5 B & AD. 313.339: 39 RR 489. 499 : (1824-1834) All ER Rep 744 at 751; *Mitchell Reid & Co. v. Buldeo Doss*, (1888) 15 Cal 1.

²⁷⁴ Sale of Goods Act, 1930

²⁷⁵ *Sivaya v. Ranganayakulu*, (1935) 37 Bom LR 538 :62 IA 89: AIR 1935 PC 67; *Alapty Ramamoorthy v. P. Satyanarayana*, ('58) A Andh Prad 550

²⁷⁶ *Ganesh Das v. Ram Nath*, (1928) A Lah 20(27): 9 Lah 148 : 111 IC 498

²⁷⁷ *Sivaya v. Ranganayakulu* , 62 IA 89 : AIR 1935 PC 67 : 58 Mad 670 154 IC 1097

the customer and these partners are independent and only act as courier agency. Jabong has delivery partner Go Javas. For instance- Mr. A orders a pair of shoes from Jabong and Go Javas collect the same from their warehouse. Due to some technical fault, delivery could not be made for several days. Here A has to apply for delivery from Go Javas and cannot hold Jabong responsible for the delay. However, to maintain the brand image, big E-commerce giants provides on the spot help in cases of late delivery and related issues but when it comes to fixing the legal responsibility, Go Javas has bigger responsibility. Also, when buyer applies for the delivery, it will be dependent on nature and circumstances of the particular contract as to the time within which seller is required to comply with buyer's demand. Under C.I.F (Cost, Insurance and Freight) it is the duty of the seller to inform buyer about arrival of his goods at the port destination after which there arises the obligation of the buyer to apply for the delivery. Same is applied in case of E-commerce business which has its establishment in some other country while the buyer is sitting in his home country, ordering the products. Usually, such goods are sent to Indian Post Office where buyer is informed about arrival of his goods and buyer is expected to go the Post Office, pay the requisite fee or Chalan and get delivery of the goods. Seller's liability is limited till the arrival of the goods to Post Office only and not beyond it. Another notable point about buyer's duty is that his duty to apply for delivery does not arise when seller has refused to perform his part of the contract without any justification even before the final date of delivery has arrived. This could be the pure case of "anticipatory breach of contract" by the seller and Section 35 has no application when buyer treats the contract as rescinded by the virtue of Section 60 of this Act²⁷⁸. This clause can be applied to the cases of E-commerce as well.

Rules as to delivery are stated under Section 36(1) of Sale of Goods Act states- "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced".

²⁷⁸ *Devilal v. Govindlal*, AIR 1961 Raj. 283

(2) Where under the contract of sale the seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in possession of a third person, there is no delivery by seller unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting goods into a deliverable state shall be borne by the seller.

These Sections must be understood in light of E-commerce transactions. Rules of delivery may be varied according to the agreement between buyer and seller on a website of the seller. The interpretation of contract must be done on the basis of construction of each contract, like it was mentioned in sub-section (1) of this Section. Usually in cases of E-commerce, it is the seller who sends the goods to the buyer after receiving the order. Place of delivery under E-commerce transactions come under express contract. The goods are delivered to the buyer from the place where they were lying like warehouse of the company. The given Section is silent on the mode of delivery of the products and any reasonable mode can be adopted by the company. Sub-section (2) deals with the time for delivery and says that seller is bound to deliver the goods within a reasonable time and where time is fixed, seller has to follow the time limit. It could depend on number of reasons like- nature of goods, transport facilities and related issues. In case the time period lapses; it will be breach of contract. Mostly all E-commerce websites provides time period of seven to ten days for the delivery of products and many a times they deliver before the said time for the ease of customer. Also, there are few other E-commerce companies like Alibaba and Ebay who asks for bigger time window which may extend till one month due to the location of their businesses and it is up to the buyer to agree on it or not. In case buyer feel that time factor is not

being followed, he is free to rescind the contract (cancel the order in case of E-commerce) but not before providing the previous notice to the seller for the same. When goods are in possession of third person like Warehouse, there is no delivery unless he ascends to attorn to the buyer and becomes his bailee instead that of seller. For the expenses of the delivery, E-commerce companies do not take delivery charges in case order is large but in case the size of the order is small, buyer himself is expected to pay for the delivery along with the cost of goods. Like under C.I.F contracts, the freight has to be borne by the seller and wharfage charges are to be borne by the buyer; same would go for E-commerce in case they are operating outside the country where buyer resides.

Section 37(1) of Sale of Goods Act, 1930 says- “Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate

(3) 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 may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

These sub-sections basically deal with delivery of the wrong quantity by the seller and have three cases- less quantity, more quantity or order mixed with different descriptions. Usually in E-commerce, quantity is specified by the buyer and there are lower chances of wrong delivery. In case buyer receives wrong quantity, he is free to cancel the complete order or wait for the part delivery (in case previously informed by the seller). Also, a buyer can make a new order on the website again. Here buyer is under duty to check for the correct quantity and he cannot claim delivery of the wrong quantity afterwards. In case more than ordered quantity is delivered to the buyer, he can reject the whole lot or take the ordered quantity. In case of mixed delivery, it is considered to be a bad delivery of items and buyer has right to reject the complete delivery.

Section 38(1) of Sale of Goods Act, 1930 talks about instalment delivery which is- “Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof instalments”.

(2) 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 instalment it is a question in each case depending on the terms of the contract and circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not a right to treat the whole contract as repudiated.

In cases of E-commerce, instalment deliveries are generally made if products are to be procured from different warehouses. In such cases, buyer may cancel the complete order before the products are shipped or he can wait for the part delivery. This falls under “nature of contract or the conduct of parties²⁷⁹”. It could be the case where price may be payable either on complete delivery or on delivery of each instalment. For instance- 75 books were ordered from an E-commerce website and delivery were to be made in 3 sets of 25 books each month and all were applied for cash on delivery. The website sent 15 books on 12th December and rest 10 were sent on 18th December. The buyer refused to take the delivery as it was less than 25 in one set. His refusal was wrong as total quantity of 25 was supplied in one month.

Section 39 of Sale of Goods Act, 1930 says “Where in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission of the buyer or delivery of the goods to the buyer.

This section governs the mode of delivery. If the contract of sale specifies the name of the carrier, the seller must deliver the goods to such named carrier.

²⁷⁹ *Colonial Insurance Co. of New Zealand v. Adelaide Insurance Co.*, (1886) 12 AC 128 (138-139)

In the light of E-commerce, suppose Mr. A orders products from E-commerce website and it got received by Mr. B, his roommate. Mr. B lost the parcel and Mr. A can hold website responsible for delivering the goods to someone else.

Section 40 of Sale of Goods Act, 1930 says “Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit. It talks about risk where goods are delivered at distant place. The risk maybe transferred to seller by express agreement or by usage of trade or by the course of dealings between the parties. In context of E-commerce, giants like Amazon and Flipkart has restricted its operations in certain areas of Ghaziabad due to mishandling of products and cases of theft from the courier persons including charges of battery on them forced such companies to blacklist those areas and only orders of certain minimum value are delivered to such areas. In case buyer receives damaged goods, company can save themselves from such liability by using Section 40.

These Sections are sufficient to establish accountability when it is linked to E-commerce. Without these provisions, it would be impossible to give legality to the world of virtual business.

Conclusion-

In this ever expanding world of E-commerce, we need various legal tools to implement legality of this business. We have to make sure that rights of both buyer and seller are not infringed due to lack of clarity or unavailability of legal norms at place. Sale of Goods Act, 1930 establishes the righteousness and Sections 32 to 40 can easily be linked to the business of E-commerce. Due to the diversified way of trading, we cannot restrict its operations just because no new provisions are ready to counter the claims by either party. IT Act, 2000 also operates as a base for E-commerce and subsequently, E-contracts are gaining the required importance. Delivery is the base issue of any E-commerce business and because it is just the starting, new laws will be developed with time to counter problems which might arise in future due the way such companies operate. Law has to be flexible which can be bended or amended with time and requirement. Sale of Goods Act, 1930 might see few amendments in future in relation to E-commerce. Until then, the laid provisions seem to be sufficient and well in place to protect the rights of both buyer and seller.