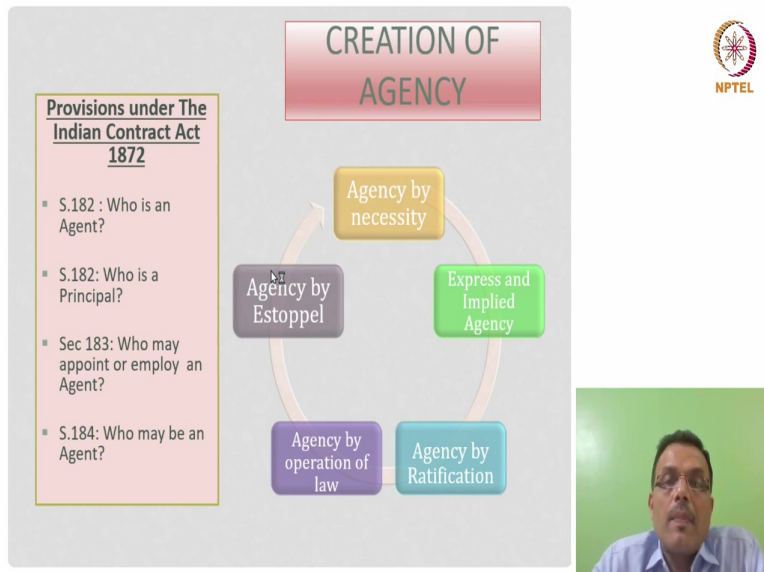


Advanced Contracts, Tendering and Public Procurement
Prof. (Dr). Sairam Bhat
Professor of Law, National Law School of India University
Lecture 36: Special Contract: Agency – Part 01



This class is regarding the special contract called the contract of agency, which is very relevant and important considering the fact that there are numerous sections in the Indian Contract Act that deals with the rights and duties of an agent. Understanding the same in the context that there are a lot of contracts in which agency gets created understanding this chapter becomes relevant and important, mostly because of the employment contract.

So, to understand agency the start is by asking our self how is agency different from employment, or what we call as the employer employee relationship, or what want to call as the master servant relationship. It is important to notice that a servant can definitely become an agent, but an agent is never a servant. An Agency can be created because when a person finds not to be in the place where the contract is to be needed and hence wants someone to do the contract for him

So an agency contracts can be created on numerous instances and occasions. As an example, one of the oldest firms of agency is an auctioneer who auctions the property be it movable or immovable property. An auctioneer is a typical agent who is assigned with the task of actually selling someone's property. Today, the auction houses for instance in the UK, are also selling arts, cultural items, or even painting for that matter.

So, they are specialist agent and what they do is auctions. They do not work for a single master, they work for several people and are quite independent in what they do. Hence they

are called as agents rather than servants. Servants are full time employees, they are supposed to be loyal to their employees and they get a salary. Whereas agents are independent, they are discretionary in nature, they can work for several people. They usually get paid based on their commission that is agreed upon between the two parties.

However, the thing which is common in understanding between a servant and agent is the fact that both servant and agent bind their master, or what is call an agent to the principal. That is where the Principal of vicarious liability, where the servant or the agent, when they do any act, they can actually bind their master(Principal) because whatever they did (or doing) was for or on behalf of their master (Principal). One of the most interesting test of vicarious liability is the application of the master and servant liability principle

First and foremost, the master is liable for all the acts of the servant vicariously if it was done within the scope of employment. So the test is, if the servant has done any act within the scope of employment, he can bind the master and both of them will be jointly responsible. The master is going to be more responsible for the simple reason is that because he has deep pockets for which servant has done the act during the course of employment. Hence, the master, who finally gets benefit of this Act should also be liable for the same. Whereas when it comes to agency, that the principal can be held responsible for the acts of the agent done within the scope of authority and he can bind the principal, because finally the principal will get the benefit of the agency act. Therefore, he should also be held responsible or liable for any of the acts of the agent towards the third party.

An interesting thing in an agency is that there is an application of the test called “within the scope of authority”. So, agents get the authority like an auctioneer and if he acts within the scope of the authority, anything that he does, the principal will be bound and responsible for the same and that is the reason for the agency to be created by many people

There are numerous examples where probably a celebrity or a film star or a film actor wants an agent and appoints them. The functions of the agents to these celebrities and the film stars are they usually try and get them certain endorsements, public appearances and other things They take care of their external work probably get them movie or film assignments. These are the ones who will negotiate the price, the days and all the contractor deals for the celebrity. And that is where the that most of these celebrities go by their agents. Interestingly, even sportsmen require agents because agents help beyond what they are doing in the sport. These agents actually represent the sportsmen with all their external transactions, including

advertisements or appearances, sponsorship, sponsor their training, or any of their aspirations that a sportsperson has. It is a very common factor that an agency or agents being employed in several of these businesses,

The Chapter on real estate law in India, it is the sector which has been dominated by agents or brokers. The RERA act 2016 mandates under Section 9 and 10, that agents must register with the RERA authority and only when you register, you can actually act as a broker or agent for these real estate companies or for the clients. The RERA act regulates the agency activity. RERA act also regulates the land and property dealers

There is an agency even in the insurance sector, which is very popular and relevant incumbently with what is called the regulator called the IRDA (Insurance Regulatory Development Authority) you will notice that agents have to register with IRDA and only then they can actually sell insurance policies or insurance products. The Agents in the insurance sector represent the insurance company and they get business to the insurance company. The commission is based on the insurance policies that they sell. However, to note that in some of these contexts, agents also represent the customer, it is like representing both the buyer or the seller, or the insurance company and the policy holder as well. So, they represent both these two parties and that is what agents can actually normally do.

The insurance business also runs through agents in as much as they actually propel the business. Insurance agents are trained, get a license and are registered. That is how the insurance business is largely functional due to agents as well. The life insurance in India is called Life Insurance Corporation of India, has agents who actually help enhance the business of the Life Insurance Corporation.

Patent law is another sector which as agency relationships A patent agent is required to file a patent. The patent law also allows for creative agents to register and practice before the patent controller. This is definitely possible that someone wants to seek a patent, he goes to the Patent Agent, as he would then know the process and the procedure to actually get and secure the patent. When they do so, that is how they appear before the court of law or before the patent controller.

The interesting question then comes is whether lawyers, advocates are agents. Now, there is nothing that prohibits lawyers from acting as agents. It is known factor that when an advocate gets his client to sign a waqalatnama which it is kind of representation as the law of Agency

is called the Law of Representation. The waqalatnama becomes kind of a document where the representation of the authority is vested in the advocate to represent the case in the court of law. But having said that, it should also be noticed that advocates are not only representing their clients, but because of the Advocate Act of 1961 they are called as officers of the court.

They are officers of the court apart from representing their clients. So, they are duty bound to not mislead the court to follow the rules and regulations of the court and to maintain the decorum of the court. To emphasize the advocates are not making a contract for the client. They are exercising the rights in the court of law and make submissions before the court of law.

When an agent makes a contract they will actually bring the third party and see that the third party actually create a contract. Advocates generally do not do that and lawyers can definitely do these kinds of transactions. So, advocate is a registered member of the bar. The lawyer is one who practices law, apart from representing the court.

Also, at this point of time, it is very important to understand that as soon as the law on contract was made in 1882, the Britishers passed very interesting and important legislation called the Power of Attorney Act. That is a very important law in the sense that it creates agency and its documentation that is required in a formal mechanism called The Power of Attorney. So, authority is vested in the power that is given to an attorney. That is how the power of attorney act is actually being viewed and enacted.

The Power of Attorney in India, it is a legal in valid instrument, it is an evidence-based instrument for the of creation of agency. In most cases, the power of attorney is important, because it gives a legal authority to someone to act on one's behalf. Either execute a simple power of attorney or execute what we call as the general power of attorney (GPA) becomes an important document for all practical purposes.

There are Supreme Court judgements regarding the Power of Attorney. There is a very landmark judgment of the Supreme Court called the Suraj lamps case. General Power of Attorney is normally granted there probably give sweeping or very wide powers to a person to represent on one's behalf. The GPA is in commercial transaction, in personal transactions, joint development agreements are made between the landowner and the builder (JDA)

The landowner apart from the Joint Development agreement with a builder also has to give a General Power of Attorney to the builder. The reason being the builder can actually seek

permissions from various government departments to start the construction in the building and various approvals for the building to be completed and then later on it can be sold to the third parties or to customers. The non-resident Indians or non-resident businesses may require GPA to be executed because of their resident in the country to do all the transactions

For example, an NRI who has a house and which is being given on rent may give a GPA to one of his cousins or relatives or a friend. This can be for certain works to collaborate like collecting rent, giving it to a new tenant, some activities to repaint the house, deposit this rent to a particular bank.

There are circumstances in which General Power Attorney is an extended, or issued in a personal capacity as well. It is a normal document as an agency that has been created under the power of attorney Act. The GPA act talks about revocation of the GPA, which is definitely possible. When there is a provision for the registration of the document it also provides for then it becomes a legal document. It cannot be cancelled unless you cancel the registration as well. In most circumstances, an agency then becomes a very critical factor in the day to day normal transaction.

What is important at this point of time is to talk about two very important and interesting kinds of agents. First and foremost is the partners as Agent under the Partnership Act of 1932, as well as the LLP act of 2008, which is the new partnership law. In India we have we have two partnership law 1932 British made law, 2008 Indian law or partnership which talks about limited liability. The Act of 1932 is about general liabilities. There is a concept of mutual agents under the partnership law.

The concept of mutual agent is interesting under the 1932 law; the partnership firm does not have a separate legal identity. This is ordinarily done because, though person's name is different and the firm name is different. Registering a business name for the firm, but it is not considered as a legal person in the eye of law. So, the partner's identity is the firm's identity. That is the normal technicality under the Partnership Act of 1932.

The firm does not have perpetual succession, if the partners die then the firm also dies. That is the reason it does not have a separate legal existence. If the partners represent the firm, the partners are representing the other partners and that's the reason it's called Mutual agency. The concept of mutual agency clearly states that partners can equally take part in the business

of the firm, they can represent the firm, as per the partner deed, whatever is the power or authority that is granted to them.

In the Mutual agency, there is no separate legal identity among the partners and are actually representing other partners. That is how the concept of mutual agency applies. The Principals of agency may also apply to such transactions when the partners act on each other's behalf.

The second most important type of aspect of agency is that of the Directors of the company. When a company cannot act on its own, because it is a legal person, it is a juristic person, and it requires natural person to act on behalf of the company. So, company needs a person to actually act on its behalf. So, the managing director or directors are supposed to be those kinds of agents.

Now, when we say directors or agents of the company, they are representing the company with outsiders, for transactions, to enter into contract, into employment, to look at procurement and the directors act on behalf of the company

The Board of Directors are a collective responsibility and the directors are an individual capacity, wherever that such authority is vested by the articles of association, they have to act on behalf of the company and represent the company as well. There are different kinds of directors, those directors who have executive functions, and there are independent directors who may not have executive function. They may not have that Representative character, they may not represent the company, though, they can take part of the meeting the board of directors, they can actually monitor supervise, but they cannot represent. The role of partners and directors who can be agents and who can act as Agent becomes very, very critically important. The partnership deed or the articles of association, is the registration document for both the partnership and for the company and therefore they act accordingly.

In partnership, there is concept called Sleeping partners, which means the partners does not take part in the day to day operations or activities of the firm. The company needs a capital investment or lends some kind of a name. doesn't have the have authority to represent the firm, like independent directors. In such situations it's important to understand who is the agent in this concept.

Finally, the contextualization of agency, when the discussion is about pledge and the bail, the Bailee and Attorney at some point of time may act as an agent. He acts as an agent when the Bailee while exercising is right of Lien because he has not been paid for the goods from the

bailer. Suppose he has done some service of labor and skill and it is not paid by the bailer the Bailee can exercise right of Lien would also means to exercise the right to sell.

When he has done that kind of labor and skill there can be an exercise the right of sale and with the Pawnee decides to sell the security of the goods, then in those circumstances, there is act of agency. They are doing it as an agent on one's behalf though they do not have the authority as ownership, they are they are exercising their right given under law

The Principles of agency even a may apply to those kinds of special contracts or transactions as the case may be. Agency as a very important business proposition in many circumstances in a day today activity. The last point here is to also understand that and agency in the international context, where a lot of these trading houses or warehouses or even a captain of a ship or a carrier may be an agent, including an air carrier or a sea carrier or a road carrier.

They also can be agents because they may actually be billing the goods on one's behalf at some point. The best example is that there is a road carrier who is carrying tomatoes, and due to a strike is not able to reach the destination, the tomatoes are actually deteriorating, and the lorry driver then decides to sell the tomato. He is a transporter and he is acting as Bailee. But at that point of time because he has to save the goods from deterioration, he has to make a sale when he makes the sale, probably he sells it on one's behalf. That is where the Principal of agency may come into place.

An agency can be created thorough a contract. Contract, can either be implied or expressed. In modern forms, the agency contract are definitely expressed contracts. In traditional jurisprudence on agency, an agency can be created out of the Conduct of Parties. One of them is by the rule of estoppel, which is kind of rule of evidence that is seen under Section 115 of the Indian Evidence Act.

In an estoppel agency then someone who has acted as an agent in the past, and continues to do so, in the future. There is no implied or express authority, but just by the Conduct of Parties of holding someone as an agent, they may continue to be so, in the future as well. Under the principles of estoppel, the principal is really stopped from denying the truth that in the past he had acted and therefore he is an agent in this current transaction as well and may be bound by his actions.

Every other aspect of agency cannot be defined every other authority of an agent cannot be expressed. There may be a necessity create an agency in certain situations and scenarios. For

example, there is an agency by necessity or urgency or the fact that the Principal cannot be contacted or is not there, therefore act on his behalf can be made. It may not be with any kind of an authority or it could be an extension of that kind of authority.

Therefore, an agency by necessity is inferred. So, this is also important in the context of the fact that if looked at customs and trade or usages, sometimes the principal may not be available to seek his permission, and then agent then has to act out of that necessity. One common example often given is the captain of a ship trying to offload goods from ship. When there is rough weather, to save the ship and to save others goods, he actually offloads the goods or throws it into the sea.

When an agency is created by operation of law, but it is by status, that agency gets creative. In terms of operation of law, or by what is called a status, one would understand that the Karta of a family is an agent of that joint Hindu family. The Karta is the head of the family in a joint Hindu undivided family. The Karta actually acts on behalf of the coparcenaries, he acts on behalf of the family members and has the agency to represent the family with third parties to make transactions. He is given that express authority by the status of operation of personal law.

Extending that operation of personal law, one of the interesting characteristics that one sees is how a wife can actually represent the husband or the husband representing the wife as the case may be in marriage. Now most spouses have the right to represent the other for necessities of life. Necessities of life means food, clothing and shelter. When the wife probably cannot get an express authority from the husband and if it is expressed, it could be General Power of Attorney.

The third parties to a GPA then can make a sale and buying from the husband. But the husband may be on the ship he may be an NRI and not in town. So, the wives or spouses should have that kind of agency, that when they procure these necessities of life, they are procuring it for the family and the husband or the wife is going to be bound by the same. That is how by status agency gets created, even in a domestic family circumstances.

The operation of law scenario can also be created from the things like where government contracts are going to be made. The Article 299 of the Constitution of India brings in a law when it says that in an executive power the state is with the President of India or the governor

of the state, as the case may be. So, contracts are executive functions. The government of India has to be represented by the executive organization.

The government can be divided as the legislative organ, the executive organ in the judiciary, and the executive organ is the executive function of contracting, that is vested in the president or the governor, as the case may be. That is what the Constitution, by operation of law, there is this kind of an authority on the president of India.

Under Article 299, the President or the governor have these powers. There is a provision where the contract can be made on their behalf, or maybe under their authority. That is how the delegation comes to the Council of Ministers, the Prime Minister, the department's, the secretaries, and so, on and so, forth. that is the kind of delegation that is generally made, wherein others in the government can also exercise powers on behalf of the Government of India.

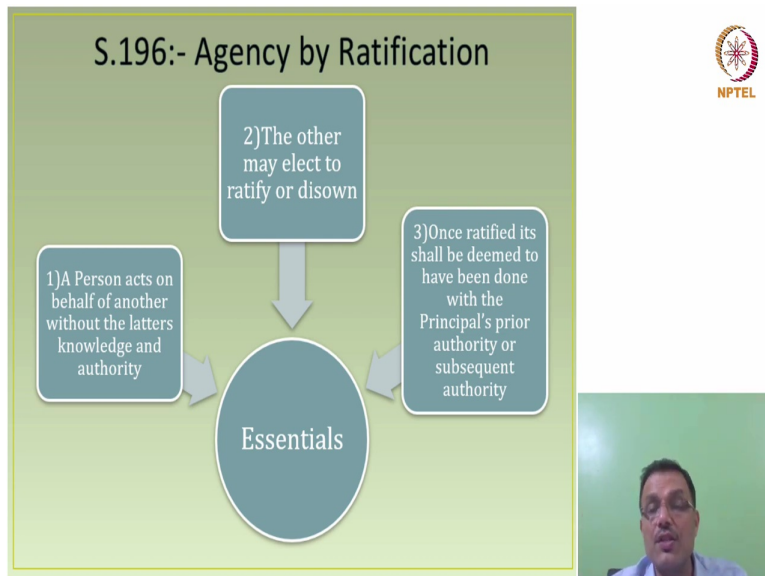
An agency is important to locate the powers of an agent, for example; an agency is different from the kind of trust or the trusteeship which is creates. Generally, if there the Trust does obviously there shall be registration of the trust as a charitable trust or as a public trust, or as a private trust, then the trustee has to act on behalf the beneficiary.

The trusteeship is a different doctrine, though sometimes say that the trust has acted on behalf of the beneficiary, which means the trustee is an agent of the beneficiary. But the point is, the trustee ship is created to manage the property for the beneficiary, but not the beneficiary being appointing the trustee. The Principal of an agency by operation of law gets created in trust property. The trustee then acts under the law for beneficiary, but as something that has not been directly appointed to the judiciary, but in terms of the trust property as well.

When considering the law, even a minor can be an agent, anyone under the law can be an agent. However, if a minor is appointed as an agent, he is only appointed for the benefits of agency, and he cannot be held responsible, personally, individually, because that is the protection that is given to minor. The principal has to be of sound mind and he has to be a major.

The principal can be a natural person or legal person, Appointment of agents can be made even beyond the territories of India, but there is as aspect of the enforceability of the contract in India. So, that is something precisely where would the powers be located in the contract see how agency operates under this Principle.

The final aspect is by agency by ratification.



The term Ratification is very important, and assumes a great amount of significance in the practical sense. Ratification or “to ratify” means to keep antecedent authority to affirm what was done in the past, when there was no authority at all. To ratify also means to give retrospective or prospective actions. Can an agency be created by ratification? The answer is absolutely, yes. That is what the chapter on agency says.

When there is a situation that an agent has acted on someone’s behalf. When an agent sells the car when there is neither an express authority or an implied authority nor authorized to do it, but when done in good faith. If the deal is good when acted in good faith for someone’s benefit. Under these circumstances ratification means the act of selling the car was done in good faith and that someone will have to accept the payment and transfer the title to that person to whom it has been sold.

This is how agency by ratification can come into place. Now, very often than not why ratification is important is because every time agent’s authority cannot be defined or and hence, out of necessity, good faith, actions for the principal, the agent may act under this authority.

It is for the principal who has the discretionary power to either ratify or not to ratify. But if he has to ratify the whole transaction. He cannot pick and choose if he ratifies he will affirm and be vicariously liable. If he ratifies he must do so with full knowledge and when once he does that ratification and agency gets created and after that the act of agent becomes a valid action

of representative character. This is very relevant in the government contract when some government officer acts and the government agrees to the same, it is a process of ratification by the government.

So, however, in government contracts, the rules are slightly different because of the involvement of Constitution, public policy, public interest and public welfare and in those circumstances, when an unauthorized act has to be ratified, the government has certain rules that needs to be followed. That is where the principals of constitution and administrative law will definitely come into effect.

However, in public sector organizations and those which are government companies, in a process where a director has acted on behalf of the company, though he had no power to do it, though he was not authorized to do it, then the company in the board of directors meeting might endorse whatever the director has acted on behalf of the company. If the Board of Directors finds it good for the Company and they can go forward with the same.

When usually directors enter into contract or place orders, or they have probably in the matters of employment, or they have acted with some third parties, without any express authority, the principles of ratification can definitely come into place. The principal has an option or discretion to ratify action. This is how agency by ratification becomes critical, it becomes very, very important aspect of creation of an agency. It binds the principal when the ratification is completed. It is also one element of that contracts that has lot in its stake. For example, there needs to be an amendment to a contract, say government contract, which is a long-term contract and a works contract considering 3 years of 5 years' contracts, the officer of the government has agreed to them. Though, any kind of amendment should be done by the government authority but certainly the officer who was in charge of the contract management agrees to the amendment because he thinks it is necessary and shall be ratified by the necessary authority. If he thinks that is the best way forward and he has kept government interest in mind, then those cases, the competent authority can definitely ratify the actions of the officer who was in charge. The ratification in administrative law is important ratification of contract. This is the critical process in which agency gets established. Unless there is a complete ratification with complete knowledge, ratification may not be valid, it is a choice that has to be done within a reasonable time.

When either ratification is sought by fraud or misrepresentation, misinformation then the ratification becomes or maybe invalid. It is the principal who has to be very careful in

exercising that kind of right of ratification, because it will hold him liable and responsible, for those which will make him binding towards the third party. Obviously, when the rule of good faith applies, it means that all the parties who are involved in this transaction of ratification must have acted in good faith, including the third party. When the third party gets to know that the agent did not have authority but acted very instinctively then he probably has not done so in good faith. As a matter of administration he should have understood the role of an agent and to have the authority from the principal for this kind of a transaction and how agency by ratification gets created.

When looked at from the GPA perspective (General Power of Attorney) not everything can be laid down in a document or an instrument called the GPA. Sometimes the agent may act, because the principal is not in the country, for example, he may file eviction notice to attend, collecting rent from house, sue the tenant, take upon his complaint, so on and so forth. So, an agent can do so many things that are necessary to protect the interest of the principal.

When these kinds of legal actions are taken, the principal obviously has to ratify because acts are done on one's behalf and benefit. In some cases, ratification may be compelled and sometimes it can be a choice and to not forget that ratification is compelled when the principal accepts the benefit of act.

With the principal of unjust enrichment, when a person places an order for 10 laptops, without any authority for any authority boss or any institution, in good faith. During the time of election, the election officer finds that laptops are very essential He orders these laptops and the government department accepts the laptop and starts operating the same. Now, the question is, when the payment is to be released, the finance department or the accounts raise a flag as to not having the authority to place for 10 laptops because he is a small officer. He should have taken proper consent, having passed the files, having got the tender through a competent process.

When they raised a lot of objections including auditors and then question is whether the third party should be paid for it or not. In those circumstances, you will notice the third parties act in good faith and the agency of the department accepting the order of the agent becomes very critical because unjust enrichment has already happened.

The affirmation by conduct has already taken place because the government department has already started using the laptop and in those cases, it will be something of ratification that the

government ought to do. There is no choice but to have compelled to actually exercise the option of ratification.