

## Module 5.12

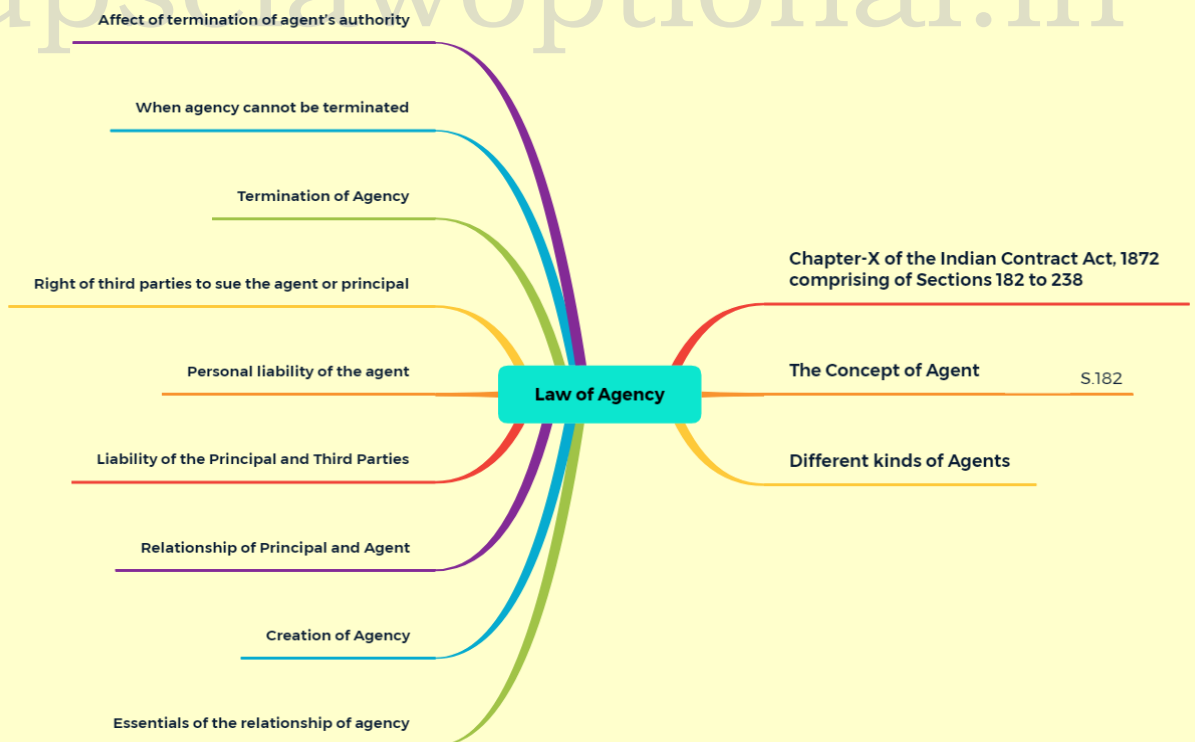
### Contract of Agency

#### Topic-I

1. **Introduction:-**

- Agency in law connotes an authority and capacity in one person to create legal relations between a person, occupying the position of principal and third parties.
- Thus in Law of Agency, one person i.e. Principal employs another person i.e. Agent to represent him or to act on his behalf, in dealing with third person.
- The law relating to agency is contained in **Chapter-X of the Indian Contract Act, 1872 comprising of Sections 182 to 238.**

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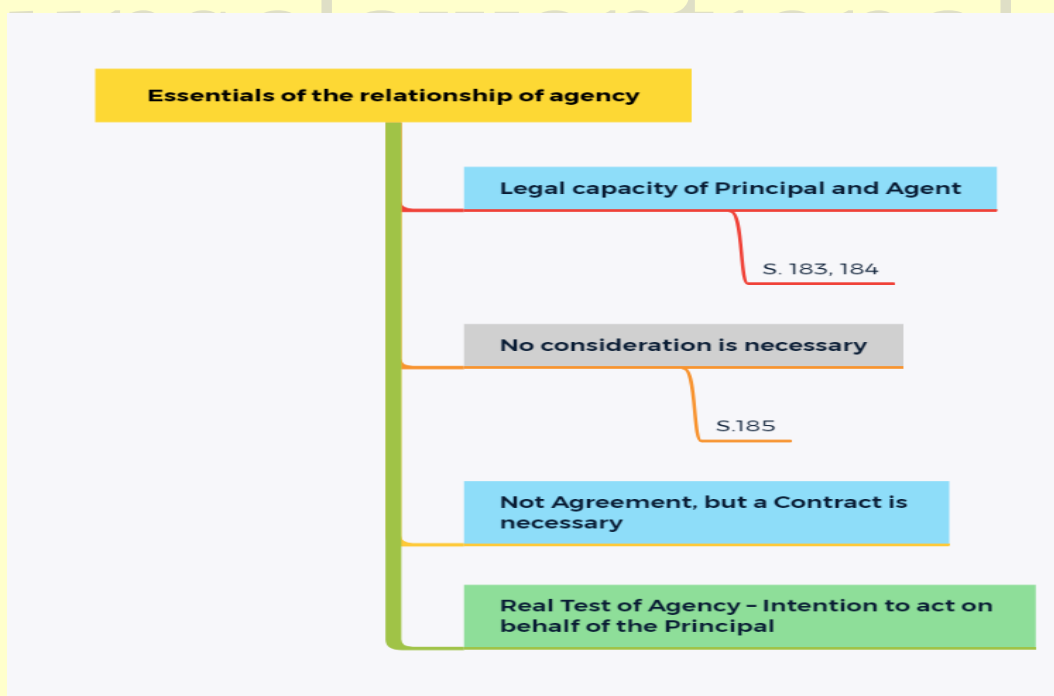


2. **The concept of Agent:-**

- **Section 182: 'Agent' and 'principal' defined** — An 'agent' is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the 'principal'. —An 'agent' is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the 'principal'."
  - An agent is merely a connecting link between the principal and the third parties.
  - The distinguishing feature of an agent is the representative character and his derivative authority.
  - The factor which characterises an agent for the purpose of this Chapter is his representative capacity coupled with a power to affect the legal relations of the principal with third parties.
3. ***Different kinds of agents:-***
- The word 'agent' connotes various activities and accordingly there are different nomenclatures which shall fall within the scope and purport of expression 'agent' in legal sense. In general, the following categories of agents are recognised:-
    - (i) **General Agent:-** One who is authorised to do all acts in connection with a particular trade, business or employment.
    - (ii) **Co-agent:-** When two or more persons are employed as agents, jointly and/or severally.
    - (iii) **Special Agent:-** An agent who has been authorised to do a single act.
    - (iv) **Auctioneer:-** An agent whose business is to sell goods or other properties by public auction i.e. opens sell and within the meaning of Sale of Goods Act, he is a mercantile agent.
    - (v) **Factor:-** A mercantile agent who is entrusted with the possession of the goods for the purpose of sell and accepts commission for such entrustment.

- (vi) **Broker**:- An agent who has the authority to negotiate the sell or purchase of goods on behalf of his principal in lieu of commission.
- (vii) **Commission Agent**:- An agent who is employed to buy or sell goods for the employer on the best possible terms, thereby receiving commission for his services.
- (viii) **Del credere agent**:- A mercantile agent who on payment of an extra commission, guarantees the performance of the contract by third parties. This category of agents is an exception to the general rule that an agent is not answerable to his principal for the failure of a third party to perform the contract. His legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals.

3. **Essentials of the relationship of agency:-**



(i) **Legal capacity of Principal and Agent:-**

- In order to be a principal, the person should be competent to contract i.e. he should be of the age of majority according to the

applicable laws and he should be of sound mind (**Section 183**). Thus a minor cannot appoint an agent but the guardian of a minor can appoint an agent for him.

- Under **Section 184**, any person may become an agent even though he is not competent to contract but to bind himself to the principal, it is necessary that the agent should be competent to contract. Therefore, if a minor is appointed as an agent, any loss caused on account of the mismanagement or negligence of the minor, compensation cannot be received from him.

(ii) **No consideration is necessary:-**

- **Section 185** lays down that no consideration is necessary for a contract of agency. The principal agreeing to be bound by the act of the agent and his corresponding duty to indemnify the agent, forms sufficient consideration.

(iii) **Not Agreement, but a Contract is necessary:-**

- Since it is not necessary that both the parties should be competent to contract, an agency may arise out of an agreement even though it does not amount to a contract as one of the parties may lack contractual capacity.

(iv) **Real Test of Agency – Intention to act on behalf of the Principal:-**

- When a person intends act on behalf of another, a relationship of agency may arise, although there may not be any agreement in this regard.
- Irrespective of the terminology used, the true relationship between the parties i.e. whether a person really intends to act on behalf of another, is the only relevant consideration.
- Thus the crucial test of the status of an agent is that his act binds the principal. An agent never acts on his own but always on behalf of another. In legal sense, the act of an agent will be deemed in law to be not his own but of the principal.

- The right to control and not physical control is the determining factor.

4. ***Certain important aspects:-***

(i) **An agent is not a servant:-**

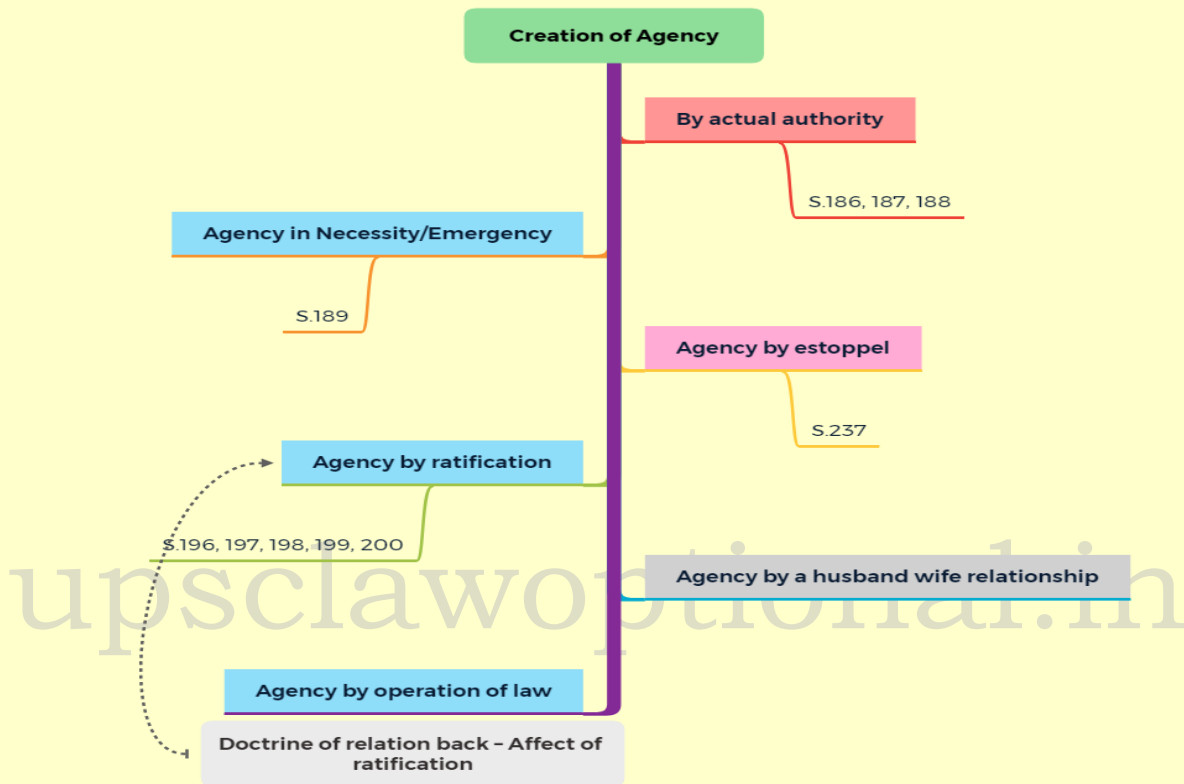
- An agent, although bound to exercise his authority in accordance with the lawful instructions of his principal, is not subject to the direct control or supervision of the principal. A servant works under the direct control and supervision of his master.
- An agent acts at his discretion and judgment, though within the limits of his authority. Thus a principal has the right to direct what the agent has to do. But as regards a servant, a master has the right not only to direct what the servant has to do but also the manner in which such act has to be done.
- Thus the amount of independence and direct control distinguishes an agent and a servant.
- An agent brings contractual relations between his principal and third parties whereas a servant does not function in such capacity.

(ii) **Acts for which an agent can be appointed:-**

- The Contract Act is silent about the acts in respect of which a principal may appoint an agent or may not appoint an agent. However, the right to appoint an agent is subject to several well known exceptions :-
  - (i) Where the act to be performed is personal in character.
  - (ii) Where the transaction is required by a statute to be done by the principal himself.
  - (iii) Where the competence to perform an act arises by virtue of the holding of some public office.
  - (iv) Where the competence arises by virtue of some power, authority or duty of a personal nature and requiring skill or discretion for its exercise.

- (v) Where a law imposes on a person, a duty, which is not free to delegate. E.g., appearance of a witness before a judicial authority.

5. **Creation of Agency:-**



- An agency may be created or constituted by the following methods:-
  - By actual authority:-** When the principal expressly or impliedly confers upon an agent the authority to act on his behalf.
  - In a situation of emergency/necessity, **when the agent acts on behalf of the principal without any previous authority.**
  - By estoppel:-** A person may be liable as a principal because of his conduct, on the basis of the law of estoppel.
  - By ratification:-** An act of an agent can be subsequently authorise by the principal and he may ratify the same thereby making himself liable.

- (v) By presumption of agency in **between a husband and wife**.
- (vi) By **operation of law**.

(i) **By actual authority:-**

- **Section 186:-** The authority to the agent may be express or implied.
- **Section 187:-** An authority is said to be expressed when it is given by words spoken or written.
- The authority given by the principal in such manner is an express authority enabling the agent to bind the principal by acts done within the scope of his authority. This may be either oral or by way of a written contract or a power of attorney.
- Existence of agency in certain cases can be implied from the circumstances of the case or from the conduct of parties in a particular situation.
- This is an instance of real or actual authority which may be inferred from the conduct and circumstances that may arise in a particular circumstance.
- In case of implied agency, the principal continues to be bound even if he has prohibited or restricted the agent from doing the authorised act unless the third party is aware of such restrictions. Thus someone who habitually pays for the articles supplied to his wife on credit cannot afterwards deny the shop keeper payment by giving secret instructions to his wife regarding purchase of article on credit.
- **Section 188:-** An agent having authority to do an act has an authority to do every lawful thing which is necessary in order to do such act. Thus if A is employed by B, residing in London, to recover at Bombay a debt due to B, A may adopt any legal process necessary for such purpose and may give a valid discharge thereof. Similarly, someone employed to sell a horse has implied authority to give a warranty that the horse is sound.
- It appears that every agent has an implied authority to act according to the customs and usages of a particular market or trade.

(ii) **Agency in Necessity/Emergency:-**

- In certain situations, law confers an authority on a person to act as an agent for another without requiring the consent of the other person. E.g. a wife for her necessities, act as her husband's agent without his authority. Similarly, a carrier of goods or master of a ship may under circumstances pledge his credit.
- This principle has been recognised in **Section 189** which says that in emergency situations the agent has the authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence will do in similar circumstances. Thus where a master of a ship finds that the cargo is perishing rapidly, he is entitled to sell the goods at the nearest port for the best possible price.

(iii) **Agency by estoppel:-**

- Sometimes a principal by his conduct creates an impression in the mind of a third person that the agent has an authority to act on his behalf.
- Where a person by his conduct or by statement has led another person to believe that a certain person is his agent, he is estopped from deny such fact subsequently. In such cases according to **S. 237** the principal is liable towards the third person for such acts done by the agent by virtue of the law of estoppel.
- Thus if A conscience goods to B for sell, and gives him instructions not to sell it under a fixed price and C being ignorant of A's instruction, enter into contract with B to buy the goods at a price lower than the reserve price, A is bound by the contract.
- **"Agency by holding out"** is a branch of the agency by estoppel. In such cases, a prior positive act on the part of the principal is required to be established from which the existence of agency has been claimed to be inferred. Thus representation of authority



requires to be emanated from some conduct of the principal, which led the other particular party to a honest belief that the supposed agent had authority to bind the principal by a particular act.

- When such apparent authority is created due to the negligence of the principal, the principal shall be responsible for loss and damages arising out of such negligence.
- An apparent authority so created continues to exist, unless terminated by a notice to the third party.
- In ***Hazard vs. Tredwell***, the Court held that an appearance of authority may arise from the nature of dealing adopted in a particular case. Hence where a principal once authorised his servant to purchase iron on credit and paid for it, he was subsequently also held liable when he had sent his servant with cash but the servant incurred credit.

(iv) **Agency by ratification:-**

- If an agent acts with the principal's authority, the principal is liable for the acts of the agent, provided that the acts fall within the apparent scope of his authority.
- If an agent enters into a contract without the authority of the principal and subsequently if the principal ratifies such conduct of the agent, i.e. accords his subsequent approval to such an act, he shall be bound by such act. In such situation, the principal adopts the benefits and liabilities of the contract made on his behalf.
- Ratification can be granted in two circumstances:-
  - (i) Where the agent has no authority at all.
  - (ii) Where while discharging his functions as an agent, the agent exceeds his authority.
- **Essentials of a valid ratification:-**
  - (i) ***Act should be done on behalf of another (Section 196):-*** It is necessary that the act in question has been done on behalf of the person who seeks to ratify the same. Thus if a person acts on behalf of A it cannot be ratified by B.

Thus in ***Keighley, Maxsted & Co. vs. Durant***, A was asked by B to purchase wheat in the joint account of A and B. But A purchased on his account only. Subsequently B had intended to ratify the act of A but when the prices fell, B refused to be bound by the transaction. The Court held that B is not bound by the transaction as he could not ratify the act which was done by A on his account only, and not on B's behalf. Thus an act which was not done on behalf of someone, cannot be ratified by him.

(ii) ***Ratification may be express or implied:- Section 197*** states that ratification may be express or implied in the conduct of the person on whose behalf the acts are done. Thus even silence or mere acquiescence amounts to implied ratification.

(iii) ***Principal should be in existence and competent to contract:-*** When a principal ratifies an act, its validity relates back to the time of doing the act by the agent. Thus the principal must have been in existence and should have been competent to contract at the time when the contract was entered.

In ***Kelner vs. Baxter***, several promoters of a company entered into a contract in the name of a company which was yet to be formed. Subsequently, the company was formed and went into liquidation. The promoters were sued for certain transactions which were entered prior to the incorporation of the company. It was held that the company could not be held liable as it was not in existence during the relevant time and thus the company could not ratify any act which had happened prior to its coming into existence.

(iv) ***Ratification with full knowledge of facts:- Section 198*** states that no valid ratification can be made by a person whose knowledge of the facts of the case is material defective.

Thus when P authorises A to buy certain goods at the market rate and thereafter accepts the purchase even though it was purchased at a higher rate, but afterwards when it comes to the knowledge of P that the goods purchased by A actually belonged to A himself, the ratification is not binding.

- (v) **Ratification of the whole transaction:- Section 199** states that if a principal makes ratification, it is deemed to have ratified the whole act and not a particular part of the transaction which may be favourable to him.
- (vi) **Ratification within a reasonable time:-** In order to be a valid ratification, it should be within a reasonable time. This principal is for the benefit of third persons. Thus when a time is fixed for the performance of contract, ratification must come before that act.
- (vii) **Ratified act should not be injurious to a third person:- Section 200** lays down that ratification which has the affect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot be made. This principal can be understood from the illustrations attached to Section 200.
- (viii) **Acts to be ratified must be a lawful act:-** The act to be ratified must not be void or illegal. There can be no ratification of an illegal act or an act which is void. Hence a contract which has no legal validity cannot be ratified. E.g., a company cannot ratify the acts of the directors which are against the powers of the company. Similarly, where money was entrusted to a person for investment and he puts it to his own use, it was held that the doctrine of ratification could not be used to validate a breach of fiduciary obligation.
- (ix) **Ratification must be communicated:-** It must be proved that there was communication of the ratification to the person concerned before the act became irrevocable.

- **Limitations to the doctrine of ratification**:- There can be no ratification in the following cases:-
  - (i) Where an agent purports to act as agent for a principal not in contemplation or existence.
  - (ii) Where the principal is incapable of contracting.
  - (iii) When the principal do not have full knowledge of facts.
  - (iv) Where the act to be ratified is void/illegal /unconstitutional.
  - (v) Where the entire transaction is not ratified.
  - (vi) Where ratification is not communicated to the concerned person.
  - (vii) Where ratification is of such acts which the principal has no power to do.
  - (viii) Where ratification puts a third party to damages.
  
- (vi) ***Agency by a husband wife relationship***:-
  - Marriage by itself does not create any agency between the husband and the wife. Such agency must be created expressly or it can be inferred from the conduct of the parties.
  - If A authorises his wife B to borrow goods for him, such agency is express. However without express authority from her husband, if B takes goods on credit which are subsequently paid by A, A's agency is implied.
  - Where the husband has expressly authorised his wife to borrow money or pledge his credit, the husband is liable. Where the husband and the wife are living together, the wife is presumed to have implied authority to pledge the husband's credit for necessaries. However, the husband may avoid liability if it appears :-
    - (i) That he has expressly forbidden his wife from borrowing money or buying goods on credit.
    - (ii) The goods purchased are not necessaries.
    - (iii) He has allowed sufficient funds for purchasing the goods she needed to the knowledge of the seller of such goods.

- (iv) The seller has been expressly told or had noticed asking him not to give credit to the wife
- The fact of marriage alone does not make the wife an agent in law. Neither the fact of living together is sufficient. It must be shown that there existed a domestic establishment in which the wife was in-charge for certain purchases on behalf of their establishment. Thus in ***Jewsbury vs. Newbold***, where the husband and the wife worked and resided in a hotel, it was held that the husband cannot be made liable for the purchases made by the wife.
- (vi) **Agency by operation of law:-**
- An agency may arise by operation of law also:-
    - (i) When a company is formed, its promoters become agents by operation of law.
    - (ii) According to Section 18 of the Indian Partnership Act, a partner is the agent of the firm for the purpose of its business. Thus the act of a partner in usual course of business of the firm, binds the firm.
6. ***Doctrine of relation back – Affect of ratification:-***
- Creation of agency by ratification gives rise to an important question as to what happens when the principal ratifies an act which has been done previously. The doctrine of relation back addresses this issue.
  - According to **S. 196**, the principal may elect to ratify or disown the acts which are done by one person on behalf of another without his knowledge or authority. If he ratifies them, the same affect will follow as if they have been performed by his authority.
  - **Ratification has the following affects:-**
    - (i) It establishes the relationship of principal-agent as regards the act ratified is concerned between the person ratifying and the person doing the act.

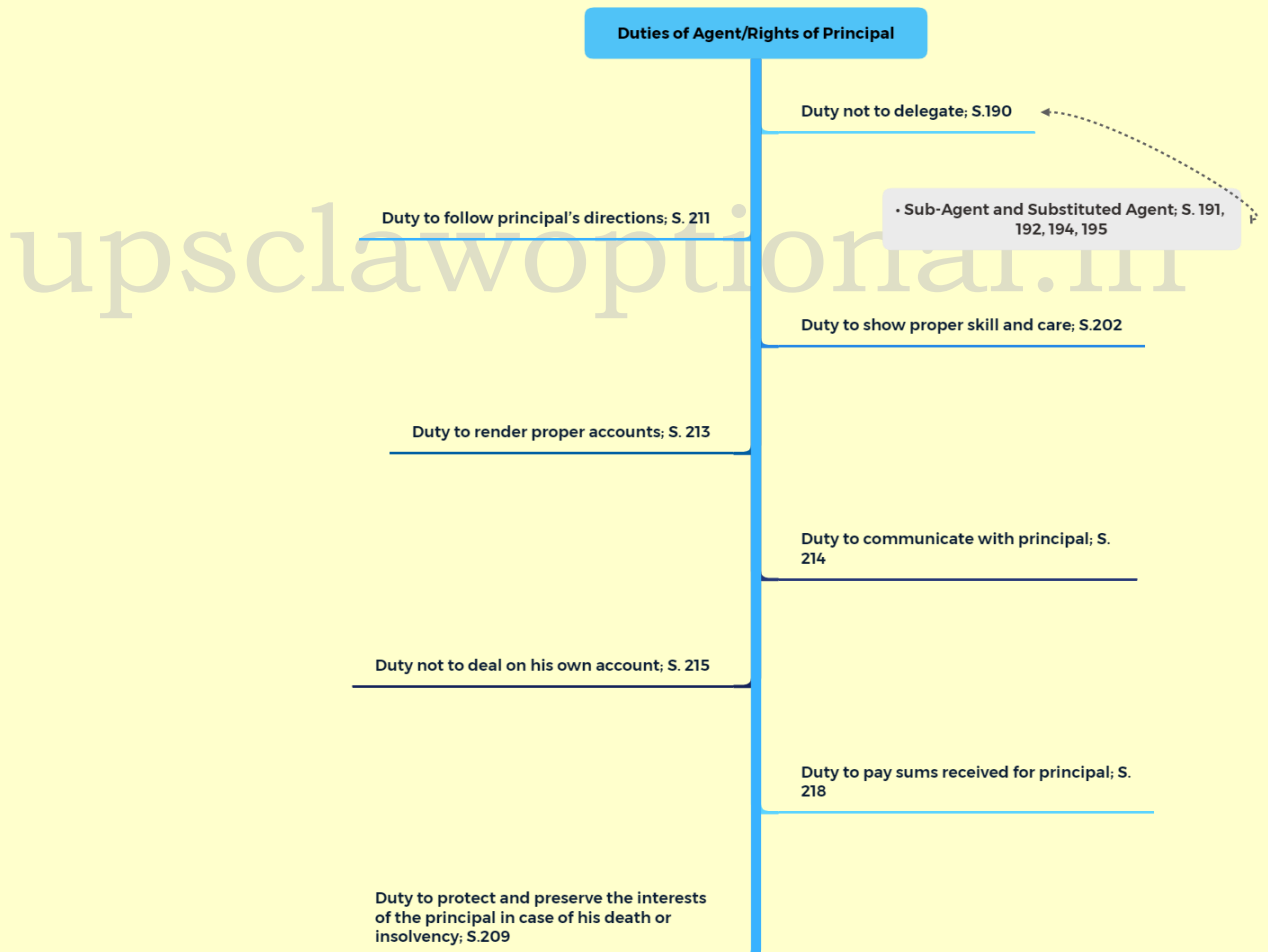
- (ii) It establishes a contractual relationship between the principal and the third party.
- Upon ratification, the agency comes into existence from the moment the agent acted and not from the time when the principal ratified the act. Thus ratification relates back to the date when the act was done by the agent. In this sense, ratification tantamount prior or previous authority.
  - In ***Bolton Partners vs. Lambert***, the Managing Director of a Company, purporting to act as agent on the company's behalf accepted an offer by L, without the authority of the company. Such acceptance by the managing director was ratified by the company. Thus the ratification related back to the time of its original acceptance. Accordingly, when L intended to revoke the offer, it was held that L was bound by such offer as by reason of relating back, the offer was accepted by the company on such date when the managing director originally accepted it.
  - However, the position shall be different if the agent makes a contract subject to the ratification and the other party is aware about the limitation of the agent's authority. In such a case the date of making the contract shall be the date of ratification and such cases revocation is possible before ratification. Hence in ***Watson vs. Davies***, A offered to sell his property to the Board of Management of a Charity. Such offer was considered by some members of the Board subject to a formal meeting of the board. Before the Board met, the offer was revoked. Subsequently, even though the board passed a resolution ratifying A's offer, it was held that A could validly revoke such offer.
7. ***Relationship between Principal and Agent:-***
- Such relationship can be discussed under the following heads:-
    - (i) Duties of agent which can also be understood as the rights of the principal and

(ii) Rights of an agent against the principal which can be understood as the duties of the principal.

7.1. **Duties of Agent/Rights of Principal:-**

- The following duties of general nature are imposed by law upon every agent, unless there modified or excluded by special contract. These duties are as follows:-

(i) **Duty not to delegate:-** An agent is not entitled to depute another person to do what he has undertaken to do himself. This is based upon the principal *delegatus non potest delegare* i.e. delegated power cannot be further delegated.



**Section 190** lays down an agent cannot lawfully employ another to perform acts which he has expressly or impliedly

undertaken to perform personally unless by the ordinary custom of trade, a sub-agent may or by nature of the agency, a sub-agent must be employed.

Thus **Section 190** contents certain exceptional cases where a **sub-agent** can be appointed:-

- (a) Where there is a custom or trade to that effect employing a sub-agent.
- (b) When the nature of agency so requires e.g. when an agent is authorised to purchase goods in a foreign country which requires engaging a sub-agent in such country.
- (c) When the act does not require a personal skill e.g. weighing coal lying at a place or transporting goods from one place to another.
- (d) When the principal expressly or impliedly agrees.
- (e) Unforeseen emergencies requiring appointment of sub-agent.
- (f) The nature of authority is such that a deputy is necessary.

In ***Mahindar vs. Mohan***, an owner of a house appointed a bank as his agent to let out the property. The bank entrusted such job of finding a tenant to a house agent. The agent collected the rent but did not pay the same to the owner. In a suit instituted by the owner against the agent, the agent took a plea that there was no privity of contract between him and the owner as he was appointed by the bank. The Court held that the agent was accountable to the owner as the bank had wide discretion in delegating certain functions to specialised persons as finding a tenant is not a job which the bank usually undertakes.

- **Sub-Agent and Substituted Agent:-**



- (i) Though as a general rule except the circumstances as mentioned in Sec. 190, the duties of a principal, cannot be delegated, the Indian Contract Act recognises two classifications of agents e.g. **sub-agent and substituted-agent**.
- (ii) **Section 191** defines that a sub-agent is a person employed and acting under the control of the original agent in the business of agency. Thus sub-agent is bound by all the duties of an ordinary agent.

When a sub-agent is properly appointed, the principal is bound by the acts of the sub-agent as if he was an agent originally appointed by the principal. The agent is responsible for the acts of the sub-agent.

According to **S. 192**, the sub-agent is responsible for his acts to the agent but not to the principal except in cases of fraud or wilful neglect. Hence a sub-agent is not directly responsible to the principal but is responsible to the agent.

- (iii) A **substituted agent** is a person who is named by the agent, holding an express or implied authority from the principal, to act for the principal.

According to **S. 194**, a substituted agent, in other words, is the agent of the principal though he is named at the request of the principal by the agent.

E.g., A authorised B, a mercantile in Calcutta to recover the money given to A from C and Company. B instructs D, a solicitor to take legal proceedings against C and Company for the recovery of the money. D is not a sub-agent, but is a solicitor for A.

According to **S. 195**, like a sub-agent, the appointment of a substituted agent is made by an agent. While selecting a substituted agent for the principal the agent must exercise due care and discretion as a man of ordinary prudence.

However, he shall not be responsible to the principal for the acts and negligence for the agents so selected.

(ii) **Duty to follow principal's directions:-**

- According to **S. 211** an agent is bound to conduct the business of the principal according to the directions given by the letter. In the absence of any directions, the agent should conduct the business according to the customs which prevails in doing business of the same kind at the place where the agent conducts the business. If an agent fails to act as stated above he is liable to the principal to compensate any loss that may be sustained. In case any profit accrues he must account for it.
- In ***Pannalal Janki Das vs. Mohan Lal***, the agent disregarding the instructions of the principal failed to ensure certain goods pending their dispatch. On account of loss caused by explosion, the agent was held liable for negligence and had to compensate the principal.

(iii) **Duty to show proper skill and care:-**

- In terms of **S. 202**, an agent is bound to conduct the business of agency with such skill as is generally possessed by persons engaged in similar business unless the principal has noticed of his want of skill.
- He is bound to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.
- Thus an agent having authority to sell on credit, must make proper and usual enquiries before making any sell. In case he makes such sell to a person who is insolvent without making proper enquiry, he must make compensation to the principal in respect of any loss thereby sustained.
- The standard of care and skill which an agent has to bestow depends upon the nature of his profession.

(iv) **Duty to render proper accounts:-**

- In terms of **S. 213**, the agent is under a duty to render proper accounts to the principal on demand.
- Hence an agent should maintain proper accounts of the sums belonging to the principal which are in his hands.

(v) **Duty to communicate with principal:-**

- **Section 214** lays down a duty that the agent in cases of difficulty shall use all reasonable diligence in communicating with the principal and to obtain his instructions.

(vi) **Duty not to deal on his own account:-**

- According to **S. 215**, an agent is under a duty not to deal on his own account in the business of agency unless the principal consents thereto. In case the agent does so, the principal may repudiate the transaction by showing that any material fact has been dishonestly concealed from him by the agent or that the dealings of the agent have been disadvantageous.
- **Section 216** entitles the principal to claim any benefit which may have resulted accrue from such transaction.

(vii) **Duty to pay sums received for principal:-**

- An agent is under a duty to pay to his principal all sums received by him on principal's account in terms of S. 218. The agent is however entitled to deduct his lawful charges.
- Even though the agent receives any money in pursuance of a void or illegal contract, he must remit the same to the principal.

(viii) **Duty to protect and preserve the interests of the principal in case of his death or insolvency:-**

- **Section 209** casts a duty upon an agent to take all reasonable steps for protection and preservation of the interests entrusted to him, when the agency is terminated due to the death of the principal or he becoming of unsound mind.

8. ***Rights of the Principal:-***

- From the above discussion, it appears that the remedies available to the principal against the agent when he fails in his duty towards the principal are as follows:-
  - (i) ***To recover damages if any loss occurs*** due to disregard by the agent of the directions given by the principal or by reason of not following the custom of the trade.
  - (ii) ***To obtain an account of profits***, recover them and in case the agent is found to retain profits illegally, the principal may deny remuneration to the agent.
  - (iii) If the principal can show that the agent has acted as a principal himself and not merely as an agent, he can resist the agent's claim for indemnity against liability incurred by him.

**Module 5.10**  
**Contract of Agency**  
**Topic-I**  
**CASELAWS**

