

4. Contract of Agency

4.1 Meaning and Nature of Agency

It is not always possible for a person to do everything by himself. Due to the complexities of modern business; it becomes necessary to delegate some of the acts to be performed by another person. Such another person is called an agent. The person to whom the act is done, or who is represented of that work is called the principal. The contract, which creates the relationship of principal and agent, is called a contract of agent or agency.

E.g. 'A' appoints 'B' to sell his land on his behalf. Here 'A' is principal and 'B' is his agent. The relationship between 'A' and 'B' is called contract of agency.

The Nepal Contract Act, 2056 has defined the term 'Contract of agency' in section 56 as "*any person may appoint any other person as his agent to do any thing on his behalf, except the something connecting with his personal skill, or to conduct business as his agent or any transaction with a third person on his behalf or to represent himself to such person, or establish any kind of legal relation with the person appointing an agent and a third person, and in case an agent is so appointed, a contract relating to agency shall be deemed to have been concluded*".

Section 182 of the Indian Contract Act, 1872 defines that "*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*".

Above said definitions signify that the agency is a legal relationship between the principal and agent for doing any work on behalf of the principal except the work relating to his personal capacity. The function of an agent is to bring about contractual relations between the principal and the third parties. The Acts of the agent bind his principal to third person. So, the function of the agent, as to bring his principal in to contractual relationship with the third party, creates the relation between principal and third party. The agent has power to make the principal answerable to the third party for his conduct.

General Rules of Agency

There are two important general rules regarding agency,

- (i) Whatever a person competent to contract may do by himself, he may do through an agent except for acts involving personal skill and qualification. For example, a person cannot marry through an agent, can not paint a picture through an agent etc.
- (ii) "He who does through another, does by himself. "In other words, the acts of the agent are, for all legal purposes, the acts of the principal.

4.2 Characteristics of Contract of Agency

The characteristics of contract of agency are as follows:

4.2.1 Appointment of the agent:

The agent is appointed on the wish of principal, while the things appropriate.

4.2.2 Mode of appointment:

The mode of appointment may be express or implied.

4.2.3 Binding Nature:

The work of agent binds the principal to the third person.

4.2.4 No need of consideration:

Absence of consideration does not affect the validity of contract of agency. It is internal matter between the principal and agent.

4.2.5 Good faith:

Agency is based on the agent has to inform his principal all the information as he knows. Similarly, the agent must neither set up adverse title nor use information against the principal obtained in the course of agency.

4.2.6 Delegation of Authority:

The principal delegates authority to the agent to do any work for him or on his behalf.

4.2.7 Purpose of Agency:

The purpose of the appointment of the agency is to establish legal relationship between the principal and third person.

1.1.1 Distinction between Agent and Servant

A servant acts under the direct control and supervision of his master, and servant has to act according to the orders of the master in every particular case. He does not create relations between his master and third persons.

An agent is not subject to the direct control and supervision of the principal. He has often a large discretion to act within the scope of his authority. A principal directs the agent as to what is to be done.

4.3 Modes of creating an Agency

There are several modes for creating agency. It can be created in any one of the following modes:

4.3.1 Agency by express agreement

Normally agency is created by an express agreement. The term express comprises both the oral and an agreement in written form. In Nepal, registration must be necessary in the prescribed governmental department to create an agency. When a power of attorney is given to another person an agency is created and the agent enables to perform the work on behalf of the principal. The authority of power of attorney may differ in accordance with the terms and conditions of that document. They are as follows:

- a. **General power of attorney:** Under this attorney the agent is authorized to do all dealings to act generally in the business agency.
- b. **Special power of attorney:** Under this attorney, the agent is authorized to do a special transaction. e.g. selling a house.
- c. **Particular power of attorney:** Under this attorney, the agent is authorized to do a particular single act. e.g. submission of document in the particular office or court.

4.3.2 Agency by implied agreement

An agency may be created by an implied form. Implied agency arises when there is no express agreement appointing a person as agent. It arises from the conduct, situation or relationship of parties. The authority to act as an agent is inferred from the nature of business. Parties are usually regarded as agent by implications of their relationship. It may be the followings types:-

- a. **Agency by Estoppel:** Estoppel is legal doctrine which prevents a person from denying a fact. If person, by his words or conduct has willfully led another to believe that certain circumstances of facts exist, the another person, who has acted on that belief may create an agent once accepted acts of facts cannot be rejected again. This agency is based on the doctrine of estoppel.
- b. **Agency by holding out:** It is a branch of estoppel. But an agency by holding out requires some positive act of conduct by the principal to establish agency subsequently. For example, 'A' who is domestic servant of 'B'. Generally A purchases goods on credit from 'C' and B pays them regularly. 'C' can assume that 'A' is 'B's implied agent. Later on, 'A' uses 'B's authority to purchase goods for his own use. C files a suit against 'B' to recover the cost of the goods which were actually consumed by 'A'. In this prior conduct in holding out that 'A' was B's agent. Here 'C' can recover the price from 'B'.
- c. **Agency by necessity:** It is also mode of creating agency by implied agreement or authority. In some cases the agency can be created because of the necessity. Where one may need to work being an agent of another person even in the absence of expressed agreement.

In certain circumstances the law confers (accepts) an authority in one person to act as agent for another without requiring the consent of principal. Following conditions must be fulfilled for the agency of necessity:

- It must be impossible to get the principals' instructions,
- The agent of necessity must act honesty in the interest of all parties.
- There must be real emergency and necessary of an act on behalf of principal

4.3.3 Agency by Ratification

Ratification means subsequent acceptance by the principal in respect of an act done by the agent without the consent of principal. It is the subsequent adoption and acceptance of an act originally done without authority or instructions. It is an approval of the previous act and conduct by principal. It has got retrospective effect. That agency comes in to existence from the moment when the agent acted and not from the time when the principal ratified. Ratification depends upon the will of principal. If he approves the previous conduct, he is said to have

conform that act and becomes liable for that act. For example; 'A' buys certain goods on behalf of 'B', 'B' did not appoint 'A' as agent. Later on "B" accepts it and the act is ratified. Here, 'A' becomes agent of 'B' with retrospective effect.

4.4 Rules and Essential Elements of Valid Ratification

There are some rules or essential elements regarding to valid ratification. Ratification becomes valid only if the following conditions are satisfied.

- The agent must act on behalf of the principal,
- The Principal must be in existence at the time of ratification,
- The principal must have contractual capacity,
- The principal must have full knowledge of material facts of ratification,
- Whole transaction must be ratified,
- Ratification must be done within a reasonable time.
- Act to be ratified should not be void or illegal,
- Ratification must not injure a third party.
- Act to be ratified must be within power of principal,
- Ratification may be expressed or implied,
- Ratification must be communicated to the concerned party.

4.4.1 Classification of Agent

There are different types of agent in regarding to their capacity, authority as well as their nature. The classifications of the agent are as below:

1.1.2 A. From the view point of agents' authority:

- **General Agent:** A general agent is one who is employed to do all acts connected with a particular business or employment.
- **Special Agent:** A special agent is one who is employed to do same particular act of represent his principal in same particular transaction. e.g. an agent employed to sell a car. As soon as the act is performed, the authority of such an agent comes to an end.
- **Universal Agent:** A universal agent is said to be one whose authority is unlimited. e.g. who is authorized to do all the acts which the principal can lawfully do and can delegate. He enjoys extensive powers to transact every kind of business on behalf of his principal.

1.1.3 B. From the view point of the nature of work:

- **Mercantile Agent:** A mercantile agent is one who has authority either to sell goods or to buy goods or to raise money on the security of goods. The various kinds of mercantile agent are as follows:
- **Factor:** A factor is a mercantile agent to whom goods are entrusted for sale. He enjoys wide discretionary power in relation to the sale of goods.
- **Commission agent:** A commission agent is a mercantile agent who buys or sells goods for his principal on the best possible terms in his own name and who receives commission for his work.
- **Broker:** He is one who is employed to make contracts for the purchase and sale of goods. He is not entrusted with the possession of goods. He simply acts as a connecting link and brings the two parties together to bargain.
- **Non-mercantile agent:** They include Advocates, Attorneys, and Insurance Agent etc.

4.5 Right and Duties of Agent

An agent is a person who works as a representative of another person or who works on behalf of principal. During course of his work, he performs several works and the works performed by him, ultimately goes under the liability of his principal. The right and duties of the principal and agent seem corresponding to each other. Being an agent, he has some rights and some duties. The rights and duties of agent are given below separately.

4.5.1 Rights of Agent

The following are the rights of an agent:-

1.1.4 a. Right to retain money:

The agent has right to retain necessary costs received on the account of the principal in the course of business of agency.

1.1.5 b. Right to receive remuneration:

Where the contract on the remuneration or commission, the agent has right to sum remuneration or commission and it must be supplied to him. He has right to receive salary at the time of completion of his work. In this respect Section 219 of the Indian Contract Act, 1872 has made the provisions.

1.1.6 c. Right to lien:

Except otherwise agreed, an agent has a right to retain goods, papers and other property of the principal received by him, until the amount due to himself for compensation and services in respect of, has been paid to him. The agent can only retain the goods he has no power to sell.

1.1.7 d. Right to Compensation:

An agent has right to compensation to him by the principal's negligence. According to the Section 62(3) of the Nepal Contract Act, 2056, unless otherwise provided that in contract, the agent is entitled to reasonable compensation for the loss or principal removes the agent without any reasons before the specific period prescribed or before the completion of work assigned to him or without a prior notice stating reason if no period or work has been prescribed for.

1.1.8 e. Right to stoppage of goods in transit:

An agent has right, as an unpaid seller, to stop the goods in transit to the principal on the following conditions;

- He has bought goods either with his own money or by incurring a personal liability for the price.
- The principal has becomes insolvent.

4.5.2 Duties of Agent

The agent performs work on behalf of principal; therefore an agent has the following duties towards the principal:

- To conduct the business of agency according to instructions of the principal:** It is the duty of every agent as to act and perform the agency work according to the directions given by the principal. When the agent acts otherwise and there occurs any loss, he must account for such work himself.
- To follows customs of trade in the absence of instructions:** It is duty of an agent to perform the work in accordance with the law, practices and custom, where expressly no instruction is made by the principal. If the agent does not do so, he is liable for the loss sustained by the principal.
- To render proper accounts to the principal:** The agent has to maintain the account properly. And the agent has to render proper account to the principal or provide detail of accounts and records on principals' demand.
- To communicate with the principal, in case of difficulty:** To provide all reasonable communication with his principal in seeking to obtain his instruction before taking any steps in facing the difficulty or emergence.
- Not to deal on his own account:** According to section 215 and 216 of the Indian contract Act, 1872 the agent must not deal on his own account in the business of agency without consent of the materials circumstances which have come to his knowledge.
- To pay all sums received for principal:** The agent must pay to the principal all sums received on his behalf.
- Not to delegate his authority and responsibility:** An agent can not delegate his authority or employ another to perform acts which he has expressly or impliedly undertake to perform personally. Ordinarily an agent can not further delegate the authority which has been delegated to him by his principal.
- Not to make secret profit:** An agent stands in fiduciary relation to his principal and therefore he must not make any profit out of his agency. He must pay to his principal all moneys received by him on principal account.
- Not to disclose confidence:** To operate the business activities, it is necessary the confidence between the agent and principal. Therefore, not to disclose the confidential matters others.
- Not to set up adverse title:** The agent must not set-up his own title or the title of third party to the goods received by him from the principal.

- k. **Act in good faith and in the interest of the principal:** An agent is only a doer of the principal; he has to work for the benefit and interest of the principal.

4.6 Rights and Duties of Principal

The duties of an agent are indirectly the rights of principal and the rights of an agent are indirectly the duties of the principal. The Principal is a person who employs the agent to work on his behalf. As being an employer, he has some rights and duties towards his agent. The Nepal Contract Act 2056 has made some provisions in this regards. The rights and duties of the principal are given below separately.

4.6.1 Rights of Principal

1.1.9 a. Right to revoke agent:

In case, the agent commits fraud or uses excess authority or deceives principal, the principal has right to revoke agent before the completion of work.

1.1.10 b. Right to instruct:

The principal has right to instruct his agent in respect of working procedure. The agent also has duty to follow his instruction.

1.1.11 c. Right to claim compensation.

The principal has right to claim compensation from his agent, if he does any work beyond the authority provided to him by principal or by careless or by negligence. In such case the agent is liable for the loss of his principal.

1.1.12 d. Right to demand secret profit

The relation between the agent and principal is fiduciary and the agent has no right to make any secret profit. If he does so, the principal has right to demand such secret earned profit from his agent.

4.6.2 Duties of principal

Duties of the principal are as follow:

- a. **To provide remuneration:** Although it is the matter between the principal and agent but the principal has to provide remuneration or commission as mentioned in an agreement. If remuneration is not mentioned in the agreement, the principal should provide reasonable commission to his agent.
- b. **To reimburse money:** The principal is liable for repaying or reimbursing money which spent by the agent to preserve the goods or performance of contract.
- c. **To provide indemnity:** The principal has duty to provide indemnity (Compensation) to his agent in following cases.
 - Against the consequences of lawful acts performed by the agent within his authority.

- Against the consequences of acts performed by the agent in good faith.
 - In respect of injury caused to the agent by the principal's negligence.
- d. **To give reasonable compensation:** In the case, where the principal removes his agent without any reason and prior notice, he must provide compensation to the agent for his loss.

4.7 Delegation of Authority

Delegation of authority means to give authority for conducting certain work to another person from the authority holders. The appointment of an agent is a form of delegation of authority. In other words, the agent works under the delegated authority on behalf of his principal. Generally the delegated authority can not be delegated again to the other without consent of the principal. Like wise, the legal provision of Nepal Contract Act has made the provisions under the section 58 that the agent has to obtain consent of the principal before delegating power to sub agent.

Exceptions of the general rule of delegation

There are some exceptions to this general rule. In the following cases the agent can delegate his authority to another or he can appoint a sub-agent and bind the principal.

- a) Where the principal has expressly permitted delegation of such power.
- b) Where the principal has impliedly, by his conduct allowed such delegation of authority. *Where the principal knows that the agent intends to delegate his authority but doesn't object to it.*
- c) Where the ordinary custom of trade sub-agent may be employed. Stock exchange member brokers generally appoint clerks to transact business on behalf of their client.
- d) Where the very nature of agency makes it necessary to appoint a sub-agent. For illustration a manager of a shop may employ sales assistant.
- e) Where unforeseen emergencies arise rendering appointment of the sub-agent is necessary.
- f) Sub-agent and substitute agent: In Nepalese Contract Act has not any provision about the substitute agent. If an original agent appoints an agent in his place is known as substituted agent. After appointing such substitute agent then original agent walks out of the scene. The original agent must act with reasonable care in selecting a substituted agent. If he makes the selection carelessly, he becomes liable to the principal for the negligence of the agent so selected.

Nepalese contract Act 2056 has not defined the form substituted agent but the Indian Contract Act 1872 has defined it under Section 194 as a person appointed by the agent according to the express or implied authority of the principal to act on behalf of principal in the business of agency.

Sub-agent and substituted agent

1.1.13 Sub-agent

A sub-agent is a person employed by and acting under the control of the original agent in the business of the agency. Thus, a person employed by an agent is called a sub-agent. A sub-agent acts under the control of original agent as for the relation in between themselves is that of agent and principal but the original agent acts as principal for the sub-agent. He has no independent power to work. The sub-agent is liable to the agent. Remuneration or commission to a sub-agent is paid by the agent.

1.1.14 Substituted agent:

When an agent has an express or implied authority of his principal to name another person to act for the principal and agent names another person accordingly, such person is not sub-agent but substituted agent of the principal. He has independent power to work. The substituted agent is liable to the principal. The remuneration or commission to a substituted agent is paid by the principal.

4.8 Termination of Agency

An agency is not a permanent entity. It may be terminated in the same manner as any other contract. The termination of agency implies the end of the relationship of the principal and agent. When the power of attorney is withdrawn by the principal the agency is said to be terminated.

This may take place mainly by the act of the parties and the operation of law. The Nepal Agency Act, 2014 has no clear provisions in this regard but Nepal contract Act 2056 has mentioned provisions about the termination of the contract of agency. An agency may be terminated in any of the following ways.

1.1.15 a. Termination of agency by acts of the parties:

i. By mutual agreement: Any agency, like, any other contract, can be terminated at any time by the mutual agreement between the principal and agent.

ii. By Revocation: The principal is empowered to revoke his authority given to the agent before at the stage of operation. The principal terminate the agency against the right of the agent. The revocation of agent must be noticed before revoke his power.

iii. By renunciation: An agency may also be terminated an express renunciation by the agent because no person can be compelled to continue as agent against his will. Unless otherwise mentioned in the contract, the agent can voluntarily discontinue the agency by giving a reasonable notice to his principal. The notice is necessary to give to the principal for renunciation otherwise he is liable to compensate the loss of his principal. The agent who renounces the agency has no right to claim remuneration for his performed work.

iv. By completion of the work: Unless otherwise mentioned in the contract, if the agent has been appointed for the specific work and he performs his duty, the agency comes to end from the time of completion of that work.

1.1.16 b. Termination of agency by operation of law:

The agency is terminated due to application of law in some conditions. It covers the following modes.

- (i) **By expiry of time:** Unless otherwise mentioned in the contract, if the agent is appointed for a fixed time, the expiration of the terms puts an end to the agency, even though the business of the agency may not have been completed.
- (ii) **By death or insanity:** Unless otherwise mentioned in the contract, the agency is terminated with the time of the death or insanity of the principal or the agent.
- (iii) **By insolvency of the principal:** Unless otherwise mentioned in the contract, if the principal is declared insolvent, the agency is automatically terminated. It is not clear in the case of insolvency of the agent under the Indian and Nepalese Contract Act. But it is accepted that the insolvency of agent also puts an end of the agency.
- (iv) **By destruction of the subject matter:** An agency which is created to deal with certain subject matter will be terminated by the destruction of that subject matter. For example, where the agency was created for the sale of a house if the house is destroyed by fire, the contract of agency is ended.
- (v) **By dissolution of a company:** If the principal or agent is an incorporated company, the agency automatically ceased on dissolution of the company.
- (vi) **Principal and agent becomes alien enemy:** If the principal and agent are nationals of two different countries and a war breaks out between those two countries on such condition those parties of agency turn into alien enemy and the contract of agency is terminated.
- (vii) **By change of law:** Due to the change of law, if the works under the contract of agency become impossible to perform subsequently, the agency puts an end.

4.9 Provisions of Nepal Agency Act, 2014 B.S. and Rule 2019 B.S.

Before enactment of the first separate Agency Act, in 2014 BS in Nepal, the Contract of agency was operated by the Agency Istihar (Law) of 1992 BS. The Agency Act, 2014 is still in operation and for clarification of the provisions, the Agency Rules 2019 has made in 2019 BS. In addition to this Act and Rule, the Contract Act, 2056 has also incorporated some provisions to deal with the law of agency.

At present in Nepal, the Contract Act, 2056 is the main legal framework to govern the matter of agency. The Agency Act, 2014 is old one and it has comprised only 11 section which are relating only to the agent, registration and renewal of agency, punishment. It does not able to comprise the modern aspects of agency. The Contract Act, 2056 is a new one and it deals with several provisions of agency, along with other forms of contract under the chapter 8, it deals with definition of agency, principal, agent, and sub-agent, and makes provisions relating to the rights and duties of them, as well as the modes of creation and termination of agency.

4.9.1 Procedure of Registration of an Agency

The Agency Act, 2014 B.S. was introduced with the object to restrict the agent from making unfair advantage in the sale of goods and to regulate, control such activities and makes other relevant provisions to the effect. The Agency Rule, 2019 is made for obtaining the objectives of the Act. According to the both Act and Rule procedure of registration of an Agency is given below:

- **Application:** The person who wants to operate the business of agency he has to apply for the registration of an agency to the Director General of the Department of Commerce, Government of Nepal. He has to mention Name and Address of the principal in the application. Further, he has to commit for providing description of transaction within every three months. He is restricted to make any undue profit other than prescribed commission. He has to pay application registration fee.
- **Registration:** The Director General of the Department of Commerce can be register the agency after receiving the application if there has been all required information in the application to register the agency. The Director can fix terms and conditions in the registration while allowing the agency. In case, where the application is not approved, the applicant can take back the paid amount. The registration must be renewed before the end of every chaitra month under the Nepalese calendar to be valid.
- **Submission of Account:** Every registered agent has to submit account of transaction under taken on every three months at the office of Director General. The account has to include description or goods, worth, profit, sale rate and so on. From this, the department receives information about the transaction.
- **Transfer of Agency:** The registered agency can be transferred from one to another. For this purpose, the person willing to be new agent has to submit the consent letter of the principal and application with Rs.25 at the department of commerce. If the Director found appropriate, agency can transfer to the applicant.

4.9.2 Effect of Non-registration of Agency in Nepal

The agency must be registered to operate the business of agency in Nepal. The transaction without having registration is not only illegal but also creates numbers of difficulties as well as makes liable for the punishment to the agent. According to the Nepal Agency Act, 2014 and Rule 2019 the effects of the non-registration of agency can bear following consequences;

- **Punishment of fine:** Government of Nepal can punish the agent working without registration, with the punishment of fine up to Rs.1000.
- **Prohibition to work as an agent:** Government of Nepal may also punish the agent working contrary to legal provision of the Act with the fine Rs.200. or prohibits to work as agent for two years.
- **Violating the essential terms:** The agent violating the contract which has been made the time of registration with essential terms is subject to punishment of fine up to Rs.500. or restriction to work as agent for up to five years.

As mentioned above, the effects of non-registration of agency makes one punishable for fine and makes him disqualifies to the business of agency for the certain period.

Agency

1.1.17 Short Answer and Questions

1. What is agency? Explain the procedure of registration of agency business in Nepal. [4+6]
2055
2. What is agency? Explain the possible circumstances relating to the termination of agency by operation of law. [4+6]
2056
3. What do you mean by agency by ratification? Explains the conditions for a valid ratification. [4+6]
2057
4. What is agency? Write down the rights of an agent. [5+5]
2058
5. Distinguish between sub-agent and substituted agent. [10]
2059
6. What is termination? Explain the methods of termination of agency business. [4+6]
2060
7. Who is an agent? Point out the different kinds of agent. [4+6]
2060
8. Explain the procedures of registration of agency business in Nepal. [10]
2061
9. Describe the procedures of registration and effect of non-registration of agency in Nepal. [10]
2062
10. Highlight the nature of agency and explain the rights and duties of agent. [3+7]
2063
11. Give the meaning of agency and describe the situation where an agency is terminated. [3+7]
2064
12. Define agent and principal. Explain the duties of an agent towards the principal. [3+7]
2065
13. What is agency? Distinguish between an sub-agent and a substituted agent. [3+7]
2065
14. Highlight on the modes of creating agency. [10]
2066
15. Who is a sub-agent? When may an agent appoint a sub-agent? [3+7]
2067
16. How an agency is created? Show the difference between a sub-agent and a substituted agent. [3+7]
2067
17. When is an agency terminated? Explain. [10]
2068