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# Analysing the Lopsided Delegation of Duties and Responsibilities in the Contracts Act

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## ABSTRACT

*The paper attempts to address the lopsided delegation of responsibilities and accountability ascribed to the Agent, vis-a-vis the Principal, by assessing and critiquing some of the relevant provisions of the Indian Contract Act, such as Section 222 to 225. It is argued that that the dilution of responsibility and myriad of protections provided exclusively to the Principal, exposes the Agent to facing multiplicity of law suits, being tricked out of the employment contracts and remunerations due and endows the Principal with ungirded power to exploit his position. In order to analyze such a discriminatory balance of power in the relationship of Agency, the paper has briefly discussed the jurisprudential understanding of the stated provisions and the doctrine of Agency in the Contracts Act. Followed by this, various provision of the Contracts Act has been assessed with a detailed discussion on the case laws from both Indian and Foreign jurisdictions. Doctrinal discussions such as on the 'Doctrine of good faith', tortious liability, Respondent Superior etc. have been undertaken to present the lacunae in the current provisions within the Contract Act. The paper has also tried to study and compare the 'law on Agency' in America and certain areas of the European Union to the Indian law and argued for the inculcation of certain interpretations, provisions and principles from these foreign jurisdictions within Indian law to increase the protections afforded to the Agent against the Principal. Arguments have been presented in the paper to draw the attention of the judiciary to this issue in order to commence deliberation on such lopsided legislation. Finally, the paper attempts to provide with alternative methods and additional methods, by relying on foreign jurisdictions to create a fair and comprehensive doctrine of Agency in India.*

## I. INTRODUCTION TO AGENCY

The concept of agency as understood today has emerged around 12<sup>th</sup> CE A.D with the advent of slavery. Slaves were considered as chattel who acted according their owners demand, thus making the owners legally liable for their acts. This legal liability led to the creation of the

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concept of representation<sup>2</sup>. With this, the responsibility of a principal for the acts of his agent or servant commenced. After a few years, due to the development of trade and mercantile law, the concept of Agency took shape and contractual liability of the Principal with respect to third parties also arose, laying down the foundation for the Theory of Agency<sup>3</sup>.

In line with the rapid creation of agency contracts in common law, agent-principal relationship was clearly distinguished from servant master relationships. Accordingly, it was established “the agent does not work for the principal physically, nor is he subject to the control of the principal in his physical actions”<sup>4</sup>. Thus, the concept of agency developed and started being implemented in common law countries. Finally, with colonization, in 1872, under section 182 of the Indian Contract Act(*Hereinafter known as ICA*); agency was defined as “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.”<sup>5</sup>

Considering the above, this paper tries to analyse the various sections under the Principal’s duty towards the agent and critiques the lack of responsibility attributed to the Principal as against the agent. It further tries to comprehend the various legal English principles guiding the duties and the lack of deliberation that has taken place by the courts regarding these sections.

### **(A) Fiduciary relationship in agency**

We have discussed a general meaning of agency in the paras given above. Henceforth, for the purpose of this paper, we will be talking about the relationship of agency as being fiduciary.

Accordingly, agency is defined as the fiduciary relationship which exists between two people, one of whom expressly or impliedly agrees that the other should act on his behalf so as to affect his relationship with third parties, and the other agrees so to act<sup>6</sup>. In common law countries, the doctrine of fiduciary relationship arises from the concept of equity. Since, “a person will be a fiduciary in his relationship with another when and in so far as that other is

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<sup>2</sup> Awet Hailezgi and Addisu Dantie, Genesis and Development of the Law of Agency Abyssinia Law | Making Law Accessible! (2012), <https://www.abysinnialaw.com/online-resources/study-on-line/item/383-genesis-and-development-of-the-law-of-agency> (last visited Sep 19, 2020).

<sup>3</sup>*Ibid.*

<sup>4</sup> 8, William Holdsworth, A History of English Law 223 (1<sup>st</sup> ed. 1966)

<sup>5</sup> Section 182 in the Indian Contracts Act, 1872.

<sup>6</sup> William Bowstead et al., Bowstead and Reynolds on Agency and Authority Agency, (Sweet & Maxwell, Thomson Reuters, 8th ed. 2006).

entitles to expect that he will act in the others interest or in joint interest”<sup>7</sup>. Thus, the relationship of agency entails that a fiduciary should act towards the benefit of the other. Here we are talking about non-gratuitous relationships per se. In the ICA, the agent’s duties as a fiduciary has been vividly discussed and explained, these duties have been laid down specifically in various sections. What the common law has not considered comprehensively is the fiduciary duties of the Principal towards the agent covered under section 222 to 225. The importance of discussing duties of the principal arises because the agency doctrine basis the principal’s responsibility in the principal’s right or power to control the agent <sup>8</sup>. Thus, the agent while acting on the behalf of the principal also overtakes the liabilities that the principal might face eventually. Therefore, on the doctrine of equity, it is important to discuss the principal’s right as well.

## II. DUTIES OF THE PRINCIPAL IN THE ICA

### (A) Agents right to be indemnified against lawful acts.

#### 1. Scope of section 222.

In *Kishan Lal And Another vs Bhanwar Lal*<sup>9</sup>, The courts opined that “the right of indemnity extends to all losses and expenses incurred by the agent while conducting the business” which means that the act should be done under the scope of authority. Thus, a principal is bound to indemnify an agent who undertakes liability on his behalf. This is the crux of section 222<sup>10</sup>. Though this section seems to protect the rights of the agent, due to its broad sense of applicability, in practice the limitations imposed on the agent by the other sections, gives the principal a lot of chance to escape liability of indemnification. For e.g.; An agent is not entitled under this section to additional expenses incurred by a supplier on account of abnormal rise in prices, where the rate of charges had already been stipulated in the supply contract<sup>11</sup>.

Finally, an essential condition for being indemnified is also that the act should be lawful in nature. Innocence and good faith are not sufficient. This again is against the rights of equity against the agent as in case the agent has acted unlawfully, though innocently, he cannot claim indemnification.<sup>12</sup> Many such instances can be seen where the principal could escape

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<sup>7</sup>*Ibid*

<sup>8</sup> More formally defined, an instruction specifies “how [an] authorized person is to exercise the power conferred.” Scott J. Shapiro, *Legality* 228 (Cambridge & London: Harvard University Press 2011).

<sup>9</sup>*Kishan Lal and Another v Bhanwar Lal*, 1954 AIR 500

<sup>10</sup> Section 222, Indian Contracts Act, 1872.

<sup>11</sup> *Alopi Prasad and Sons Ltd. v Union of India*, AIR 1960 SC 588 at 595.

<sup>12</sup> *Ram Kumar Agarwala v Lakshmi Narayan Agarwala*, AIR 1947 Cal 157.

liability can be seen, which is unfair.

## 2. Coherence of the American approach

America being a civil law country has expressly stated the remedies that the agent has which deems much more responsibility to the Principal as compared to the Indian law. The Article 62 of agency talks about some such duties. For instance, the agent has specific right to be indemnified against all losses and liabilities incurred by him in the execution of his authority<sup>13</sup> without limitation, the agent can set off the liability that arises when the agent is sued for money due to his principal<sup>14</sup> and any form of remuneration that was due to the agent etc.

The act has even provided restitution rights to the agent in case the agent acts under non-contractual clauses from which the principle benefits. Such rights can even arise in case where though the agency is contractual, circumstances that arise fall out of it. For example; when one party is a minor. The case of *Craven Ellis v. Canons Ltd*<sup>15</sup> states one of such situations. Under Indian law, no restitutory rights exists due to which many contracts such as with minors might not be covered in it.

Additionally, the agent, under American law can be indemnified under principles of equity as well where an independent case of indemnity can exist.<sup>16</sup> If this applied to India, an agent could claim indemnification under section 222 or section 124, increasing his scope of getting compensated.

## 3. Non-Delegable duty of the master

The legal principle acting within the scope of this section can be that of the 'non-delegable duty of the master'. This "is an obligation that cannot be outsourced to a third party according to the terms of the contract. In the event that it is delegated"<sup>17</sup>. Thus, according to this kind of duty, the principal is obligated under fiduciary relationship to protect the agent against losses under the English principle of justice and equity, as this section has tried to do.

### (B) Agent's authority while acting under good faith.

#### 1. Scope of the section

The section that deals with this is section 223<sup>18</sup>. The section gives the agent the authority to

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<sup>13</sup> *Supra note 9*

<sup>14</sup> *Ibid*

<sup>15</sup> *Craven Ellis v Canons Ltd* [1936] 2 K.B 403.

<sup>16</sup> *Lacey v Hill* (1874) L.R. 18 Eq 182, illustration 7.

<sup>17</sup> *Black's Law Dictionary* 126 (9th ed. 2009).

<sup>18</sup> Section 223, Indian Contracts Act, 1872.

be indemnified against consequences of act done in good faith. This duty of the principal is based on the principle of good faith even though injury to a third person has been caused.<sup>19</sup>

In this section, the famous case of *Adamson v. Jarvis* has to be noted<sup>20</sup>.

The facts of the case are that Adamson was an auctioneer who was given cattle by Jarvis to be sold at an auction. Adamson followed the instructions and sold the cattle. But Jarvis was not the real owner of the cattle. The real owner then sued Adamson for conversion and was successful. Adamson had to pay damages and then sued Jarvis to be indemnified for the loss incurred by him. The court held that since Adamson acting on good faith acted on Jarvis's instructions, he would be indemnified by the principal. Though this case is taken to support mesne profits, Adamson as an agent could recover damage due to his own act being unlawful and under the mistake of fact<sup>21</sup>.

The court thus increased the scope of an agent's right by making sure that he does not incur loss for no fault of his. The application of this case was further seen in the case of *Hazarimal v. Khemchand*<sup>22</sup>.

## 2. Principle of good faith

In India good faith has been described as "A thing which is in fact done honestly whether it is done negligently or not"<sup>23</sup>. Good faith is an objective standard that has been set by the law for contracting parties' intentions which is implied in every contract. "The good faith question often arises because a contract is an exchange expressed imperfectly and projected into an uncertain future thus, contract parties rely on the good faith of their exchange partners because detailed planning may be ineffectual or inadvisable. Therefore, express contract terms alone are insufficient to determine a party's good faith in performance"<sup>24</sup>. Although the doctrine is old and defined in simple terms, it is not practically as easily understood as stated. The existence of the principle of good faith puts immense burden on the agent while acting, especially when there is a lack of instructions. Secondly, in case the agent due to lack of knowledge acted in such a manner that invariably caused an economic loss to the Principle then the question of 'did the agent not act in good faith?' comes up. Hence, section 223 which is actually about principle's duty to secure the losses of an agent can be used to the principal's benefit further diminishing his responsibility under agency.

<sup>19</sup> Firm of Madhowji Thawor v. Yar Hussain Hydor Dasti, AIR 1962 Sind 40.

<sup>20</sup> Adamson v Jarvis ,(1827) 4 Bing 6: 29 RR 503

<sup>21</sup> *Ibid*

<sup>22</sup> Hazarimal Kochnaji v Khemchand Maggaji, AIR 1926 Raj 86.

<sup>23</sup> Madhav Rao Jivaji Rao Scindia v. Union of India (1971) 1 SCC 85

<sup>24</sup> Burton, Steven J. "Breach of Contract and the Common Law Duty to Perform in Good Faith." 369-404. (Harvard Law Review 94, ed. 2 1980)

## **(C) Agent and criminal acts.**

### **1. Scope of liability under 224**

This section maintains that; if the nature of the act for which the contract of agency has been entered into is unlawful or criminal, such as an act of fraud, assaulting someone, defaming etc and the agent commits such acts in furtherance of the principal's order, and incurs losses, he cannot be indemnified for such losses. For example, an agent was appointed to import adulterated mustard oil and while doing this suffered a loss. He could not in such a case be indemnified for the loss he suffered<sup>25</sup>. This section can be contrasted with section 223<sup>26</sup> as here criminal can be interpreted to mean bad faith.

In the Indian Contract law very, few cases elaborate on the scope and usage of this section. Even where the cases are discussing the scope of the sections, they have done so in a very limited capacity. For example, only one relevant supreme court case seems to discuss the section 224<sup>27</sup> in *Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty and Sons and Ors*<sup>28</sup> wherein all they said was that "Agreements to commit criminal acts are expressly and specifically excluded, by Section 224<sup>29</sup> of the Contract Act, from the scope of any right to an indemnity".

### **2. Contract and tortious liability- Indemnity v Contribution**

In the jurisprudence of tort law, a distinction between contribution and indemnity needs to be made. This is important because, in case the act in question has been tortious in nature, the agent can ask for contribution, but not for indemnity. "Indemnity springs from contract, express or implied, while contribution is an equity founded on acknowledged principles of natural justice. In contribution a proportionate amount is recovered, while in indemnity the recovery is of the whole amount of the damage"<sup>30</sup>. Contribution arises in case of joint tortfeasors. In the watershed judgement of *Merryweather v. Nixan*<sup>31</sup> the court held that a tortfeasor could recover neither contribution (splitting the burden of loss) nor indemnity (all of loss) from the person at whose request the tort had been committed. Due to changes in the modern equity laws of England such as Law Reform Act (Married Women's and Tortfeasors) Act, 1955 etc stating that, disallowing contribution is against principles of equity and fairness, and many other such reasons as was stated in the important case of *Dharni Dhar And Ors. vs*

<sup>25</sup> J Ramaraj v Iliyaz Khan, AIR 2007 Kant 2031

<sup>26</sup> Section 223, Indian Contracts Act, 1872.

<sup>27</sup> Section 224, Indian Contracts Act, 1872.

<sup>28</sup> Pratapchand Nopaji v Firm of Kotrike Venkatta Shetty 1975 AIR 1223

<sup>29</sup> *Ibid.*

<sup>30</sup> Arthur P.; et al Standard Encyclopaedia of Procedure 1911-1922. (1998)

<sup>31</sup> Merryweather v Nixan (1799) 8 T.R. 186

*Chandra Shekhar And Ors*<sup>32</sup>. which discussed, “Contribution may be claimed on the basis of express or implied agreement or on equitable considerations. In cases of joint tortfeasors there may be no express or implied contract to indemnify one another, but it seems inequitable that one man should be made to suffer the consequences arising from the actions of all of them”<sup>33</sup>, contribution is now allowed. However, the rule of no indemnity or contribution still applies where the wrong is intentional or morally blameworthy.

Although this section had to cover criminal cases, according to the English laws, cases of tort also are covered in this section. The agents right to be indemnified remains unaffected under this clause. Additionally, the court can award contribution for tortious act and the amount of contribution is decided according to what the courts perceive as just and equitable. Section 224<sup>34</sup> although is textually surrounding itself around criminal acts, due to practice has increased the scope of recourse for agents acting as tortfeasors, in turn benefiting them.

### **3. Doctrine of Respondent Superior**

The above section, further, falls under the “The doctrine of ‘respondent superior’ (let the superior answer). It will be applied to make the principal liable where the agent commits a tort while engaging in the business of the principal” as was stated in *Atlantic Die Casting Company v. Whiting Tubular Products*<sup>35</sup>. This doctrine can be further applied to section 223, where the principal has to indemnify the agent, when the agent commits a tortious act while acting under good faith.

#### **(D) Compensation for Injury due to Principal’s neglect**

##### **1. Scope of section 225**

This section is the least deliberated one in Indian judiciary. No relevant case by the supreme court was found under this section and a *Nagpur High Court case*<sup>36</sup> instead has considered the applicability of this section.

Section 225<sup>37</sup> enables the agent a right to compensation against injury caused by the Principal’s neglect or want of skill. This section can be read with reference to section 211<sup>38</sup> which lays down that in case the principal knew about the incompetence of the agent with regard to the skill in question and due to such want of skill or negligence any loss or damage

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<sup>32</sup> Dharni Dhar And Ors. vs Chandra Shekhar And Ors., AIR 1951 All 774

<sup>33</sup> *Ibid*

<sup>34</sup> Section 224, Indian Contracts Act, 1872.

<sup>35</sup> *Atlantic Die Casting Company v. Whiting Tubular Products. Inc.* 337 Mich 414.

<sup>36</sup> *Sunderlal Ji Bhate v Sheikh Lal Shiekh Dalu* [1953]ILR Nag843

<sup>37</sup> Section 225, Indian Contracts Act, 1872.

<sup>38</sup> Section 211, Indian Contracts Act, 1872.

occurs, the agent will not be held liable under for the same. Conjointly, the principal in such a case becomes liable for injury to the agent. Thus, a master owes a non-delegable duty to exercise reasonable care in providing a safe working place for his employees<sup>39</sup>. Although, the agent can not claim losses if there was contributory negligence on his part.

It seems that this is the only section that envisages Principal's fiduciary duty against the agent. Here, the Principal has to ensure that the agent has the necessary skill that is required, the principal does not expose him to unreasonable risk<sup>40</sup>, does not act negligently etc. Here 'negligent' can be "implies a gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual which having regard to all the circumstances out of which the charge arises, it may be the imperative duty of the accused to have adopted<sup>41</sup>".

Hence this section is important so as to ensure that the Principal does not take advantage of his position in relation to the agent and hence does not exploit him.

### **III. THE DUTIES AND RIGHTS DILEMMA- REVISITED**

In this chapter I would like to address a few possible recourses that can be taken to equalize the duties of the principal as compared to those of the agent.

Firstly, as discussed above inference from the American law with regard to restitution rights can be given. Secondly, Indian law can adopt a method adopted by Britain and the rest of the European Union. In 1986, the European Communities enacted a directive on self-employed commercial agents, according to which an agent and principals in a commercial agency relationship are subject both to the Common law and the Commercial Agents Regulations which guided specific contracts entered into by the agent and principal simultaneously<sup>42</sup>. Thus, both the agent and principal could be held liable under the specific contracts along with liability under common law. For this an important distinction between an agent and a commercial agent has to be made. A commercial agent is a sub category of agents who gets business from customers for any interested principals, whereas an agent is one who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it<sup>43</sup>. In India no such specific distinction has been made

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<sup>39</sup> *Otislevator Co v Roger* (Ga. 1924). 125 S . E. 736

<sup>40</sup> *Federal Insurance Co v Nakano Singapore (P) Ltd*,(1992) 1 Current LJ 539 CA Singapore.

<sup>41</sup> *Sushil Ansal v. State*, (2014) 6 SCC 173

<sup>42</sup> Tosato, Andrea "Commercial Agency and the Duty to Act in Good Faith". 661–695 )*Oxford Journal of Legal Studies*. 36 (3) 2010).

<sup>43</sup> *Black's Law Dictionary*, 63 (6th ed.)

This approach could work very well in an agent's benefit as well as a principal's benefit. Under the ICA, most provisions can be avoided if a clause in the specific contract specifies otherwise. This means that the contract law is not exhaustive in nature. Therefore, a principal under a specific contract can ask the agent to waive his rights to which he would otherwise be entitled to while entering into the contract. A principal will usually do this to avoid his responsibility or liability. If in India, like U.K, both the liabilities under the specific contract and ICA becomes applicable, while giving precedence to the specific contract, some standard of minimum duties that the principal and agent have to perform can be maintained, ensuring the best interest of both the parties.

#### **IV. CONCLUSION**

The journey of the concept of agency right from slavery to its modern-day concept has been long. The development of fiduciary relationship, augmented the duties and responsibilities attributed to both the agent and principal. Finally, the ICA laid down these duties in a non-exhaustive manner. On the hand, the duties and responsibilities of an agent were laid down comprehensively, whereas, the duties of the principal on the other hand as laid down under section 222 to 225, failed to do the same. The large number of duties imposed on the agent, gives the principal a great deal of scope of escaping these responsibilities. The alleged broad scope of section 222 and 223 comes with practical limitations being imposed by other section, whereas section 224 can be detrimental and unfair to the agent and finally section 225 remains an unexplored duty of the principal.

The American approach to agency and the approach of European Union can thus be used to shed light on better implementation of the sections discussed. With deliberation on the interpretation of these statutes by the courts, keeping in mind the true essence of equity under common law, duties of the principal can henceforth be used to protect the rights of the agent.

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