

Power of Attorney: An Overview

Introduction

A Power of Attorney (hereinafter "POA"), in simple terms, is a legal document/ instrument giving one person the power to act on behalf of another person to make decisions about the latter's property and finances. A POA is an important legal document for it is in the event of a principal's illness or disability, or when the principal can't be present to sign necessary legal documents for financial transactions..

1. Meaning and Nature of POA

Wharton, an American Jurist has succinctly defined a POA as "a writing given and made by one person authorizing another, who, in such case, is called the attorney of the person (or donee of the power), appointing him to do any lawful act in the stead of that person, as to receive rents, debts, to make appearance and application in court, before an officer of registration and the like."

POAs, in India, are broadly governed by the provisions of Powers of Attorney Act, 1882 and the Indian Contract Act, 1882 (hereinafter the "Contract Act") It must be noted that both the Powers of Attorney Act and the Contract Act now extend to the whole of India including Jammu and Kashmir¹. However, the said Acts aren't exhaustive and various aspects related to POAs are also dealt, inter alia, under the Indian Stamp Act, 1899 (hereinafter the "Stamp Act") and the Indian Registration Act, 1908 (hereinafter the "Registration Act").

Section 1A of the Powers of Attorney Act provides that

"... a power of attorney includes any instrument empowering a specified person to act for and in the name of the person executing it."

Similarly, section 2(21) of the Stamp Act also gives an inclusive definition of the term POA. It reads

"Power-of-attorney includes any instrument... empowering a specified person to act for and in the name of the person executing it"

Highlights

This article attempts to explain:-

- 1) Meaning and Nature of POA,*
- 2) Execution and Registration of POA.*
- 3) Effect of execution of a POA.*
- 4) Detailed diagnosis of legal provisions associated with revocation of POA.*
- 5) When a POA may become irrevocable, and lastly,*

¹ The Jammu and Kashmir Reorganisation Act, 2019, Sch. 5, entry no.72.

After reading both definitions, it is fairly discernible that, a POA establishes a principle-agent relationship between the executant (person who executes the POA) and the attorney (person in whose favour POA is executed). Thus, it is an instrument creating a relationship of agency between the parties to POA. The law relating to agency would, therefore, be attracted when a POA is executed. In the case of **State of Rajasthan v. Basant Nehata**², the Supreme Court held that POAs, inasmuch as the principles of agency are concerned, are governed by Chapter X of the Contract Act.

Before moving forward, it must be noted that a POA is not a document of transfer of title in property in whose respect it is executed. The Supreme Court, in **Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana & Anr**³. (hereinafter "Suraj Lamp case"), observed:

"A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him... Even an irrevocable [power of] attorney does not have the effect of transferring title to the grantee."

2. Execution and Registration of POAs

Section 33 of the Registration Act requires a POA to be executed before and authenticated by a Registrar or a Sub-Registrar (if the principal resides in any part of India where the Act is in force) or by a Magistrate (if the principal resides in any other part of India) or a Notary Public or any court, Judge, Magistrate, Indian Consul or Vice Consul or representative of the Central Government (if the principal does not reside in India).

However, registration of POAs is optional in India. A POA can be registered under section 18(f) of the Registration Act which allows the registration of any document not required by section 17 to be registered. However, in certain cases, registration of a POA may become compulsory under section 17 of the Registration Act. For example, a POA which authorises the attorney to recover rents of immovable property belonging to the executant for the attorney's own benefit is an assignment and requires registration under section 17(1)(b) of the Registration Act; similarly, a power of attorney which creates a charge on the immovable property referred to therein in favour of the attorney of the POA, requires registration⁴. In other cases, a mere general POA, even though it deals with immovable property, need not be registered since it does not come under any of the documents specified in the Registration Act as requiring registration⁵.

² State of Rajasthan vs. Basant Nehata, 2005 (12) SCC 77.

³ Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana & Anr., 2009 (7) SCC 363.

⁴ Law Commission of India, Sixty-Eighth Report on Powers of Attorney Act, 1882 (Mar 1977)

⁵ Id.

3. Effect of POAs

The effect of a POA is dealt in section 2 of the Powers of Attorney Act. The section in its operative part provides that "The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power...". The section further reads "every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof".

This section intends to emphasize that, though, the signature is of the attorney, the document is to be read as if it is signed by the executant of POA. This legal fiction necessarily implies that any document executed by attorney will be binding on the executant of the POA. Simply stated, the section provides that the signature of the agent i.e. attorney will be deemed to be the signature of the principal i.e. executant of POA.

However, the principal or the executant of the POA will not be bound by any such act of the attorney which is done without his authority. In such a situation, the executant will have the option to either ratify such act or to disown it. The principal will be bound only if he chooses to ratify such act and not otherwise.

4. Revocation of POAs

Generally speaking, a POA, like any other contract of agency, is revocable. Section 201 of the Contract Act contemplates the modes via which a contract of agency or a POA may be revoked. It reads "An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors." As ascertainable section 201 provides five situations via which a POA may be revoked i.e., first, when a principal revokes the authority given to the attorney under POA; second, when the attorney renounces the powers granted to him under the POA; third, when the objective for which POA is made gets completed; fourth, when the principal or the agent dies or becomes of unsound mind; fifth, when principal is declared an insolvent under any law for the time being in force in India.

However, it must be noted that, such revocation is not possible after the authority entrusted to the attorney by the POA has been exercised by him. As per section 203 of the Contract Act, the principal can revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. In case where the authority has been partly exercised by the attorney, there

can be revocation of POA as regards such acts and obligations as arise from the acts already done⁶. This means that revocation of a POA doesn't affect the authenticity of the transactions done (in pursuance of the POA) before such revocation.

As per section 207 of the Contract Act, such revocation may be either express or implied. However, the executant of POA is mandated to give a reasonable notice of revocation to the attorney, otherwise he can be made liable to make good any damage which may be caused to the agent by virtue of such revocation⁷. Moreover, if a POA has been executed for a fixed period of time, its premature revocation by the principal will make him liable towards the agent, unless the revocation has been made with any sufficient cause⁸.

5. Irrevocable POAs

The Supreme Court, in Suraj Lamp case, held that

a POA is "revocable or terminable at any time unless it is made irrevocable in a manner known to law."

A POA may have a clause in it stating that such POA is irrevocable. But, the mere usage of the word 'irrevocable' in a POA will not make the POA irrevocable⁹. A POA can be made irrevocable only in accordance with the provisions of law. Section 202 of the Contract Act contemplates a situation whereby a POA may become irrevocable. Section 202 enumerates that "Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest." In other words, when a POA is given for valuable consideration or is given to secure the interest of donee in the subject matter property, then so long as the donee has that interest, the power is irrevocable. This position is supported by the decision of the Supreme Court in the matter of **Seth Loon Karan Sethiya v. Ivan E. John**¹⁰, where it held that the agency cannot be revoked where such agency is created in exchange for some valuable consideration and the authority granted by the agency is to secure the interests of the agent or to effectuate the security against such consideration. Therefore, it could be said that whether a POA can be revoked by executant/ donor or not depends on the fact that whether POA creates an interest in favour of the attorney or not.

However, merely inclusion of expression that a POA is "coupled with interest" doesn't render such POA irrevocable. This has been aptly explained by the Gujarat High Court in the matter of **Manubhai Prabhudas Patel and Ors. v. Jayantilal Vadilal and Ors**¹¹.

⁶ The Indian Contract Act, 1872, sec. 204.

⁷ The Indian Contract Act, 1872, sec. 206.

⁸ The Indian Contract Act, 1872, sec. 205.

⁹ Corporation Bank, Bangalore v. Lalitha H. Holla, AIR 1994 Kant. 133.

¹⁰ Seth Loon Karan Sethiya v. Ivan E. John, AIR 1969 SC 73

¹¹ Manubhai Prabhudas Patel and Ors. v. Jayantilal Vadilal and Ors., Special Civil Application No. 16056 of 2003.

“... the mere saying that the power of attorney is an irrevocable power of attorney coupled with interest is not the end of the matter. The Court, can clearly say that the document, though, is styled as an irrevocable power of attorney is not in substance a power coupled with interest so as to make it an irrevocable power of attorney.”

Similarly, it isn't necessary to expressly mention that a POA is an irrevocable instrument to render it irrevocable, for if the substance of the entire document indicates that it is irrevocable POA coupled with interest, it cannot be adjudicated as not irrevocable for non-inclusion of the word “irrevocable”. This was explained in the same case¹² by the Gujarat High Court as follows:

“... even if there is no title to show that the power is an irrevocable power, but, the substance of the entire document would suggest that the same is an irrevocable power coupled with interest.

Therefore, a document of POA has to be construed as a whole to understand the tenor of the document and the intention of the parties. A stray sentence here and there cannot be picked out to construe it. The real intention of the parties has to be covered not merely from what ex-facie is stated in the document, but, from the totality of the recitals in the document.

In the case of **Shri Ram Murti Singh Sisodia v. Shri Pratap Singh Sisodia & Ors**¹³, the question before the Delhi High Court was whether a POA given for consideration would stand extinguished on the death of the executant of the POA. Answering in negative, the Court explained the object of giving validity to a POA for consideration even after death of the executant. It observed that

“the object... is to ensure that entitlement under such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney.”

Going one step further, the Gujarat High Court in the case of **Bhagwanbhai Karambhai Bharvad v. Arogyanagar Coop. Housing Society and Ors**.¹⁴, held that a POA granted on payment of consideration, in which subject matter property the donee has an interest, cannot be revoked, nor it can be terminated by death, unsoundness of mind, or insolvency of the donor to the prejudice of donee and the said POA shall be binding upon the legal heirs of the deceased donor.

Nevertheless, as per section 202 of the Contract Act, a POA can be revoked even when the authority of an attorney is coupled with interest, if the contract (POA) expressly provides for such revocation. The Orrisa High Court in **Birat Chandra Dagara v. Taurian Exim Pvt. Ltd**¹⁵, held that an agency

¹² Id.

¹³ Shri Ram Murti Singh Sisodia vs Shri Pratap Singh Sisodia & Ors., RFA No. 146/2004

¹⁴ Bhagwanbhai Karambhai Bharvad v. Arogyanagar Coop. Housing Society and Ors., AIR 2003 Guj 294.

¹⁵ Birat Chandra Dagara v. Taurian Exim Pvt. Ltd., AIR 2005 Ori. 147.

coupled with interest, in terms of section 202, can be terminated, in the presence of an express contract.

6. Conclusion

What appears from the above matrix of legal provisions and case laws is that a POA with respect to immovable properties shouldn't be loosely drafted. It should be drafted, in accordance with law, in such a manner so as to reflect the common intention of both the parties executing it. It is advised that appropriate legal consultation must be taken on case to case basis while planning to execute POAs.



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