

Powers-of-Attorney – The Fundamentals

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X, who stays in Delhi, wishes to sell his land situated in Pune. His friend Y stays in Pune and can manage the transaction. X finds it difficult to stay in Pune or to come often for completing the transaction. X can appoint Y to do complete the transaction on his behalf. X can sign a document called a Power of Attorney (POA) appointing Y as his agent to do the needful. It is an effective instrument, and facilitates transactions without need of parties meeting in person.

X, who stays abroad, wishes to manage his bank accounts, borrow moneys, give security for loans, and invest moneys in India. His brother Y stays in Pune and can manage this. Y can do these on behalf of X. If X gives Y a POA, Y can do these tasks effectively.

These two examples are referred throughout this article.

Power-of-Attorney

A POA is a formal document by which a person appoints his Attorney to do or carry out several acts and deeds for and on his behalf and in his name. This is a contract of agency. X, who gives the POA is its Donor, and is the Principal in this contract of agency. Y, the attorney is the Donee, and the Principal's agent.

As an agent, Y represents X in his dealings with third persons. Whatever Y will do *within his authority* binds X. When Y transacts on behalf of X, he creates a contract or deal between X and the other party with whom he deals. X and the third party become liable to one another.

Thus if X has appointed Y as his attorney to sell X's land, and Y makes an agreement of sale with Z, the agreement is binding on X and Z. If X does not sell the land, Z can sue X. Y is not liable.

If Y takes a loan from Z Bank for X's business. X is bound to repay the loan. If X does not repay, Z can sue and recover it from X. Y is not liable to repay.

If Y invests X's funds with Z (a financial institution), the transaction binds X and Z. If Z does not return the money, X can sue Z.

Some basic principles

Few basic principles deserve mention.

1. Even after appointing Y, X does not lose his power to make the deal himself. He can sell his land himself. He can make investment. He can borrow money.
2. X can appoint another attorney in addition to Y to do the same deal, if he so wishes. This is, however, not desirable.
3. Y is not bound to sell the property at all. Nor need he make any investment. There is no compulsion on Y to deal.

4. The third party whom Y approaches (Z in this case) can refuse to deal with Y, and can insist on dealing only with X.
(But some laws require officers and authorities to recognize agents.)
5. Y is bound to follow all directions, if any, of X given in the POA, but beyond these, he is free to use discretion in exercising his powers. He is not under the control of X.
6. Generally in all cases, X can revoke the powers. (One exception is discussed below).

Which powers

A POA can be given to do almost all contracts which X can himself do. He can appoint attorneys to carry on his business, to sell land, to purchase property, to make and sell investments, to borrow, to guarantee repayment, to give security for repayment of loans, to represent in legal proceedings etc. It is for X to decide the powers he wishes to give to Y.

A POA cannot be given for doing acts which X must do himself personally, viz. vote, marry, make a will, and vote at meetings of a cooperative society.

Authority

Authority is the power which Y can exercise on behalf of X. This depends on the powers given in the POA.

In the first example above, Y has the power to sell land. He cannot therefore lease or mortgage the land, or cultivate it. He can however do all acts necessary for completing the sale, viz. find purchasers, negotiate with them, decide the price, allow giving public notices, engage advocate for advice, pay him fees, make an agreement of sale (*Sathekhat*), collect price, get the agreement and sale deed registered, etc. X can restrict any of these, if he so wishes. For example X can impose a condition that price will be received by Y only by cheque or demand draft drawn in X's name. This will be a limitation on his power, and ought to be stated in the POA.

In the second example, Y has a power concerning investments and borrowings. He cannot sell X's vehicle.

Types of authority

In terms of the law of agency contained in sections 182 to 238 of the Indian Contract Act 1872, Y's authority is described as follows:

- Express authority: to sell land, to borrow money, to open bank account, to invest money.
- Implied and incidental authority: to do all things necessary for the purposes, not expressly mentioned in the POA. Y can do every lawful thing which is necessary in order to sell that land, viz. give advertisement in newspapers. Y can do every lawful thing to open invest money, viz. engage a broker or financial consultant.

In case of dispute, it falls upon the court to decide whether the powers exercised fell within the authority of the attorney. Thus a person authorised to carry on business has authority to buy goods on credit. But an attorney appointed to manage business could not compromise any suit relating to the business, though he will have the power to appear in suits concerning the business.

- Authority in an emergency: Y also has authority to do all acts necessary to protect the interest of X as may arise out of any emergency.

Effect of acts within authority

Binding effect

When Y does any act falling within authority, that act binds X. In the second example, if Y invests with an institution which closes down, Y will not be liable to X for the amount lost.

Any act which Y without authority does not bind X. In the first example, if Y mortgages the land for a loan, X will not be liable to repay the loan, nor will the land be subject to the mortgage.

Agent not liable

Moreover, for acts done within authority, Y is not liable at all to Z, unless he has agreed to be personally liable. He is not liable to X either, unless he has committed misconduct. There are other exceptions. Y is protected for any payment made or act done in good faith in exercise of his powers, even if the powers are revoked subsequently. He has this protection under Section 3 of the Powers of Attorney Act.

Ratification

Where Y had done acts without authority, or beyond his authority, X can always ratify these later. If X ratifies them, the acts will bind him.

Apparent authority

What binds the Donor is any act which falls within the apparent or ostensible authority of Y. E.g. X has imposed a restriction that Y shall not sell land below Rs 10 lakhs, but this is not mentioned in the POA. Here Y's actual authority is to sell the land at a price not below Rs 10 lakhs. However, since this is not known to others, Y's apparent authority is to sell at whatever price. Thus if Y sells land for Rs 9 lakhs, the sale is binding on X. This is because the purchaser was not aware of the restriction. The apparent authority, i.e. authority as it appeared to him, was the authority to sell without restriction.

This makes it necessary that the person giving a POA take care while drafting appropriate powers.

Donor and Attorney

The Donor must be 18 and of sound mind. The Donee can be younger, but appointing a minor attorney is not desirable.

A partnership firm, a company or any other legal person can also give POA. In a firm, partners can give a POA to one of them.

Two or more Donors can appoint an attorney in one POA. Similarly, a POA can appoint more than one attorney. It can also be provided whether the powers in the POA must be done by all attorneys, or by any of them. This choice depends on the wishes of the Donor and the requirements of that appointment.

Types of POA

A POA may be general or special. A general POA covers more than one subject matter. A special POA deals with specific subject matter. This difference is important for purposes of stamp duty, and in cases where powers in the POA are not clear and require interpretation.

Thus a POA given by Y to carry on Y's business, or to take care of Y's personal transactions while Y is abroad, will be a general POA. A POA by Y to apply for and obtain a water connection will be a special POA.

Delegation

In the context of X's POA for sale of land, a question might arise whether Y can appoint another agent to complete the sale, i.e. whether Y can delegate the powers. Y can delegate powers if he is specifically authorised to do so. He can of course appoint other persons to carry out his own powers. Thus he can appoint a lawyer to represent X in any proceedings involving any agreement of sale he made.

It is possible that X gives power to Y in the same POA to appoint another agent. If Y appoints S as his agent, S is called the sub-agent. Y cannot give to S any more powers than he himself has.

The relationship between X, Y and S is as follows. X is liable for and bound by acts done by S within authority. S is responsible to Y and not to X. X cannot hold S liable for misconduct. Y is responsible to X for S's conduct.

Revocation by donor

Can X revoke the POA? As a rule every POA can be revoked, even if it mentions that it is irrevocable, except one (see below).

X can revoke his POA by giving notice to Y. The POA also stands revoked if the principal dies or becomes of unsound mind, if the business of the agency comes to an end, or if the principal is declared insolvent.

A POA cannot be revoked as to acts which are already done by the attorney. Thus in our first example, if X revokes the POA after Y has made the agreement of sale (*Sathekhat*) but before the sale deed and collection of balance price, X continues to be bound under the agreement to Z, and must complete the sale. However, Y cannot now do any further acts, like collecting price or completing the sale. In our second example, if Y has borrowed a loan from Z Bank, and X revokes the POA after part of the loan is disbursed, X will be liable for the loan already disbursed.

Revocation binds Z only if Z knows of revocation. In the above case, if Y sells the property and collects the price from Z even after X has revoked the POA, the sale is valid if Z did not know of revocation. In the other case, if Z Bank has disbursed part of the loan before revocation, and some more before coming to know of the revocation, X will be liable for the entire amount disbursed before Z came to know of the revocation.

Hence if a donor wishes to revoke a POA, it becomes important to call back the original POA and to give notice of revocation

1. to the attorney;
2. if necessary also a public notice in newspapers;
3. if the third party is known, to such third party.

Hence while dealing with Y, Z must insist on seeing the original POA.

Irrevocable POA

A POA which cannot be revoked is irrevocable. A POA is not irrevocable merely because it mentions that it is irrevocable.

A POA cannot be revoked if the agent or attorney has himself an interest in the property which forms the subject matter of the agency. (section 202 of the Indian Contract Act). E.g. A POA in favour of a Bank authorising the Bank to sell the property hypothecated as security to the Bank and to adjust the sale proceeds towards the loan would be an irrevocable power so long as the loan is outstanding. But a POA given by an owner of land to a developer or

promoter in terms of an agreement to sell or develop property is not irrevocable even if it mentions that it is irrevocable.

Renunciation by attorney

Y can also renounce (end) the POA by giving notice to the principal.

Termination of POA

A POA is also terminated by when (i) the time for which it is given expires; (ii) the performance becomes impossible or illegal. A POA given by a partnership firm is revoked by dissolution of that firm.

Execution (signing) of a POA

A POA must be executed, i.e. signed, by the Donor. The Attorney need not sign it. A POA given by a firm in favour of any partner or any outsider must be executed by all the partners; but if one or more partners holds a general POA executed by all the partners with a power to delegate, that/those partners can give a POA in favour of a third person.

A company can give a POA in favour of a director or a third person. It must be under the common seal of the company (section 48 of the Companies Act, 1956) and must be signed by the director or directors according to provisions in its Articles of Association of the Company and resolution of its Board of Directors.

A POA need not be executed before a notary or any officer or authority. But such a POA will cause difficulties of authentication. If Z were to deal with Y who has such a POA from X, Z can feel whether X has really given the POA.

But if the POA is signed, in the presence of and authenticated by a Notary Public or any Court, Judge, Magistrate, Indian Consul or Vice Consul or representative of the Central Government, as required by section 85 of the Evidence Act, there is a presumption that it has been duly executed, and authenticated (viz. checked by them). POAs called from abroad are best done before Indian officers appointed for that purposes in Indian Consulates / High Commissions.

A POA for completing registration of documents under the Indian Registration Act ought to be done as follows:

- a. if the donor is in India, the POA must be executed before and authenticated by the Sub-Registrar of the place where the donor resides.
- b. if the donor does not reside in India, it must be executed before and authenticated by a Notary, Judge, Magistrate, Court, Indian Consul or Vice-Consul. Indian Consulates abroad provide these facilities.

Stamp duty

A POA must be stamped according to the Stamp law in force in that State. Stamp law of each State provides for stamp duty payable on a POA; else the Indian Stamp Act will apply. The stamp duty will vary for different kinds of POA. Stamp duty can be different across States.

A POA made and hence stamped in Rajasthan, but to be used in Maharashtra, must have stamp required by Bombay Stamp Act applicable in Maharashtra. If it has adequate stamp, it need not be stamped again. POAs from abroad (which might not have been stamped), or from other States having less stamp, can be got stamped from the Collector within three months from receiving them in the State.

Rights and duties of parties

Where X has appointed Y as his agent, Y can do all lawful acts for the purpose for which POA is given. Y is entitled to get expenses incurred by him for work done by him, but no remuneration unless agreed. Y is entitled to indemnity from X, i.e. X must good to Y all loss suffered by Y in exercise of his powers; but Y may agree that he shall not hold X liable for Y's acts. Y cannot delegate his powers, unless authorised. X can demand accounts, and Y is bound to render accounts to X. Y must not deal in his own account, or make secret profits or take secret commission. X can revoke the POA, and Y can renounce it. Any notice given to Y is considered as notice to X.

Contents of POA

1. Who is appointing – the Donor
2. Who is being appointed – the Attorney
3. Recitals, history, purpose
4. The powers
5. Any restrictions on powers
6. Term (time) of the POA, if any
7. Joint or several exercise, if two or more attorneys
8. Signatures
9. Formalities

Tips for a person dealing with an attorney.

1. Realise that the person has an option to deal with the attorney. Hence:
 - a. he can insist upon dealing directly with the principal in person, since it is not necessary to deal with the attorney at all.
 - b. he can insist upon further satisfactory authorisation from the principal.
 - c. he can insist upon dealing with the principal at the first instance, and then pursue the matter with the attorney.
2. Ensure it is properly stamped under applicable law.
3. Insist on seeing the original deed of POA, to be returned after inspection.
4. Take a copy of the POA countersigned by the attorney.
5. Take a covering letter from the attorney indicating
 - a. the principal is alive and of disposing mind,
 - b. the principal has not revoked the POA, and his powers subsist,
 - c. that he will be personally liable if these statements are not true.
6. Read the *entire* POA and find
 - a. is there any limit on validity, viz. given for a period, or 'while I am abroad';
 - b. are there any restrictions on powers;
 - c. all powers necessary for the transaction are given in the POA.
 - d. provisions about termination or revocation.
7. Ensure the instrument of power-of-attorney has been authenticated by proper authority: viz. Notary, Consul, Judge, Magistrate.

Laws applicable

The Indian Contract Act 1872, particularly Chapter of Agency – sections 182 to 238.

The Powers-of-Attorney Act 1882.

The Indian Registration Act 1908, particularly sections 32 and 33

The Indian Stamp Act, or the stamp law applicable in a State.

The Indian Evidence Act 1872, particularly section 85.

The Notaries Act 1952.