SYNOPSIS

Power of attorney

Power of attorney is an instrument empowering a specified person to act for and in the name of the person executing it.

Attorney: Attorney is an ancient English word signifying a person who is set in the turn, stead, or place of another; a person acting for another. When not coupled with any qualifying expression, the word is usually construed as meaning attorney at law. So, an attorney is one that is appointed by another man to do anything in his absence.

Public and private attorney: An attorney is either public ie an advocate made by the warrant (vakalatnama) from his client, or private ie a person made by the power of attorney for any particular business from his principal.

Instrument: Instrument of power is a formal legal document in writing; a writing of a formal nature that defines rights, duties, entitlements, or liabilities such as a contract, will or promissory note.

Execution: The word 'execution' stands derived from the Latin *ex sequi* meaning – to follow out, follow to the end, or perform, so that, when used in their proper sense, all three convey the meaning of carrying out some act or course of conduct to its

completion.^[1] Execution of a deed is by signing, sealing and delivery of that in the presence of witness.^[2]

Registration: There is no rule of law by which it can be said that a power of attorney for transfer of an immovable property has to be registered.^[3] But irrevocable power of attorney that is eloquent of substantial rights is compulsorily registrable.^[4] The Registrar, however, has no power to refuse registration except for reason which are brought out and recorded in the register in the manner known to law.^[5]

Stamping: Power of attorney is liable to stamp duty.

Execution under power of attorney

Power of donee: The donee of a power of attorney may execute an instrument in his own name and signature by the authority of the donor of the power. And every instrument so executed shall be as effectual as if it had been executed by the donor.

No transfer of title: 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. It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. But even an irrevocable attorney does not have the effect of transferring title to the grantee. An attorney holder may however execute a deed of conveyance in exercise of the power granted

[1] Hameed Joharan v Abdul Salam (2001) 7 SCC 573

[2] Parmeswaran 2016 p 119

[3] Parmeswaran 2016 p 255

[4] Parmeswaran 2016 p 258

[5] Parmeswaran 2016 p 257

under the power of attorney and convey title on behalf of the grantor.^[6]

Principal agent relation: A grant of power of attorney is essentially governed by Chapter X of the Indian Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well-known, a document of convenience.^[7]

Deposition by attorney: The attorney may depose for the principal in respect of such act or fact emanating from documentary evidence or from universally known act or fact of from the act or fact within his personal knowledge, but cannot depose for the principal for the acts done by the principal not reflected in the records or not universal or personally known to the attorney. In other words, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is required to be cross examined.^[8]

Personal appearance of the principal: Powers of Attorney Act 1882 Sec 2 cannot override the specific provision of a statute which requires that a particular act should be done by a party in

[6] Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana (2012) 1 SCC 656 Para 13

[7] State of Rajasthan v Basant Nahata (2005) 12 SCC 77

[8] Parmeswaran 2016 p 199

person. So, When the Code of Criminal Procedure requires the appearance of an accused in a court it is no compliance with it if a power of attorney holder appears for him. It is a different thing that a party can be permitted to appear through counsel.^[9]

Principal can act independently: Even after execution of a power of attorney the principal can act independently and does not have to take the consent of the attorney. The attorney is after all only an agent of the principal.^[10]

Question of excess authority: Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four comers of the instrument either in express terms or by necessary implication.^[11]

General power of attorney: But where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.^[12] There is no magic in the nomenclature of a power of attorney being a general power of attorney. The scope and power has to be gathered from the language of the document.^[13]

Subsequent ratification: The maxim '*omnis ratihabitio retrotrahitur et mandato priori aequiparatur*' (every subsequent ratification has a retrospective effect, and is equivalent to a prior command) is applicable to the subsequent ratification. The defect

[9] T.C. Mathai and Ors. vs. The District and Sessions Judge, Thiruvananthapuram, Kerala (1999) 3 SCC 614 Para 15

[10] Deb Ratan Biswas v Anand Moyi Devi AIR 2011 SC 1653

[11] Bank of Bengal v. Ramanathan Chetty AIR 1915 PC 121

[12] Parmeswaran 2016 p 51

[13] Parmeswaran 2016 p 58

of first power of attorney may be removed by ratification in second power of attorney for ratification relates back to the original act provided there is a disclosed principal.

That an act done, for another, by a person though without any precedent authority whatever, becomes the act of the principal, subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for the detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his previous authority. And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, in fact he was not, a party to the contract.^[14]

Vakalatnama

A vakalatnama is a document in writing appointing a counsel to act in court.

Meaning of vakalatnama: The appointment of a counsel (pleader) to act in court shall be by a document in writing.^[15] Such document in writing is commonly known as vakalatnama. Derived from Urdu where an advocate is referred to as a vakil and advocacy is referred to as vakalat, a vakalatnama is the document empowering a counsel to act for and on behalf of his client. A counsel shall file a vakalatnama before the court in order to represents his client in a case.

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[14] Lord Macnaughton in Keighley, Maxsted and Co. v. Durant [1901] A.C. 241 quoting Tindal, C. J. in Wilson v. Tumman, 1843 6 M. & . G. at p. 242 [Jugraj Singh v Jaswant Singh (1970) 2 SCC 386]

[15] Code of Civil Procedure 1908 Order III Rule 4

Advantage of vakalatnama: The beauty of vakalatnama lies in its two advantages:

a) It is subjected to the court fee^[16] which practically happens to be at lower side than the stamp duty required for a power of attorney.

b) The inherent power or implied authority under the vakalatnama which is not available in case of a person holding power of attorney.

So, a professional accountant who is required to file a duly stamped power of attorney shall not act beyond the defined powers.

Inherent power of a counsel: When counsel is appointed under a document, the enumeration of certain powers in it would not exclude the implied powers necessarily inherent in the appointment, howsoever exhaustive the enumeration of powers necessary for the proper discharge of the work of counsel in court may be.^[17]

The implied authority of the counsel with a document in writing is subject to the overriding considerations that he must act in good faith for the benefit of his client and take prior consent from the client if there is time and opportunity, otherwise the power fails.^[18]

The implied authority of the counsel with a document in writing includes:

- the authority to compromise a case in which he is engaged even without specific consent from his client, however if there

[16] Parmeswaran 2016 p 237

[17] Parmeswaran 2016 p 239

[18] Jamilabai Abdul Kadar v Shankarlal Gulabchand (1975) 2 SCC 609 Para 26

is any instruction to the contrary or withdrawal of authority, the implicit power to compromise in the pleader will fall to the ground.

- the authority to refer the matter to arbitration, however he cannot extend to revoke the appointment of arbitrator made by the party.^[19]

A counsel without vakalatnama may 'plead' but not 'act': A counsel (pleader) may appear for another counsel to plead on behalf of the party who has given document in writing to the latter counsel but he has no power to act on behalf of the party without document in writing in his favour; and such pleader cannot refer the matter to arbitration.^[20]

Non-appearance by the counsel: It cannot be gainsaid that an advocate has no right to remain absent from the Court when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in Court without `sufficient cause' cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and discourteous to the Court and can never be countenanced. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, normally, a party should not suffer on account of default or non-appearance of the advocate.^[21]

A counsel with vakalatnama is not an agent: Every pleading shall be signed by the party and his pleader, if any.^[22] The pleading need to be signed by the party or his duly authorised

[19] Parmeswaran 2016 p 288

[20] Parmeswaran 2016 p 241

[21] The Secretary, Department of Horticulture, Chandigarh v Raghu Raj (2008) 13 SCC 395 Para 27-28

[22] Code of Civil Procedure 1908 Order VI Rule 14

representative (through a power of attorney) in his absence. And if the party is a juristic person (such as a company) then either its officer or an individual authorised expressly through a power of attorney may sign the pleading.^[23] The counsel holding the vakalatnama may sign the pleading as a pleader only; he cannot be an authorised representative without the power of attorney.

[23] United Bank of India v Naresh Kumar (1996) 6 SCC 660