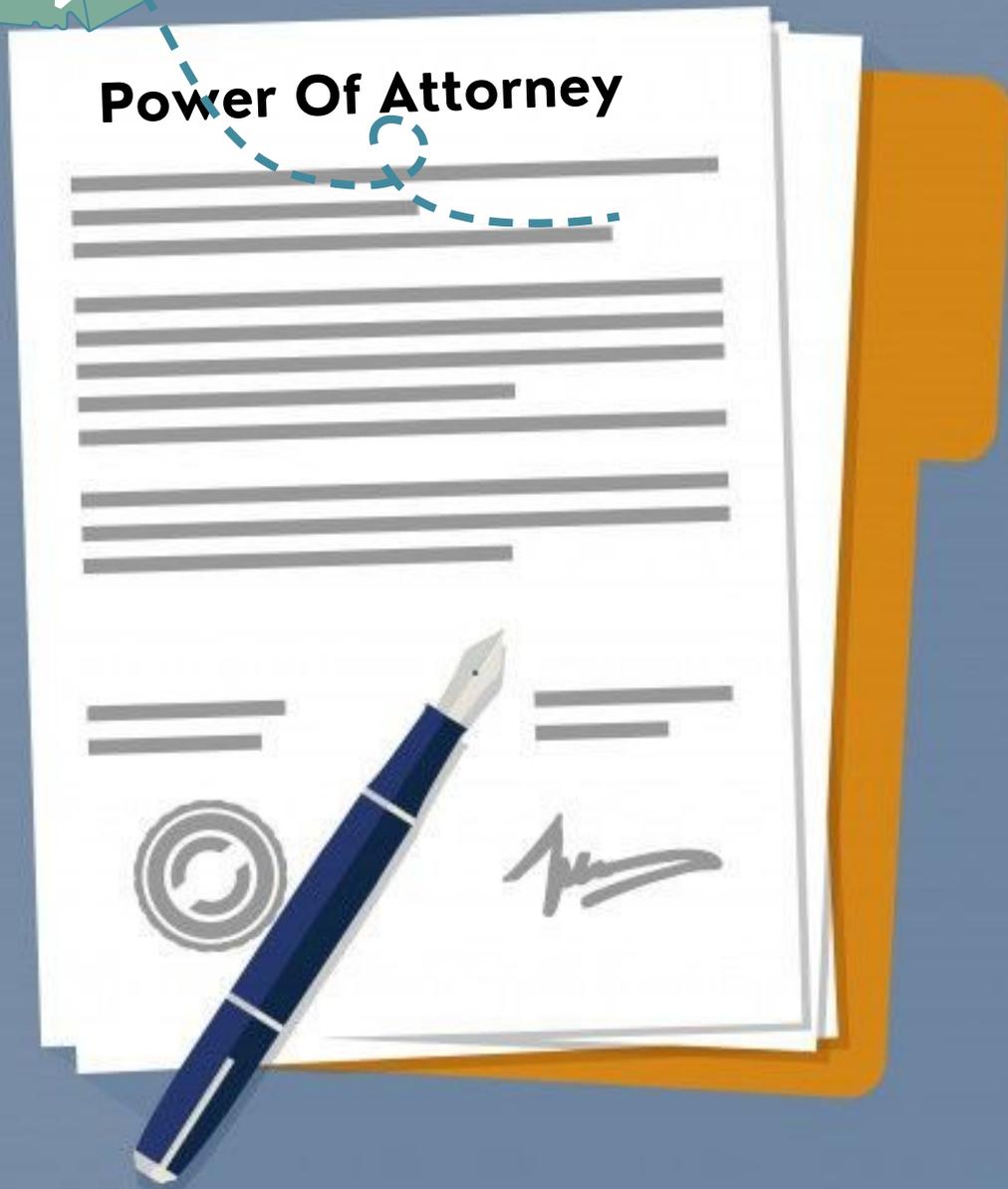


POA ACROSS BORDERS: SAFEGUARD YOUR ASSETS AND ORDERS!



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Introduction[1]:

Navigating the legal maze between sipping tea in the UK and managing things back in India might sound like a headache, but fear not! There's a superhero document called the Power of Attorney ("POA") that can swoop in to simplify life when it comes to managing your affairs in India while residing outside India. A well-executed POA can make the process easier, whether you need someone to manage financial transactions, legal obligations back home, or other legal tasks.

What is Power of Attorney?

A POA is a written document granting powers to the Attorney to perform certain act, deeds and things on behalf of the Principal. The law relating to POA falls within the law of agency and is regulated by the Power of Attorney Act, 1882[2] ('the Act', for short), and provisions of The Indian Contract Act 1872.

The person granting the POA to another is referred to as Principal or donor and the person accepting the POA is referred to as Attorney or donee.

POA gives the Attorney an authority to handle certain things on behalf of the Principal, including legal matters, taxes, commercial activities, property and financial matters. When the person is unable to manage these issues personally due to any reason, this delegation of authority becomes essential. A POA can be a lifeline for managing property, financial transactions, tax issues, and other things in India in the context of NRIs situated outside India.

[1] The article reflects the general work of the authors and the views expressed are personal. No reader should act on any statement contained herein without seeking detailed professional advice.

[2] <https://www.indiacode.nic.in/bitstream/123456789/2360/1/a1882-07.pdf>

Types of Power of attorney:

General Power of Attorney ×

Attorney can manage a variety of tasks with a General Power of Attorney as allowed under the POA, including managing investments, filings, executing of certain agreements, concluding contracts, and more. It's like having a trustworthy companion in India who can manage your general affairs without your personal presence. For example.: X has given powers to Y for managing of all his transaction with respect to his business, bank accounts, investments, immovable properties etc.

Special Power of Attorney ×

This POA is a specific power of attorney and is comparable to assigning a specific task to your Attorney. With a Special Power of Attorney, you can give permission for a specific task or series of tasks for example managing a specific litigation in the district court or negotiating a specific transaction.

Revocable and Irrevocable:

In India, the irrevocability of POA is governed by The Indian Contract Act, 1872, and other relevant laws.

Revocation of Power of Attorney:

Generally, the Principal can terminate the POA at their discretion. The POA can be terminated on occurrence of below events as per section 201 of the Indian Contract Act 1872^[3]

Principal revokes the POA or;

By the Agent renouncing the business of the agency or;

By the business of agency being completed or;

Either the Principal or the Attorney passes away, becomes incapable or unsound mind, or is found to be insolvent or;

By the Principal being adjudicated an insolvent under the provisions of any Act for time being in force for the relief of insolvent debtors.

^[3]Section 201 of The Indian Contract Act, 1872

In addition to the aforesaid, a POA may also be revoked by the other ways:

By mutual agreement;

Completion of term of agency by expiry of time agreed upon;

Destruction of subject-matter of agency;

The agency becoming subsequently unlawful;

Dissolution of principal firm.

Irrevocable Power of Attorney :

To be irrevocable, a POA is required to be in the nature of power coupled with interest. Let us understand this expression better by looking at the judgement of full bench of the Supreme Court passed in Seth Loon Karan Sethiya vs Ivan E. John and Ors. [4]

In this case, a person who owed money to a bank, granted the bank permission to act on his behalf and get a court order to recover the debt. The Court looked at the terms of the POA which specifically recorded that:

AND WHEREAS I am very heavily indebted to the Bank of Jaipur Limited, Agra branch and my liability is partly secured by the pledge of my goods and partly by the equitable mortgage of my and my mother's immovable properties with the said bank ;

AND WHEREAS a major part of my said liability is unsecured ;

AND WHEREAS I have agreed to appoint the Bank of Jaipur Ltd. to be my true and lawful attorney to execute the said decree in Suit No. 76 of 1949 (with which we are concerned in this appeal) which may ultimately be passed in my said appeal and to do the following acts, deeds, matters and things for me, on my behalf and in my name and to credit to my account the sum or sums which may be realised in execution of or under the said decrees ;

[4] AIR 1969 SC 73, 1968 38 CompCas 760 SC, 1969 1 SCR 122

Considering this language and the conduct of the parties, the full bench of the Apex Court recorded that there was no doubt that this was a power coupled with interest and was an irrevocable POA. This type of authority is known as a "power coupled with interest". The Apex Court while referring to Section 202 of the Indian Contract Act, 1872, held that it is settled law that where the agency is created for valuable consideration and authority is given to effectuate a security or to secure interest of the agent, the authority cannot be revoked. Parties should take adequate care to draft an irrevocable POA with clear and cogent recitals that establish the exact context and background of the transaction instead of simply using the word irrevocable.

What liabilities can be imposed on the Attorney?

An Attorney is protected if he acts in good faith under section 3 of the Act. In simple terms, it safeguards those who act as agents for another person by using a POA to do certain actions on their behalf. It states that even if such person didn't know certain crucial details at the time, as long as that person acted in good faith.

For example, B have a power through POA to manage A's finances. B pay the bills, in good faith. B does not incur any liability for making those payments, if B subsequently learns that A died or lost the ability to make decisions and B weren't aware of it at the time.

Procedure for execution of POA by NRI situated in UK to manage their assets in India, following steps should be followed to create valid POA-



Documents required/ to be attached[5]:

POA needs to be signed by the applicant before the Consular Officer.

The POA needs to be witnessed by two UK based individuals with their names, addresses and valid passport particulars (passport no., date of issue and place of issue) clearly mentioned in the POA.

The witnesses need to sign the POA before the Consular Officer and they should not be amongst the beneficiaries.

The two witnesses need to produce their original passport and self-attested copies of their passport pages containing personal particulars. Only the copies need to be submitted along with the POA.

The applicant/executant is also required to affix one passport size photograph on the last page of the PoA near the place of his/her signature and then make a photocopy of the document for retention by the Consulate.

If the witnesses cannot come in person, notarised copies of their passports containing their signatures need to be submitted.

[5]<https://cgibirmingham.gov.in/page/display/98#:~:text=The%20PoA%20needs%20to%20be,not%20be%20amongst%20the%20beneficiaries.>

Along with above requirements, the following are also essential :

Citizenship Factors: There is an additional stage for NRIs with citizenships other than Indians. Your POA might first need to be apostilled by the pertinent authorities. The Indian Embassy may continue with the attestation after this stage. If executor already has an Overseas Citizen of India (OCI)/ Person of Indian Origin(PIO) card, executor may skip this step and just include a copy of it with your application.

Sending the POA to India with Attestation: Executor are prepared to transmit your POA to India after the Indian Consulate or Embassy has attested to it. This action denotes that your document has gained legal validity.

Procedure to be completed after receiving POA in India: The notarized attested POA must have requisite amount of stamp paper attached to it. The latest photograph should also be attached to the final page.

POA in respect of immovable property:

With the use of a POA, you can authorise another person to handle business transactions, including real estate deals. It's important to understand that a POA does not straight away transfer property ownership, but rather empowers Attorney (Attorney-in-fact) to handle paperwork and formalities. The transfer of ownership requires a deed of conveyance, sale deed or gift deed, which are independent legal documents, even if the Attorney can help with the transaction.

This issue was considered in detail by the Supreme Court in Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Ors[6] where it was held that

We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of `GPA sales' or `SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property.

Thus, only through a registered sale deed, not only a POA, can property be transferred legally. The court elaborated on the misuse of POA transactions, such as General Power of Sales and Sale Agreement/General Power of Attorney/WILL transfers, which were frequently used to avoid paying taxes and create "black money," was the subject of this judgement.

[6]Special Leave Petition (C) No. 13917 of 2009

It also recognized a limited exception under Section 53A of the Transfer of Property Act, providing protection to the party in possession. This case has emphasized the importance of property transaction and registration for transparency and curbing fraud while acknowledging valid uses of POAs for property management. In essence, it sought to ensure legal compliance and transparency by preventing the abuse of POAs in real estate agreements.

The Court conclusively stated that the parties could not effectuate a valid sale by executing a POA, nor by entering into Sale Agreement which is followed by Power of Attorney (GPA) or Will - a transaction termed as Sale Agreement/GPA/Will transfer.

Conclusion:

A POA continues to be a very useful legal tool for individuals, including NRIs to manage many financial tasks and collecting rents, negotiating deals or finalizing property matters in India. Individuals must ensure that only trusted agents are granted the authority to handle financial investments, tax preparation, real estate transactions, and general asset management with a well-drafted POA.

A carefully drafted POA streamlines and enables important financial and property-related processes while denying ownership rights, so that NRIs can exercise control and oversight from across geographical boundaries.

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