

**LAW COMMISSION OF INDIA**  
**SIXTY-EIGHTH REPORT**

**ON**

**THE POWERS OF ATTORNEY ACT, 1882**

**MARCH, 1977**

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March 15, 1977

I have great pleasure in forwarding herewith the sixty-eighth Report of the Commission on the Powers of Attorney Act, 1882. This, no doubt, is a very minor Act and the Report of the Commission is more in the nature of a Note than the usual type of Report. However, the Commission thought that since the Act was very old, it needed a fresh look and so it examined the said Act and has made some suitable recommendations.

One of the main points which we have made in the Report relates to the definition of the "Power of Attorney" which the Act did not contain and we thought that an Act of this kind was incomplete without the definition of "Power of Attorney". The Report makes certain other recommendations which it is not necessary to set out in this letter.

The Report will show that the study of the Act has also involved a close examination of several other Central Acts.

Before concluding, I would like to add that after the Commission was constituted in September 1971, it has forwarded twenty-four reports (number forty-five to sixty-eight) including the present one; and after the present Commission was reconstituted in September 1974, it has forwarded eight reports including the present one.

In the end, let me repeat the suggestion which I have already made on two or three previous occasions that, after the report of the Commission is printed, copies of the report should be circulated to the relevant academic and professional institutions so that it may stimulate a debate on the questions considered by the Commission and that, in turn, may assist Government in coming to its own conclusions on the relevant recommendations made by the Commission.

I may, incidentally, add that the Commission has already completed its study of the Indian Evidence Act and has finalised its report including several recommendations for the amendment of the relevant provisions of the Act. This, no doubt, was an arduous task, but the Commission has done its best to examine the Act in depth and has made recommendations which the Commission thinks it is necessary to make in the Act. The final

report deals exhaustively with all the questions which the Commission discussed before reaching its final conclusions. It has become an extensive document and spreads over more than two thousand pages. It is now being typed and as soon as its typing work is over, it will be forwarded to Government in due course.

In dealing with the problem of suggesting recommendations in the relevant provisions of the Act, the Commission has been fully conscious that the Act is a very commendable piece of legislation and has served a very useful purpose of affording invaluable assistance in the conduct of proceedings before the Courts. Nevertheless, with the passage of time, it has been disclosed that there has been a difference of judicial opinions on some relevant and important points and this aspect of the matter the Commission has borne in mind in making its recommendations.

After the Act was passed, in 1872, some new juristic principles have been evolved and received recognition from the jurists and these have been carefully examined by the Commission in making some of its recommendations.

At present, the Commission has undertaken another important Act for its study and that is the Transfer of Property Act. This Act was last amended in 1929 and the Commission feels that since it is an important piece of legislation, a fresh look at the Act is now required. Like the study of the Evidence Act, the study of this Act also is being made by the Commission in full depth, and though the task is heavy and arduous, the Commission trusts that it will complete its work in regard to this Act and will be able to make its report during its tenure which expires on the 31st August, 1977.

Yours

Sd./-

(P. B. Gajendragadkar)

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# REPORT ON THE POWERS OF ATTORNEY ACT, 1882

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## CHAPTER 1

### INTRODUCTORY

#### *Why the subject has been taken up*

1.1 Revision of the Powers-of-Attorney Act, 1882, has been taken up by the Law Commission as a part of its function of revising Central Acts of general application and importance. The law relating to powers of attorney touches on contracts and property. The Commission has already forwarded a number of Reports dealing with certain subjects forming part of the Law of Contract<sup>1</sup>, and also a few Reports dealing with branches of the Law of Property<sup>2</sup> or touching thereon. It, therefore, appeared to be appropriate to take up this Act also.

Another consideration which has weighed with the Commission in taking up the subject is the fact that the existing Act is expressed in language which is manifestly out of tune with modern legislative phraseology.

#### *Need for revision*

1.2 Though the Act does not require reform in many matters of substance, the structure of its sections is, at many places, rather antiquated<sup>3</sup>. A few of its provisions have become obsolete by the passage of time<sup>4</sup>. In the circumstances, it is desirable that the whole Act should be replaced, instead of mere amendments being carried out in the various sections.

#### *Reasons for enacting the existing Act*

1.3 So much as regards the need for revision. We begin our consideration of the Act with the Statement of Objects and Reasons to the Powers-of-Attorney Bill No. 22 of 1881<sup>5</sup>. The reasons why the legislation in question was initiated were thus stated:

1. For example, the 7th Report (Partnership Act), the 8th Report (Sale of Goods Act), the 11th Report (Negotiable Instruments Act) and the 13th Report (Contract Act).
2. See the 6th and 30th Reports (Registration Act), the 17th Report (Trusts Act), and the 66th Report on the Married Women's Property Act, 1882.
3. For example, in sections 2 and 3, there are a number of paragraphs, which do not appear as sub-sections.
4. For example, section 2, 2nd paragraph; section 3, last paragraph, and section 4(g) dealing with the application of the Act to old powers of attorney.
5. Gazette of India, 22nd October, 1881, Part V, pages 1473-1474.

“As the law stands, the donee of a power-of-Attorney, when executing an instrument pursuant to the power, must sign, and where sealing is required must seal, in his principal’s name. The first object of this Bill is to render it legal for such donees to execute in and with their own names and seals. The law respecting the execution of instruments under powers-of-attorney will thus be made accordant with what will be the rule in England from and after the 31st December, 1881, and with what is believed to be the practice in the North-Western Provinces, British Burma and, probably, elsewhere in India. The section effecting this is copied from section 46 of the recent Statute 44 & 45 Vic., c. 41, which takes effect from the close of the present year.

“The second object of the Bill is to preclude doubts as to the liability of a donee of a power-of-attorney who makes payment in good faith after the donor of the power has died or become lunatic or bankrupt or insolvent, or has revoked the power, when the fact of death, lunacy, bankruptcy, insolvency or revocation was not known to the donee at the time of making the payment. The section effecting this is copied from section 47 of the Statute above-mentioned, and merely extends to all attorneys the rule as to trustees, executors and administrators making payments under powers, which has been in British India for the last fifteen years—see Act XXVIII of 1865, section 39.

“The third and last object of the Bill is to provide for the deposit of instruments creating powers-of-attorney, and for the evidence of the contents of such instruments. The section effecting this is copied (with the modifications necessary to adapt it to India) from 44 & 45 Vic., c. 41, section 48.

—WHITLEY STOKES”

*Aspect of power—its significance*

1.4 The essential characteristic of an agent is that he is invested with a *legal power* to alter his principal’s legal relations with third persons : the principal is under a correlative liability to have his legal relations altered. This theory (as to the essential characteristic of an agent) was advanced first by Hohfeld<sup>1</sup>.

The English judges have occasionally described an agent as holding such a “power”<sup>2-4</sup>.

1. Hohfeld, *Fundamental Legal Conceptions*, page 52.

2. *Read v. Anderson*, (1884) 13 Q.B.D. 779, 782; (Bowen, L.J.).

3. *Lamb v. Goring Brick Co.*, (1932) 1 K.B. 710, 713; (Wright, J.).

4. *Salford Corporation v. Lever*, (1891) 1 Q.B. 168; (Lord Esher).

This is also the expression used by Mellish L.J.<sup>1</sup>, by Romilly M.R.<sup>2</sup> and by Lord Watson<sup>3</sup> in reported cases.

*Restatements and academic writings*

1.5 This theory was later developed by Seavey in an article in the Yale Law Journal<sup>4</sup>. The American Restatement<sup>5</sup> of the Law of Agency states that an essential characteristic of the relationship of agency is that "an agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself". Falconbridge<sup>6</sup> discusses the whole law of agency in terms of the agent's power.

Salmond<sup>7</sup> employs this expression in his draft of the Law of Contracts: "An agent is a person who is authorised by law to exercise on behalf of another person, called his principal, *any* power possessed by that other person . . . . . of doing any act in Law."

J. L. Montrose<sup>8</sup> accepted it in an article published a few years ago.

*English Act of 1971*

1.6 In England, the Powers of Attorney Act, 1971 makes certain new provisions in relation to powers of attorney and the delegation by trustees of their trusts, powers and discretions.

Section 1 of the Act contains rules for the execution of powers of attorney. In brief, it requires attestation by two witnesses.

Section 2 abolishes the need to file or deposit instruments creating powers of attorney in the Supreme Court.

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1. *Parker v. McKenna*, (1874) L.R. 10 Ch. 96, 125.
  2. *Pariante v. Lubbock*, (1855) 20 Beav. 588, 597-598.
  3. *Stumore v. Breen*, (1866) 12 App. Cas. 698, 704.
  4. Seavey in 29 Yale L.J., pages 859—95.
  5. American Law Institute, Restatement of the Law of Agency.
  6. Falconbridge in 17 Can Bar Rev. 248, referred to by F.E. Dowrick in "Relationship of Principal and Agent" (1954) 17 Modern Law Review.
  7. Salmond & Winfield, Contracts, pages 338-40, cited by Dowrick, "Relationship of the Laws of Principal and Agent" (1954) 17 Modern Law Review.
  8. J. L. Montrose, "The Basis of the Power of Agent in cases of Actual and Apparent Authority", 16 can. Bar Rev. 757.

Section 3 concerns the proof of instruments creating powers of attorney. In brief, it provides for proof by photographic copies, certified to be true and complete copy. Section 4 deals with powers of attorney given as security. Such a power cannot be revoked so long as the security remains undischarged.

Section 5 deals with protection of a donee and third persons where a power of attorney is revoked and the donee is ignorant of revocation. Section 6 gives additional protection for transferees under stock exchange transactions (in case of revocation). Section 7 makes provisions for the execution of instruments, etc. by the donee of a power of attorney.

Section 8 repeals section 129 of the Law of Property Act, 1925 relating to married women. Section 9 gives power to delegate trusts, etc. by a power of attorney. Section 10 deals with the effect of a general power of attorney in the specified form given in the First Schedule to the Act. Section 11 contains the short title, repeals, consequential amendments, commencement and extent.



## CHAPTER 2

### EXTENT AND DEFINITION

#### *Section 1—Extent*

2.1 Addressing ourselves to the Act, we shall first deal with certain preliminary provisions. The Act at present applies to the whole of India except the State of Jammu and Kashmir. The subject-matter of the legislation falls within the Concurrent List, and the relevant entries do not apply to the State of Jammu and Kashmir. Hence it is unnecessary to consider the question of extension of the Act to the State of Jammu and Kashmir.

#### *Need for definition of "power-of-attorney"*

2.2 Curiously enough, the Act does not contain any definition of "power-of-attorney". Since the operative portion of the Act, namely, section 2, uses the expression "power-of-attorney", it is desirable that such a definition be inserted. An example of such a definition will be found in section 2(21) of the Indian Stamp Act, 1899, which reads as follows :<sup>2</sup>

"Power of Attorney" includes any instrument (not chargeable with fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it.

Wharton<sup>3</sup> defines a power of attorney as "a writing given and made by one person authorising 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. It may be either general or special, i.e., to do all acts or to do some particular act."

Stroud<sup>4</sup> defines it as an authority whereby one is "set in turn, stead or place" of another to act for him.

1. Concurrent List, Entry 7, "Contracts including.....agency", and Entry 6, "Transfer of Property.....Registration of Deeds and Documents".
2. Section 2(21), Indian Stamp Act, 1899.
3. Wharton, Law Lexicon (1953), page 784.
4. Stroud, Judicial Dictionary (1953), page 2257.

### *Rules of agency not dealt with*

2.3 Several matters concerning agency are dealt with, not in the Powers of Attorney Act, but in the Indian Contract Act, 1872 (sections relating to agency). Important amongst these are—

- (a) who may execute a power;
- (b) who may become an attorney;
- (c) when is a power terminated; and
- (d) whether a power coupled with interest is revocable.

The reason, obviously, is that these matters would be governed by the general principles of the law of agency<sup>1</sup>. A power of attorney is an *authority in writing* to another person to act for and in the name of the person who executed the power<sup>2</sup>. Therefore, speaking generally, the law relating to authority, that is, agency, would be attracted when a power of of attorney is executed. Halsbury<sup>3</sup> explains the matters thus—

“An agent who to execute a deed, as for example, a conveyance or deed of partnership must be appointed by deed. Such an authority is called a power of attorney.”

The definition given in the Stamp Act is less elaborate, but may be regarded as adequate as a statutory definition<sup>4</sup>. The real emphasis in the concept of power of attorney is on the authority to use the name of the principal. That is sufficiently brought out in the definition in the Stamp Act.

### *Recommendation to adopt a definition*

2.4 We recommend that a suitable definition on that line may be inserted<sup>5</sup>. For the purpose of the present Act, however, it is unnecessary to exclude documents requiring court fees. Such documents were excluded in the definition in the Stamp Act, merely to avoid double stamp under the Court Fees Act and under the Stamp Act<sup>6</sup>.

1. Cf. Halsbury, 3rd Edn., Vol. 1, page 153, para 365, relating to Powers of Attorney, which deals with the subject under “Agency—Formation of Agency—Appointment by deed.”

2. Cf. Chapter 2, *supra*.

3. Halsbury, 3rd Edn., Vol. 1, page 153, para 365.

4. *Supra*, Para 2.2.

5. See Appendix I for tentative draft.

6. See *Ramdeo v. Lahu Nath* I.L.R. (1937) Nag. 494, 496; A.I.R. 1937 Nag. 65, 66 (Stone, C.J.).

## CHAPTER 3

### THE EFFECT AND CONSTRUCTION OF POWERS OF ATTORNEY

#### *Section 2—Principle*

3.1 The effect of a power of attorney is dealt with in section 2. The section in its operative part provides that the donee of a power-of-attorney may execute or do any assurance, instrument or thing in his own name and signature, and an instrument or thing so executed or 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".

The wording of the section is somewhat unfamiliar and slightly un-intelligible, but what it intends to emphasise is, that though the signature is of the donee, the document is to be read as if signed by the donor. This legal fiction necessarily implies that the document will be binding *on the donor*. Simply stated, the section provides that the signature of the agent will be deemed to be the signature of the principal. The language of the section has not caused such difficulty in practice, and need not be disturbed on this point.

The section follows section 46 of the Conveyancing Act, 1881<sup>1</sup>, which was in these terms :

"46. *Execution under power of attorney :*

(1) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, 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; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, 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.

(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act."

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1. Conveyancing Act, 1881 (44 & 45 Vic. c. 41) (repealed and replaced).

This section of the Conveyancing Act was, so far as England is concerned, replaced by section 123 of the Law of Property Act, 1925<sup>1</sup> which was in the same terms.

### *Object*

3.2 As was stated in the Statement of Objects and Reasons<sup>2</sup> to the Powers-of-attorney Bill, 1881, as the law relating to powers of attorney stood before the Bill, the donee of a power of attorney, when executing an instrument pursuant to the power "must sign and, where sealing is required, must seal in his principal's name."<sup>3</sup> The first object of the Powers of Attorney bill, was to render it legal for such donees to execute in and with their own names and seals. The Statement of Objects and Reasons added: "The law respecting the execution of instruments under powers of attorney will thus be made accordant with what will be the rule in England from and after the 31st December, 1881, and with what is believed to be the practice in the North Western Provinces, British Burma and probably elsewhere in India."

### *Section 2, last paragraph*

3.3. The last paragraph of existing section 2 relating to application of the existing Act to power executed before its commencement, need not be repeated in the new Act.

### *Expression "Assurance" to be omitted*

3.4. The word "assurance" should be omitted from this section, as it would be covered by the word "instrument". It is not the practice now to mention "assurance" separately. The definition of "instrument" in the Indian Registration Act, 1908 may be seen, as an example of later legislative practice.

With the above changes, section 2 may be incorporated in the new Act.<sup>4</sup>

### *Section 3.*

3.5. We now come to section 3, which indemnifies the holder of a power of attorney for acts done by him in good faith before notice of death of grantor. It is based<sup>5</sup> on section 7 of the

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1. Law of Property Act, 1925 (15 & 16 Geo. 5 Ch. 20).

2. Gazette of India, October 22, 1881, Part V, page 1473.

3. See Chapter 2, *supra*.

4. See Appendix 1.

5. See now section 5, Powers of Attorney Act, 1971.

Conveyancing Act, 1881, and is, in fact, a copy of it. That section of the English Act was replaced, so far as England is concerned, by section 124 of the Law of Property Act, 1925, which was in these terms :

“124. *Payment by attorney under power without notice of death, etc.*

(1) Any person making any payment or doing any act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died “or become subject to disability or bankrupt, or had revoked the power, if the fact of death, disability, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2) A statutory declaration by an attorney to the effect that he has not received any notice or information of the revocation of such power of attorney by death or otherwise shall, if made immediately before or within three months after any such payment or act as aforesaid, be taken to be conclusive proof of such non-revocation at the time when such payment or act was made or done.

Where the donee of the power of attorney is a corporate aggregate, the officer appointed to act for the corporation in the execution of the power may make the statutory declaration in like manner as if that officer had been the donee of the power.

Where probate or letters of administration have been granted to any person as attorney for some other person, this section applies as if the payment made or acts done under the grant had been made or done under a power of attorney.

“(3) This section does not affect any right against the payee of any person interested in any money so paid; and if that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(4) This section applies to payments and acts made and done before or after the commencement of this Act, and in this section ‘power of attorney’ includes a power of attorney implied by a statute’.

(This was replaced in part by section 5 of the 1971 Act).”

The English Act is more elaborate than the section in our Act—see particularly the portion relating to “statutory declarations”. However, it is not necessary to make in our Act such elaborate provisions.

*Verbal changes*

3.6. A few verbal changes are needed in section 3—

- (i) Mention of ‘lunatic’ and ‘bankrupt’ should be omitted. The expression ‘unsound mind’ and ‘insolvent’ are more appropriate, and should be substituted.
- (ii) The last paragraph of section 3, providing that the section applies only to payments etc., made after the commencement of the existing Act, need not be repeated in the new Act.

*Nagpur case*

3.7. An interesting argument advanced in a case before the Nagpur High Court may be noted at this stage. An appellant had died before the filing of the appeal. In ignorance of the death, a memorandum of appeal was filed on her behalf by her counsel under instructions from her accredited agent. Before her death, she had instructed her accredited agent to engage pleaders to file an appeal. The engagement of the counsel by the agent took place after her death in ignorance of her death, and the purchase of stamps and filing of the memorandum of appeal also took place thereafter. When the fact of death was discovered, her counsel sought to make an application for substitution of the name of the legal representative. The court held that since the appellant had died before the filing of the appeal, an application to substitute could not be entertained. An attempt was made by counsel on the appellant’s side to bring the case within the provisions of the Contract Act, and section 3 of the Powers of Attorney Act was relied upon, the contention being that the various acts that took place in ignorance of the death of the donor of the power were valid by virtue of the section.

The High Court, however, pointed out that section 3 did no more than indemnify the holder of the power for action done by him in good faith, if the termination of the power by the death of the person granting it was unknown to him at the time. It might operate to indemnify the agent, but in this case the court was not concerned with any such question.

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1. *Mst. Radhabai v. Mongia*, A.I.R. 1939 Nag. 274.

*Construction of powers of attorney*

3.8. Sections 2 and 3, dealt with so far, are the important provisions. The general principles regarding the construction of a power of attorney are well settled. The power must be strictly construed as giving only such authority as it confers expressly or by necessary implication. In particular,— (1) The operative part of the instrument is controlled by the recitals; (2) where an authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the performance of the particular acts; (3) the general words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose; (4) a power-of-attorney is construed so as to include all powers necessary for its effective execution<sup>1</sup>.

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 four corners of the instrument, either in express terms or by necessary implication<sup>2</sup>.

The general words used in the subsequent clauses of a power-of-attorney must be read with the special powers given in the earlier clauses, and cannot be construed so as to enlarge the restricted powers therein mentioned<sup>3-4</sup>.

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1. *Avantha Pillai v. Rattnasabhabhale*, (1968) 2 Mad. L.J. 574.

2. *Bank of Bengal v. Ramanathan Chetty*, 43 I.A. 48, 55.

3. *O.A.P.R.M.A.R. Adakappa Chettiar v. Thomas Cook & Son*, A.I.R. 1933 P.C. 78.

4. *Sneh Lata v. Prafula*, I.L.R. (1966) Cut. 90, 93 (Misra, J.).

## CHAPTER 4

### DEPOSIT OF POWERS OF ATTORNEY

#### *Section 4—Deposit of powers-of-attorney*

4.1. Section 4 provides for the deposit of powers of attorney in High Courts, and for the issue by the High Courts of certified copies of the powers-of-attorney so deposited. Corresponding provisions existed in England in section 219 of the Supreme Court of Judicature Consolidation Act, 1925, read with R.S.C. Order 61A, but these provisions have now been repealed. Proof in England is governed by the Evidence and Powers of Attorney Act, 1940.

This procedure appears to be out of tune with modern notions about the functions of the judiciary. Powers-of-attorney can be registered under section 18(f) of the Indian Registration Act, 1908, which *allows* the registration of any document *not required* by section 17 to be registered. Section 57(5) of that Act enables what are known as "registration copies" of such documents to be given in evidence for proof of contents of the original. In the circumstances, section 4 of the Powers of Attorney Act, 1882 does not serve any particular purpose. It may also be noted, that there are now facilities for the authentication of power-of-attorney by notaries<sup>1</sup>. Section 4 should, therefore, be deleted, and we recommend accordingly.

4.2 It may be noted that section 4 is based on section 48 of the Conveyancing Act, 1881. The English section was replaced by section 219, Supreme Court of Judicature (Consolidation) Act, 1925,<sup>2</sup> which was in these terms :

"219. *Deposit of original instruments creating powers of attorney :*

(1) An instrument creating a power of attorney, the execution of which has been verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the central office.

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1. See discussion in Chapter 6, *infra*.

2. Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo V, Ch. 49.



(2) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

“(3) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked and when so stamped and marked shall become an office copy.

[Sub-section (4) repealed by 3 & 4 Geo. VI Ch. 28, s. 4].

(5) Rules of court may be made for the purpose of this section regulating the practice of the central office and prescribing, with the concurrence of the Treasury, the fees to be taken therein.”

Recently, by the Powers of Attorney Act, 1971, this procedure has been totally abrogated in England (section 2).

## CHAPTER 5 MARRIED WOMEN

### Section 5.

5.1. Section 5, relating to married women's power to execute a power of attorney, was not contained in the original Bill of 1881. It was added later in pursuance of the following observations which Mr. Stokes made while introducing the Bill :

"It might also be worthwhile to declare (in accordance with section 40 of that statute)<sup>1</sup>, that married women, *whether minors or not* should have power to appoint attorneys on their behalf for the purpose of executing a deed or doing any other act which they might themselves execute or do. The matter would be considered by the Select Committee.....  
....."<sup>2</sup>.

5.2. As has been pointed out<sup>3</sup>, section 5 of the Act is quite general in its terms and there is nothing which limits the generality. The section, in so far as it expressly permits married women to create a power, overrides section 183, Indian Contract Act, under which only a person who is of the age of majority etc. can employ an agent.

5.3. It may be noted that, but for such a provision, a minor cannot execute a power of attorney<sup>4</sup>.

#### *Modification needed.*

5.4. As regards Hindus and Muslims, the provision is, in relation to proprietary transactions, an exception to the rule that a minor cannot execute instruments affecting property. As regards others governed by the Married Women's Property Act, 1874 (3 of 1874), the provision extends the principle underlying that Act even to minors.

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1. Conveyancing Act, 1881 (44 & 45 Vic., c. 41), s. 40. Later section 129 L.P. Act 1925 repealed 1971.
  2. See Gazette of India, December 17, 1881, Supplementary, page 1413.
  3. *Chinnammami v. Venkayya*, A.I.R. 1933 Mad. 407, 409 (Pandalai, J.) (Upholding the validity of a power executed by a Hindu minor married women in favour of her husband and authorising him to apply under section 73, Registration Act).
  4. Bowstead on Agency, Tenth Edition, page 14, Article 6, footnote (o).

We recommend that this part of the section *i.e.* the words, "whether a minor or not", should be deleted, as it assumes that a minor can marry. It is under the Child Marriage Restraint Act, 1929, as amended, the minimum age for the marriage of girls is 18 years. The marriage of minor girl is prohibited after this amendment. Retention of the present provision in the Powers of Attorney Act would create a wrong impression about the legal position as to the minimum age of marriage.

5.5. In England, the corresponding provision—section 129, Law of Property Act, 1925—was replaced in 1971 as "unnecessary". However, in India, at least until comprehensive legislation as to married women is enacted, the section may serve a useful purpose, and may be retained with the above modification.

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1. The Powers of Attorney Act, 1971, section 8.

## CHAPTER 6

### MISCELLANEOUS

#### *Attestation and presumptions regarding attested powers.*

6.1. We now come to the topic of authentication of powers-of-attorney. Under section 3 of the Notaries Act<sup>1</sup>, the Central Government in the whole or any part of India, and any State Government in the whole or any part of the State, has power to appoint, as Notary a legal practitioner or other person who possesses the prescribed qualifications. Under section 8(1)(a) of that Act, one of the functions of a notary is to verify, authenticate, certify or attest the execution of any "document". Under section 7, a notary is bound to have and use a seal.

Under section 85 of the Indian Evidence Act, 1872, the court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or any court, Judge, Magistrate, Indian Consul or Vice Consul or representative of the Central Government, was so executed and authenticated. Under section 57(6) and (7) of that Act, the seals of Notary Public are taken judicial notice of. The provisions of the Registration Act will be noted later<sup>2</sup>.

#### *Registration Act.*

6.2. It may not be out of place to mention here in brief the provisions relating to powers-of-attorney, contained in some other Acts. There are provisions in the Indian Registration Act, 1908, regarding powers of attorney for presenting documents at Registration offices. Under section 32(c) of that Act, a power-of-attorney can be granted to an agent to present a document for registration; but, under section 33(1), only certain powers of attorney are recognised. Briefly speaking, section 33 requires the power of attorney *to be executed before and authenticated by* a Registrar or 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).

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1. Notaries Act, 1952 (53 of 1952).

2. Sections 32-33, Indian Registration Act, 1908, *infra*.

Under section 33(4), a power of attorney mentioned in the section can be proved by the production of it without further proof, when it purports on the face of it to have been executed before the person or court already referred to. These provisions are of a special nature, and would not be affected by the changes recommended in the Powers of Attorney Act.

*Stamp Act.*

6.3. Then there are provisions in the Indian Stamp Act, 1899, First Schedule, Entry 48, for the stamping of a power of attorney as defined in section 2(21) of that Act. That also will not be affected by the proposed revision of the Powers of Attorney Act.

The provisions in the Notaries Act, 1962, and the Indian Evidence Act, 1872, have been referred to separately<sup>1</sup>.

*Compulsory registration.*

6.4. In certain cases, registration of a power of attorney may become compulsory under section 17 of the Indian Registration Act, 1908. Thus, a power which authorises the donee to recover rents of immovable property belonging to the donor for the donee'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 donee of the power, requires registration<sup>2</sup>. In other cases, a mere general power of attorney, even though it deals with immovable property, need not be registered<sup>3</sup> since it does not come under any of the documents specified in the Registration Act as requiring registration.

*Irrevocable Powers—provisions in English Act of 1925.*

6.5. At this stage, we may refer to certain provisions in English statutes which may be of interest. Sections 126 and 127 of the Law of Property Act, 1925<sup>4</sup> made certain provisions regarding the effect of a power of attorney given for value and expressed to be irrevocable or a power of attorney, whether for value or not, made irrevocable for fixed period<sup>5</sup>. The two sections, and the definition of "purchaser" given in section 205(i) (xx<sup>i</sup>), are reproduced below :

1. See para 6.1, *supra*.
2. (a) *Ganpat v. Adarji*, (1879) I.L.R. 3 Bom. 312, 325;  
(b) *Indra Bibi v. Jain Sirdar*, (1908) I.L.R. 35 Cal. 845, 848.
3. Compare the discussion in *Kochuvareed v. Mariappa*, A.I.R. 1954 T.C. 10, 17.
4. Sections 126, 127, Law of Property Act, 1925 (15 & 16 Geo. V, Ch. 20). See now the 1971 Act.
5. See now section 4 of 1971 Act.

“126. *Effect of irrevocable power of attorney for value :*

(1) If a power of attorney given for valuable consideration is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—

- (i) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, disability or bankruptcy of the donor of the power; and
- (ii) any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, disability or bankruptcy of the donor of the power, had not been done or happened; and
- (iii) neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power without the concurrence of the donee of the power, or of the death, disability or bankruptcy of the donor of the power.

“(2) This section applies to powers of attorney created by instruments executed after the thirty-first day of December, eighteen hundred and eighty-two.”

“127. *Effect of power of attorney irrevocable for a fixed time :*

(1) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then in favour of a purchaser,—

- (i) the power shall not be revoked for and during that fixed time either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, disability or bankruptcy of the donor of the power; and
- (ii) any act done within that fixed time by the donee of the power in pursuance of the power shall be as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, disability or bankruptcy of the donor of the power, had not been done or happened; and

“(iii) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time without the concurrence of the donee of the power, or of the death, disability or bankruptcy of the donor of the power, within that fixed time.

(3) This section applies to powers of attorney created by instruments executed after the thirty-first day of December, eighteen hundred and eighty-two.”

“205. (i) (xxi) ‘Purchaser’ means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in Part I of this Act and elsewhere where so expressly provided ‘purchaser’ only means a person who acquires an interest in or charge on property for money or money’s worth; and in reference to a legal estate includes a chargee by way of legal mortgage and where the context so requires ‘purchaser’ and ‘valuable consideration’ includes marriage but does not include a nominal consideration in money.”

*No need.*

6.6. We have devoted thought to the question whether similar provisions are needed in India. Our conclusion is that it is not necessary to insert these elaborate provisions in the Indian Act. No strong need has been felt for such provisions. In our view, in the conditions of the country, it is not necessary to adopt them.

*Devolution of power given for value—English provision.*

6.7. In section 188. Law of Property Act, 1925<sup>1</sup>, there is a provision for the *devolution* of power of attorney given to a purchaser of property. It is as follows :

“128. *Devolution of power of attorney given to a purchaser :*

(1) A power of attorney given for valuable consideration may be given, and shall be deemed to have been always capable of being given, to a purchaser of property or any interest therein, and to the persons deriving title under him thereto, and those persons shall be the duly constituted attorneys for all the purposes of the power, but without prejudice to any right to appoint substitutes given by the power.

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1. The Law of Property Act, 15 & 16 Geo. V, Ch. 20.

“(2) This section applies to powers of attorney created by instruments executed after the thirty-first day of December, eighteen hundred and eighty-two.

(3) This section does not authorise the person deriving title under the donee of the power to execute, on behalf of the registered proprietor, an instrument relating to registered land to which effect is to be given on the register, unless the power is protected by a caution or other entry on the register.”

There does not appear to be any necessity to make this provision.

#### *Repeal.*

6.8. While repealing the present Act, provision will have to be made for powers of attorney deposited under the present Act with the High Court under section 4. These should be returned to the depositor or his successor in interest, or, where such return is not practicable, be dealt with in accordance with rules to be made by the High Court.

#### *Appendices.*

6.9. In order to give a concrete shape to our recommendations, we have, in Appendix I, given them in the form of a draft Bill.

Appendix 2 contains a comparative table, showing the provision in the existing Act and the corresponding provision, if any, in Appendix I.



APPENDIX 1

Recommendation as shown in the form of a draft Bill.

(Note : This is a tentative draft only)

Contents of Appendix 1

Clause	Subject matter
1.	Short title and extent.
2.	Definition.
3.	Execution under powers-of-attorney.
4.	Payment by attorney under power without notice of death etc.
5.	Powers of attorney of married women.
6.	Repeal.

THE POWERS-OF-ATTORNEY BILL, 197.....

A Bill to amend the law relating to powers-of-attorney.

Be it enacted by Parliament in the...year of Republic of India as follows :

*Short title and extent.* [Existing section 1]

1. (1) This Act may be called the Powers-of-Attorney Act, 197.....

(2) It extends to the whole of India except the state of Jammu and Kashmir.

(3) It shall come into force on .....

*Definition.* [New]

2. In this Act, unless the context otherwise requires. "power-of-attorney" includes any instrument empowering a specified person to act for and in the name of the person executing it.

*Execution under powers-of-attorney.* [Existing section 2]

3. 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; and 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.

*Payment by attorney under power, without notice of death, etc. good. [Existing section 3]*

4. (1) Any person making or doing any payment or act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become . . . of unsound mind, or *been adjudged* an insolvent or had revoked the power, if the fact of death . . . . unsoundness of mind . . . insolvency or revocation was not, at the time of the payment or act, known to the person making or doing the same.

(2) *Nothing* in this section shall affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer, if the payment had not been made by him.

[Existing section 4 is omitted]<sup>1</sup>.

*Powers of attorney of married women. [Existing section 5 modified]*

5. A married woman of full age, shall, by virtue of this Act, have power, as if she were unmarried, . . . . ., by a non-testamentary instrument to appoint an attorney on her behalf, for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this Act relating to instruments creating powers-of-attorney shall apply thereto.

7 of 1882.

6. (1) *The Powers-of-attorney Act, 1882, is hereby repealed.*

(2) *Instruments deposited with a High Court under section 4 of that Act shall, on an application made for the purpose to the High Court in which they are deposited, in accordance with such rules as may be made by the High Court, be returned to the person who deposited them, or their successors-in-interest, or where such return is not practicable, be otherwise dealt with in accordance with such rules.*

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1. See the body of the Report, para 4.1.

## APPENDIX 2

*Comparative Table showing the provision in the existing Act and the corresponding provisions, if any, in Appendix 1*

<i>Existing Section</i>	<i>Clause in Appendix 1</i>
1	1
2	3
3	4
4	omitted
<b>5</b>	5

We would like to place on record our warm appreciation of the valuable assistance we have received from Shri Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P. B. Gajendragadkar	.....Chairman
P. K. Tripathi	.....Member
S. S. Dhavan	.....Member
S. P. Sen-Varma	.....Member
B. C. Mitra	.....Member
P. M. Bakshi	.....Member-Secretary

Dated, New Delhi  
the 15th March, 1977.