

FINAL SUMMARY PAPER

WORKSHOP PAPER ON TOPIC – (A):-

Subject : ROLE OF POWER OF ATTORNEY IN LEGAL PROCEEDINGS.

Introduction:

(1) Legal Maxim '*Qui facit per alium, facit per se*' is the substratum of law relating to agency and power of attorney, which means "He who acts through another does the act himself." The same principle is expounded in section 2 of The Power of Attorney Act, 1982, Due to busy schedule, or inability as a result of sickness, old age, or staying abroad, it becomes more necessary for a person/principal to depend on others for getting his things done. Owing to this reason, the power of attorney is now playing vital role. A power-of-attorney is a written contract establishing a relationship between a principal and a special kind of agent, allowing that agent to act on the principal's behalf. The power-of-attorney may also be either general or special. The law relating to Power-of-Attorney falls within the law of agency and is regulated by the Powers of Attorney Act, 1982 ('the Act', for short), and provisions of Contract Act 1882.

Defining a Power of Attorney:

(2) In **Blacks dictionary** it is described as the 'instrument by which a person is authorized to act as an agent of the granting it'. In **Strouds judicial dictionary** "power of attorney is defined extensively as an

authority whereby one is set in the stead or place of another to act for him". **Wharton** has defined power of attorney 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 rent, debt 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".

(3) As per recommendation made by the Law Commission of India in its 68th report submitted in 1977, the legislature in 1982 made amendment and inserted Section 1(A) of the Power of Attorney Act 1882 which is inclusive definition as "in this Act 'power of attorney' includes any instrument empowering a specified person to act for and in the name of person executing it'. Power of Attorney is also defined under S. 2(21) the Indian Stamp Act, 1899, that "any instrument empowering any specified person to act for and in the name of the person executing it." Thus, 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 of attorney. The essential character of agent is that he is invested with legal power to alter his principal's legal relation with third person. A power of attorney holder is nothing but an agent as defined in S. 182 of the Indian Contract Act, 1872. The authority of an agent is his power to affect his principals position by doing acts on his behalf. Actual authority is

the legal relationship between the principal and agent created by a consensual agreement to which they alone are parties.

(4) Section 2 of the Power of Attorney Act empowers to donee of a power-of-attorney to do anything “in and with his own name and signature” by the authority of the donor of the power. Once such authority is granted, the Act recognises that everything done by the donee shall be as effectual in law as if it had been done by the donee of the power in the name and with the signature of the donor. It must be in writing. The first object of the Power of Attorney Act was to render it legal for such donor to execute in and with their own names and seals. The Act does not however confer on a person a right to act through agents. It presupposes that the agent has the authority to act on behalf of the principal and protects acts done by him in exercise of that authority but in his own name.

Who can grant power of attorney:

(5) As per section of 183 of the Indian Contract Act, 1872, any person who is a major, and is of sound mind can appoint an agent. Prior to amendment of 1982 in Power of Attorney Act, 1982, as per section 5, even married minor woman was entitled to appoint Power-of-attorney on her behalf, but concept of 'full age' of the marriage having been introduced, now minor can not appoint any power-of-attorney. The provision under O.32 of C.P.C. would take about representation of a Minor in civil proceedings. A corporation can give power of attorney. A power of attorney issued by a

partnership firm must be signed by all the partners, otherwise it is held invalid. Power of attorney issued by a company must bear its common seal, otherwise it may not be valid.

(6) However, there are certain acts which are required to be done by the party in personal capacity, and in such cases the party can not employ power of attorney to perform such act. In Ravulu Subba Rao and ors. v. Commissioner of Income-tax, reported in AIR 1956 SC 604, the Hon'ble Apex Court has held that "Section 2 of the Power of Attorney Act cannot override the specific provision of a statute which requires that a particular act should be done by a party in person". In this case, a general power-of-attorney holder had applied under rules 2 and 6 of the rules framed under section 59 of the Income Tax Act, for renewal of the registration certificate of a Registered Partnership firm. The application was signed by him for himself and again as the attorney of his partner Subba Rao. The rules provided that an application for registration of a firm under section '26-A and for renewal of registration certificate "shall be signed personally by all the partners". It was held that where the Law specifically provides that a particular act should be done by a person himself, one cannot delegate the power or authorize anyone to do it on his behalf and any such act done by an agent on his behalf would not be accepted.

Who can be appointed as Power of attorney:

(7) As per section 182 of the Indian Contract Act, 1872 an

agent is a person employed to do any act for another or to represent another in dealings with a third person. As per section 184 of the Contract Act, any person may act as agent, but a minor or a person of unsound mind cannot become an agent, so as to be responsible to his principal. Every act performed by an agent within the authority of the power of attorney is legally binding upon the principal granting it.

Types of Power-of-attorney

(8) Ordinarily, there are two types of power of attorney; viz., general power of attorney and special power of attorney. Under general power of attorney, the principal empowers his agent with the right to carry out all legal acts on his behalf without restricting it to a particular transaction or act. Whereas, under special power of attorney, the principal empowers his agent to carry out a specific transaction for him. Such power of attorney expires on the completion of that specific transaction. As per the maxim, '*delegatus non potest delegare*', a power of attorney holder cannot sub-delegate his powers, unless he has been specifically empowered to so. The Power-of-attorney may be classified as revocable and irrevocable power-of-attorney.

REVOCAION OF POWER OF ATTORNEY:

(9) Power of Attorney can be revoked or cease to exist, if:

1) Revoked by the principal himself (S.201 of the Indian Contract

Act, 1872),

- 2) The principal dies or becomes insane (S.209 of the Indian Contract Act),
- 3) The business for which the agent was appointed is over,
- 4) Mutually agreed upon by the principal and agent,
- 5) The right under the power of attorney is renounced by the agent.

When power of attorney cannot be revoked:

(10) The principal always has right to revoke the power-of-attorney, unless as per section 202 of Contract Act, it is irrevocable i.e. when the agent himself has interest in the property which is subject matter of the power of attorney and there are no express terms allowing the principal to terminate it. In the case of **Seth Loon Karan Sethia (AIR 1969 SC 73)**, the Hon'ble Supreme Court has held that where agency is for valuable consideration, the authority cannot be revoked. Such power of attorney operates even after the death of the executant.

Ratification of defective Power of Attorney/ replacement by second one:-

(11) In **M/s M.M.T.C. Ltd., Vs. M/S Medchl Chemicals & Pharma (P) Ltd., 2002 Cri.L.J. 266**, it has observed that, no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can represent the company. It has been held that it is open to the dejure

complainant company to seek permission of the court for sending any other person to represent the company in the court. It is also held that, even presuming, that initially there was no authority, still the Company can, at any stage, rectify that defect. In **Jugraj Singh Vs. Jaswant Singh [AIR 1971 SC 761]** the Hon'ble Supreme Court held that when the first power of attorney was not complied with the requirements of the law and was ineffective and was not authenticated as required by section 33 of the Indian Registration Act, 1908, a second power of attorney with proper authentication by a Notary of the foreign country is valid. It was further observed that the second power of attorney being a document ratifying a former inconclusive act related back, to the time when the first document was made and cured the illegality in the presentation for registration which had taken place.

Registration of power of attorney:

(12) Registration of power of attorney is not compulsory. However, a power of attorney given for transfer of an immovable property of value more than Rs.100 must be compulsorily registered. If a power of attorney has been executed in a foreign country, the signature of the notary or judge before whom it is executed is required to be legalised by an accredited representative of the Indian embassy in that country. Proper stamp duty must be paid on such Power of Attorney within 3 months from the date of receipt of the power of attorney in India. While elaborating the scope of power of

attorney the Hon'ble Apex Court in Suraj Lamp and Industries Pvt. Ltd. V/s. State of Haryana and another (Spl. Leave Petition © No. 13917 of 2009 dated 11/10/2011) held that a power of attorney relating to immovable property must be compulsorily registered; and also held that decision in this authority would have prospective application. It is further held that the above observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. The State of Maharashtra, recently passed Registration (Maharashtra Amendment) Act, 2010 which came into force from 1st April 2013, whereby Irrevocable Power of Attorney, relating to transfer of immovable property made after 1 April 2013, is required to be compulsorily registered.

Role of Power of attorney in Legal Proceedings:

(13) For deciding the right of a power of attorney holder to appear or act in any Court, it is necessary to glance through the relevant provisions of law. Rules 1 and 2 of Order XIII of CPC provide that any appearance, application or act in or to any Court may be made or done by the party in person, or by his recognized agent including his power of attorney holder or by a pleader on his behalf. Section 303 of Cr.P.C. gives an accused person a right to be defended by a pleader of his choice. As per section 2(q) of Cr.P.C., pleader is a person authorised by or under any law for the time being in force, to

practise in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding. In view of the provisions of section sections 29 and 33 of the Advocates Act, 1961, advocates enrolled under the said Act are entitled to practise the profession of law before any Court or authority. However, section 32 of the Act empowers the Court to permit any person, not enrolled as an advocate to appear before it in any particular case. Section 119 of CPC prohibits unauthorized persons from addressing the Court except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do. As per section 45 of the Advocates Act, 1961, practice by unauthorised person in Courts and before other authorities is an offence punishable with imprisonment for a term which may extend to six months.

(14) An advocate, whose name has been entered on rolls of State Bar Council has exclusive right to practise the profession of law before any Court, and any other person, including a power of attorney, though can appear before the Court for and on behalf of his principal, yet he has no right of audience before a Court of law, unless specifically permitted by the Court. The Hon'ble Bombay High Court Ashwin Shambhuprasad Patel v/s. National Reyon Corporation Ltd. AIR 1955 BOM 262 had taken the view that the power of attorney has no right of audience in Court. However, after passing of Advocates Act, 1961 while another matter came of before Apex Court in Harishankar Rastogi v/s. Giridhari Sharma, AIR 1978 Supreme Court 1019, wherein after considering the provisions u/sec.29, 30,

32 of the Advocates Act and u/sec.302, 303,304 & sec. 2 (q) of Cr. P. C. the Hon'ble Apex Court has held that, in appropriate case the Court can grant the permission to even non Advocate person to represent the party who so wishes, but such other person can not practice the profession of habitually representing parties in court.

(15) The Hon'ble Bombay High Court in subsequent decision in Mohan Punjabi v/s. Vachha in (1984) 86 BOM LR-2 has taken into consideration ratio laid down in Harishankar Rastogi's case, and held that in appropriate case permission can be granted to the power of attorney holder of the party to plead for the party. In this context reference can be conveniently made to the decision in the case of Varsha A. Maheshwari Vs. Bhushan Steel Ltd., New Delhi and another. 2011(3) Mh.L.J. 666), wherein the Hon'ble Bombay High Court has held that a person holding a power of attorney on behalf of a party is not entitled to a right of audience before a Court of law, and such person cannot be heard as a representative of the party unless specifically permitted by the Court.

(16) In a Judgment reported in Bhima Yashwant V/s. Regional Director, E.S.I. Corporation, 1978 Mh. L. J. 589, the Hon'ble Court decided tenability of claim regarding appearance of audience by non advocate on the basis of power of attorney. A person "P" who was not "advocate" claiming to appear as holder of power of attorney. Party himself was not applying for permission for "P" to appear, but actually was engaging an advocate. Under such facts and

circumstances, permission was refused to “P” to appear in a case. In the case of T.C. Mathai Vs. District and Sessions Judge, Thiruvananthapuram, Kerala (AIR 1999 SC 1385), the Hon'ble Supreme Court has observed that an agent, who is power of attorney holder cannot become a "pleader" for the party in criminal proceedings, unless the party secures permission from the Court to appoint him to act in such proceedings. It is also held in this case that application seeking such permission under section 32 of Advocate Act, for permitting private party to appear before the court in particular case, must be filed by the party and not by the power-of-attorney.

(17) It is well settled that even after execution of a power of attorney, the principal can act independently and need not to take the consent of the attorney. In the case of Deb Ratan Biswas and Others Vs. Most. Anand Moyi Devi & Ors. (2011 (4) SCALE 656), it has been held that no consent of power of attorney is necessary for entering into compromise.

Complaint for offence of Defamation:

(18) In case of Fr.Thomas Maniankerikalam Vs. Thomas J. Pudiath, 2005(3) CTC 567 (SC), a Complainant who was residing in Dubai executed a power-of-Attorney in favor of another person to file complaint for offence under section 500 IPC. The Hon'ble Apex court held that Section 199(1) of Code of Criminal Procedure lays

down that where a complainant is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint or is a woman who according to the local customs and manner, ought not to be compelled to appear in public, some other person may with the leave of the Court make a complaint on his or her behalf, but the Complainant who is residing outside India cannot authorize a person as a power-of attorney to file a complaint U/S 500 IPC.

The Power of Attorney can not act for dead person: (Effect of death of principal):-

(19) In case of Mrs.Radhabai Vs. Mongia 1939, Nagpur 274; wherein appeal was filed by an advocate on the basis of instructions given by power of attorney of the appellant in ignorance of the death of appellant. Thereafter, application was filed for bringing the legal representatives of the deceased appellant on record. Their Lordships held that since the appellant had died before filing the appeal, therefore, application to substitute the legal heirs could not be entertained for the reason that section 3 of the Power of Attorney Act did no more than indemnify the holder of power for action done by him in good faith, if the termination of the power by the death of person granting it was unknown to him at the time. It might operate indemnify the agent but in this case the court is not concerned with any such question. Thus, it was held that since appeal filed through power of attorney in ignorance of the death of the appellant is not the valid appeal in eye of law, section 3 cannot be invoked. Thus,

power of attorney holder can act in judicial proceedings on behalf of the party as long as such party alive.

(20) In case of *Jimmy Jahangir Madan Vs. Bolly Cariyappa*. *Hindley AIR 2005 SC 48 = (2204) 12 SCC 509*, a complainant who filed under section 138 of the negotiable Instruments Act, died. The legal heirs of the deceased complainant appointed agents under power of attorney to proceed with the complaint. The power of attorney holders filed petition u/s 302 of Cr.PC. to continue the prosecution. Hon'ble Apex court held that neither heirs of the complainant filed petition u/s 302 of the Code to continue the prosecution, nor any permission was sought by them from the competent Court that they should be allowed to continue the prosecution through their power of attorney holders, rather the prayer was made by the power of attorney holders, which is not permissible under law. But the liberty was given to the heirs either to make application themselves before the Court concerned to continue the prosecution or apply to the Court to grant permission to them to authorize a power of attorney holder to continue the prosecution on their behalf.

Complaint under Section 138 of N.I.Act.:-

(21) The division bench of Hon'ble Bombay High Court in case of *Reliance Industries Ltd. V. The State of Maharashtra* MANU/MH/0362/2010 has held that the complaint can be filed and signed by General Power of attorney of the complainant and it would

be valid complaint u/s.138 of N.I.Act. Further the Hon'ble Apex Court in case of Shankar Finance & Investments V. State of A.P. AIR 2009 SC 422 held as "The attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder, and not by the attorney holder in his personal capacity. Therefore, where the payee is a proprietary concern, the complaint can be filed : (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the "payee"; (ii) the proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor". Hence the complaint can be filed and signed by General Power of Attorney of the complainant.

Power of attorney holder as a witness:

(22) The Hon'ble Bombay High Court in case of Mamatadevi Prafullakumar Bhansali Vs. Pushpadevi Kailashkumar Agrawal and another 2005 (7) LJSOFT 36 has held that if the power-of-attorney has personal knowledge about the transaction, then he can depose as a witness. The Hon'ble Supreme Court in the case of Janki Vashdeo Bhojwani Vs. Industrial Bank Ltd., [(2005) 2 SCC 217 =AIR 2005 SC 439 =2005 (3) CTC 128 (SC)], has held that power of attorney holder cannot depose for principal in respect of matters of which only

the principal can have personal knowledge and in respect of which principal is entitled to be cross-examined.

(23) In the case of Man Kaur Vs. Hartar Singh Sangha (2010 ALL SCR 2511), the Hon'ble Supreme Court has summarised the position as to who should give evidence in regard to matters involving personal knowledge as follows:

(a) An attorney holder, who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized

managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder.

(24) In the case of **A.C. Narayanan Vs. State of Maharashtra and another (2013) 4 MLJ (Cri) 213** *the Hon'ble Supreme Court has summarised the right of a power of attorney in criminal proceedings* in the following words:

“(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the Payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney

holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant of his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

Advocate can not act as Power-of-attorney Holder for his client:-

(25) Hon'ble Delhi High Court in case of Baker Oil Tools (India) Pvt. Ltd. vs Baker Hughes Ltd. & Anr. R.F.A.583/2004 decided on on 3 June, 2011 has held as “8. It is unfortunate that a totally wrong practice has grown up in our Court where one or the other partner of a solicitors' firm signs pleadings and affidavits on behalf of a foreign client in pursuance of authorisation contained in the power of attorney and the same firm of Advocate/Solicitors acts, appears and pleads in a professional capacity. The said practice is not sanctioned by law. To my mind such a practice is opposed to law.

9. On principle, the Advocate cannot act in dual capacity and cannot be a mixture of two characters. No express provision is required to be enacted in this behalf. With great respect, the

implication from the scheme of the Code interpreted in light of well recognised rights and obligation of the Bar is too obvious. It is unfortunate that the wrong illegal practice referred to in opening part of this order and the questions formulated by the Court has continued so far.

10. It is not sufficient that an Advocate acts impartially. It is also necessary that the Advocate must always appear to act impartially. The basic principle of acting impartially and mere representation of a client consistent with duty to opponent and Court keeping reasonable distance from arena of conflict would be jeopardised if the Advocate acts in professional and non-professional capacity both in the same matter and at the same time. Practices and procedures of the Court must serve the administration of justice and rule of law in keeping with its noble ideals, traditions and objectives. The Court are required to interpret various provisions of various Acts and rules in manner so as to avoid anomalies as far as possible. Shri Ajit P. Shah, the learned counsel for the Bar Council has invited attention of the Court to the fact that a constituted attorney is entitled to identify himself with the interest of his client and give instruction to the Advocate representing the client before the Court. It would be strange if the lawyer constituted attorney gives necessary instruction in the matter to himself or his co-partners. Taking an overall view of all the relevant provisions pointing out to the Court and their objectives as indicated above, I have no hesitation in accepting each of the submissions urged on behalf of Bar Council of Maharashtra

and Goa and interpret the relevant provisions so as to infer prohibition of combination of two capacities by necessary implication.” Thus, it is held that the Advocate can not act in dual capacity as an advocate and power-of-attorney holder for his client.

Conclusion:

(26) **The** right to appear and practice is only available to advocate, whose name has been entered on rolls of State Bar Council. Power of attorney holder can appear, apply or act in any Court on behalf of a party to a suit, appeal or any other proceeding, but has no right of audience before Court. The power-of-attorney attorney holder practically steps into the shoes of the principal to perform all the acts on his behalf except right to plead unless permitted by the court, and to depose about facts which are in exclusive knowledge of the principal. The principal is required to be very cautious while delegating such power, else result would be counter productive.

* * * * *