

## DEATH OF A DONOR OF AN IRREVOCABLE POWER OF ATTORNEY-EFFECT

What happens upon death of a donor of an Irrevocable Power of Attorney executed for valuable consideration or to secure the interest of the donee in the subject matter property? Does it make the Irrevocable Power of Attorney invalid? To rephrase: Whether an Irrevocable Power of Attorney executed by donor/s in favour of donee/s for valuable consideration or to secure the interest of the donee in the subject matter property becomes invalid upon death of the donor/s.

### WHAT IS A POWER OF ATTORNEY?

Under Sec. 1A of the Powers of Attorney Act, 1882 ('POA Act'), *"a power of attorney includes any instrument empowering a specified person to act for and in the name of the person executing it"*. **In other words, it is an instrument by which a person is authorised to act as an agent of the person granting it.**

### SO, ONCE I HAVE MADE A POWER OF ATTORNEY, IS IT IRREVOCABLE?

Though, the POA Act does not state when a power of attorney is irrevocable, essentially, a Power of Attorney is revocable like any other contract. As the Power of attorney creates an agency, it is governed by the Indian Contract Act 1872. The revocation of the authority has been contemplated under section 201 of the Indian Contract Act 1872, which specifies that *"An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency; or by the business of the agency being completed; **or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.**"*

Thus, on a bare reading of the section it appears that the POA is terminated in the case the principal or the agent of the POA dies.

### BUT WHAT HAPPENS TO AN IRREVOCABLE POA FOR VALUABLE CONSIDERATION UPON DEATH OF A DONOR?

Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the agent/donee of the authority, such an authority is irrevocable.

Section 202 of the Indian Contract Act, 1872 enumerates that *"where the agent himself has an interest in the property which forms the subject-matter of the agency, the agency cannot, in the*

*absence of an express contract be terminated to the prejudice of such interest.*

**In other words, where a power of attorney is given for valuable consideration and expressed to be irrevocable, or is given to secure the interest of the donee in the subject matter property, then, so long as the donee has that interest, the power is irrevocable.** However without authority being coupled with interest just by declaring the power to be irrevocable does not make it irrevocable.

## **WHAT DO THE COURTS IN INDIA HAVE TO SAY ON VALIDITY OF IRREVOCABLE POA FOR VALUABLE CONSIDERATION UPON DEATH OF DONOR?**

In the case of Seth Loon Karan Sethiya vs. Ivan E. John<sup>[1]</sup>, the Supreme Court of India, held: 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.

Similarly, the Delhi High Court in the case of Shri Ram Murti Singh Sisodia vs. Shri Pratap Singh Sisodia and Ors, (Unreported case)<sup>[2]</sup>, held: The object of giving validity to a power of attorney given for consideration even after death of the executants is to ensure that entitlement under such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney.

## **IS THE IRREVOCABLE POA ALSO BINDING ON THE LEGAL HEIRS OF THE DONOR?**

This aspect was dealt with in an important case of Bhagwanbhai Karambhai Bharvad v. Arogyanagar Co-Op. Housing Society Ltd. and Ors<sup>[3]</sup> by the Hon'ble Gujarat High Court.

- In this case, the land owners (original defendants No. 1 to 5) had executed agreement to sell in favour of a society-- The Arogyanagar Co-operative Housing Society Ltd (the original plaintiffs) for sale of their land after receiving the entire consideration on 2-03-1993. On the same day defendants 1-5 also executed a notarized supplementary agreement for possession in favour of the plaintiff society. Irrevocable Specific power of attorney was also executed by the defendants' No. 1 to 5 in favour of one Jayantibhai C. Patel. On behalf of the defendants No. 1 to 5 the power of attorney holder executed five separate sale deeds on 8-4-1999 in favour of the plaintiff-society. The five sale deeds were registered on 3-8-1999 by the Sub-Registrar. It is to be noted herein that at the time of execution of the 5 sale deeds, executed by the Power of Attorney Holder, on behalf of all the 5 land owners, Defendant No.2 i.e. one of the land owner was already dead.
- Defendants No. 1, 3, 4 and 5 i.e. the land owners (except no.2), also executed registered sale deeds on 26-12-1997 in favour of the original defendant No.6 i.e. the petitioner herein, as well as notarized power of attorney in favour of Amrutbhai and notarized supplementary agreement for possession was also executed on the same day. Sale deed was also executed by the defendants No. 1, 3, 4 and 5 in favour of the defendant No. 6 by the power of attorney holder on 24-5-1999.
- The plaintiff society (respondent therein) challenged the sale deed executed in favour of the defendant No.6 (petitioner therein)
- Amongst the various contentions and grounds of arguments of the petitioner herein (defendant No.6), one was disputing the sale deeds which were executed by the Power of

Attorney holder on behalf of the land owners in favour of the plaintiff society, subsequent to the death of one of the donors', on the grounds that at the relevant time, one of the donor's (defendant No.2) was not alive for execution of the sale deeds and heirs and legal representatives of the deceased donor had not consented for execution of the sale deeds and hence the sale deeds executed on behalf of the deceased donor in the absence of consent of the heirs and legal representative of the donor were illegal and not sustain-able in the eyes of law and in view of Section 201 of the Indian Contract Act the power of attorney had come to an end and terminated at least in respect of the deceased donor.

- The Hon'ble Court dismissed the ground and held:

*"I am of the view that the defendant No. 2 though died there was no need for the power of attorney holder to obtain the consent from the heirs and legal representative of the defendant No. 2 as the presence or absence of the defendant No. 2 makes no difference in view of the fact that the defendant No. 2 had already parted his power for execution of the sale deed in favour of the power of attorney holder."*

*"... agency would not be terminated Under Section 202 of the Contract Act even after death of the person who has, authorized where there is no express contract for termination..."*

This case draws the inference that an irrevocable power of attorney granted on payment of total consideration, in which subject matter property, the donee has an interest, cannot be revoked, nor can it be terminated by the death, unsoundness of mind or insolvency of the donor to the prejudice of the donee. It further draws the inference that an Irrevocable Power of Attorney for valuable consideration shall be binding on the legal heirs of the deceased.

## **YOU MEAN TO SAY THAT I CAN GO AHEAD AND REGISTER A SALE DEED EVEN THOUGH THE DONOR OF THE POA HAS DIED?**

The practical aspect of doing a transaction whereby a document such as a sale deed for example requires to be registered at the Sub-Registrar's office on the basis of an irrevocable power of attorney where the donor has died is still not that simple or clear. As a matter of practise, in the event of any document registration on the basis of a power of attorney a declaration is sought by the Sub-Registrar and needs to be given by the attorney stating amongst other things that the executant/donor is still alive.

## **IS THERE ANY GOVERNMENT NOTIFICATION CLARIFYING THE DOUBTS?**

Yes, in view of such practical difficulty and upon suggestions obtained from various people, vide a notification bearing No.3047/07/259 dated 23 February 2007, the government clarified that such a declaration is not applicable in the case of an irrevocable power of attorney for valuable consideration as expressly mentioned therein and or a power of attorney executed along with a development agreement/ agreement for sale/sale deed. It further clarified that in view of Section 202 of the Indian Contract Act 1872, a power of attorney having the ingredients as required under section 202, is irrevocable and is valid even upon death of the donor (unless declared invalid/terminated by a court), and that in such an event a declaration does not need to be provided by the attorney, but first, whether the instrument is irrevocable or not has to be ascertained by the Sub-Registrar.

Thus, though the notification, has clarified and attempted to remove the hindrances in registration of deeds and documents on the basis of irrevocable power of attorney where the donor is not alive, yet the notification also inter-alia specifies that it is at the discretion of the Sub-Registrar to decide whether such declaration is necessary based on the contents and the language of the instrument.

## THAT MEANS THE CONTENTS AND LANGUAGE OF THE POA ARE CRUCIAL

That's right! In view of the legal provisions and the various case laws, it can be inferred that a lot depends on the contents of an instrument. As such proper legal consultation should be taken for drafting such Irrevocable Power of Attorney to ensure that all the ingredients along with the intent are captured clearly in the instrument. Additionally document/s to be executed on the basis of such Irrevocable Power of Attorney should also be drafted cautiously, capturing the power of attorney in the document, and proper advice and consultation should be sought for the same.

### WHAT IS THE INFERENCE?

**What appears from the above legal provisions and the cited case laws is that an irrevocable power of attorney, for valuable consideration and creating an agency wherein the agent/donee has an interest in the subject matter property, cannot be terminated to the prejudice of such interest, even on death of the donor unless of a written contract to the contrary.**

However, whether a power of attorney is irrevocable or not and whether the intention of the donor is as such will be case specific and as finally decided by the Courts in the event of dispute. Whether the instrument giving power is coupled with interest or not will depend on the facts and its wordings.

As such if the necessary ingredients required under Section 202 of the Indian Contract Act 1872 so as to hold that the agency cannot be terminated is clearly established then the fact of death of a donor cannot bring about the termination of the agency created under such irrevocable power of attorney. ***Merely knowing the law would not suffice, each case would be required to be looked into and inferred and interpret whether the POA fits within the corners as provided hereinabove.***

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[1] AIR 1969 SC 73

[2] RFA 146/2004

[3] AIR 2003 Guj 294

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