

Stamp duty on Powers-of-Attorney authorising sale of immovable property.
a comment on Amendment of April 2008 to the Bombay Stamp Act.

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Powers of Attorney (POA) giving authority to sell or transfer immovable property are subject to special treatment for the purposes of stamp duty under Article 48 of the Bombay Stamp Act 1958.

Until March 2008, such a POA, when given for consideration, invited same stamp duty as livable on a conveyance, i.e., calculated on the basis of market value of the property. If given to a promoter or developer for sale or transfer of immovable property, it attracted stamp duty of approximately 2 % on market value of property. However other POAs authorising to sell immovable property attracted a stamp duty of Rs 100.

“I have now decided to include power of attorney without consideration authorising to sell immovable property under this article (*i.e. as a conveyance*). The one exception would be for close relatives.” announced Shri Jayant Patil, Finance Minister of Maharashtra, Budget Speech in March 2008. With one stroke, the Finance Minister declared the end of a freedom hitherto enjoyed, an important and effective facility. The Bill seeking to achieve these objectives was proposed by the Minister of Revenue on 16 April 2008 has been enacted, and is to become law. Therefore if an owner of land of Rs 30 lakhs in Pune wishes to give a POA to his friend authorising him to sell that land, he must pay Rs 1.5 lakhs for stamp duty. If this is a flat, he must pay Rs 1,33,750. This amount must be paid at the time of making the POA, i.e., even before the friend proceeds to find purchasers.

After stating the broad principles relating to a POA, the articles discusses the relationship between parties involved, and the nature of POA. It then proceeds to analyse POAs given for consideration; and lastly it discusses implications of the amendment of April 2008. The scope of the article is limited to such POAs given to persons other than developers of property for the purposes of development.

A Power-of-Attorney

A POA is an instrument empowering a specified person (the attorney) to act for and in the name of the person executing it (the giver). The attorney is an agent of the giver, and exercises those powers which are given in the instrument. That is his authority. Whatever he does within the scope of his authority binds the giver. Thus where the attorney has a power of sale of property, he can effectively sell the giver's property, the sale binds the giver, and the buyer gets good title. Unless restricted or limited, his authority is very wide and extensive. He can choose the purchaser, decide the price, the terms of the sale and all matters governing the transaction. If the attorney has only the authority to make a contract for sale, he can only do so much. Such a contract binds both the giver and the purchaser, and the giver is liable to complete the sale-deed on terms agreed by the attorney. Yet another attorney may have even less powers, viz only to negotiate a sale, or to procure purchasers. The latter only finds customers for the property.

Relationship of agency

This relationship of agency between the giver and the attorney is governed by the provisions of the chapter relating to agency in the Indian Contract Act 1872. It can exist without any POA. An agency can be created by mere authorisation, or even orally. Unauthorised acts done by one on behalf of another may be ratified by the latter. Such transacting does not require a POA. Authority to sell property may therefore legally be given orally, or by an authorisation short of a POA. That will entail practical difficulties in implementation. A prospective purchaser of property may be unwilling to deal with such an agent. Such agent will not be able to register any sale-deed made by him, because sections 32 and 33 of the Registration Act prevent him from presenting documents for registration unless he acts

under a POA executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the owner (giver of the POA) resides.

Choosing an attorney

Whether X wishes to appoint an attorney to complete the deal with a chosen purchaser, or to find purchasers and then complete the sale, X will want to appoint a person whom he can trust and have faith, and who will effectively complete the intended business. If property to be sold is situated in another place, he will possibly want to choose a person belonging to that place, or is able to complete the deal effectively there. He may expect advice from the attorney. This choice is important. X may not have close relatives or have relatives with these abilities or qualifications.

X must also exercise care and caution in his choice. Whatever Y, the chosen attorney, will do in the exercise of powers given to him, will bind X. It is in the interest of X to give Y only the powers necessary for completing the task, and no more.

Thus where X wishes to sell one of his many immovable properties, he ought to give powers to Y for sale only of that property. If he were to give a general power of attorney giving Y powers to sell any land owned by X without specifying properties, X takes considerable risk. So long as the POA remains with Y, and even after its revocation, Y can attempt to use the POA to sell any other property owned by X.

Features of this relationship

If X has appointed Y as his attorney to sell X's land, and Z is the prospective purchaser Y has located, their relations are generally as follows:

1. Even after appointing Y, X does not lose his power to sell the land himself. X may himself find a purchaser, or may be required to find one if Y does not find one.
2. X can appoint another attorney in addition to Y for the same deal. This is, however, not desirable.
3. On approaching interested purchaser (Z in this case), Y cannot insist that Z must deal with him and not with X.
4. When Y approaches Z, Z can refuse to deal with Y, and can insist on dealing only with X.
5. Y is bound to follow all directions, if any, of X given in the POA; otherwise he is free to use his own discretion. He is not under the control of X.
6. Y is not entitled to remuneration for making the deal, unless specifically agreed.
7. Y is liable to give account when demanded by X.
8. Y is entitled to reimbursement of amounts spent by him for the purpose of completing the deal, whether the sale actually happens or not. Y is also entitled to indemnity for losses and expenses he suffers while exercising his powers.
9. Y is not bound to sell the property or to do anything at all.
10. Generally in all cases (except one), X can revoke the powers. Every POA can be revoked by giving notice to the attorney. However, it is effective against third parties only when they know about the revocation. Acts done by the attorney before revocation bind the giver.
A POA is not irrevocable simply because it mentions so. The only instance of irrevocable POA is where the agent or attorney has himself an interest in the property which forms the subject matter of that agency (section 202 of the Indian Contract Act). Eg. if X has given a POA in favour of a Bank authorising the Bank to sell X's property mortgaged as security to the Bank, and to adjust the sale proceeds towards the loan if remaining unpaid, such power are irrevocable so long as the loan is outstanding.
Yet even such irrevocable POA cannot compel third parties to deal with the attorney.
11. Generally X will bear the stamp duty on the POA, and Z will bear the stamp duty on the sale-deed of the property.

Nature of a POA

A POA is a facility, for the giver or the attorney depending upon whether it is made for the benefit of the giver or the attorney.

A POA merely enables the attorney to act on behalf of and in the name of the giver. If he does any such act, the transaction binds the giver. Hence if under a POA to sell immovable property, the attorney makes an contract for sale (agreement to sell), the giver will be bound to complete the sale according to the terms agreed by the attorney with the purchaser of property. If he sells the property under the POA, the ownership gets transferred. If he does nothing, there is no effective transaction.

If one analyses this relationship in terms of rights and duties, a POA pure and simple merely confers powers on the attorney with a liberty to exercise them. The creation of rights and duties will depend upon whether the attorney exercises his powers. If the attorney uses all or any of the powers, the third party with whom he transacts acquires rights vis-à-vis the giver. The giver owes no duties to the attorney that the giver shall complete the transaction; the giver becomes liable to the third party. The attorney is not subject to any duty, liability or disability under the transaction, unless he has undertaken to be personally liable. He does owe duties to the giver to exercise use diligence, and not to deal on his own account etc.

If this structure stands modified for a certain transaction, the POA is not a POA pure and simple. It might either be another transaction passed off as a POA, in which case it must pay stamp duty applicable to the true nature of the transaction. Else it might be part of a larger transaction, in which case the whole transaction affects its liability to stamp duty. An example of the latter is the POA taken by developers of property from its owner for the purposes of doing all acts facilitating development of property.

POA – a facility for the giver

X may want to or be required to give a POA to Y in the following circumstances:

- X is a Company or other body corporate,
- X is a firm or other association or body of persons, and all partners / members cannot attend to the transaction,
- X stays abroad and the property is situated in India,
- the property is situated in another place, perhaps in another state or country,
- the property is situated outside India,
- X requires assistance and Y will assist him to find purchasers giving favourable terms,
- Y possesses expertise in finding purchasers, negotiating terms with them, and completing the transaction,
- X does not want botheration and does not wish to be involved in the transaction,
- X might not find time, viz. obtain leave from employment, to complete the transaction,
- X is physically disabled,
- X is one of many joint owners of the property being sold, and he cannot attend to the transactions when at a time convenient to other joint owners.

POAs for and without consideration

A POA might be 'given' or 'taken'. A comparison of the Marathi and English version of the Finance Ministers Budget Speech of March 2008 reflects this difference. The Marathi version refers to POAs 'taken for consideration'. The English version refers to POAs 'given for consideration'.

'Consideration' is a term of the law of contract. It is 'something' which a promisee has done, or promised at the request of the promisor.

A POA facilitates the giver when the giver can get his task done through another. This will be a stand-alone POA, unconnected with any transaction between the giver and the attorney.

This is a POA without consideration. Consideration is not necessary for creating an agency (section 185 of the Contract Act); hence such a POA is a valid contract and enforceable.

Where it facilitates the Attorney, it is actually protecting some interest or concern the Attorney has in the business or task in connection with which the POA is given. This is a supporting POA, it supports or facilitates another transaction between the giver and the taker. This POA is one '*given for consideration*'.

A POA executed by a borrower in favour of a bank, giving it the power to sell his immovable property mortgaged with the Bank for the purpose, is also 'given for consideration'. Thus the fact that the Bank has given an amount to the borrower is consideration for the borrower giving to the Bank the powers under the POA.

Thus where X, in return of Y paying him an amount or doing something for the benefit of X, gives to Y a POA with a power to sell immovable property, absolutely or subject to certain conditions, the POA is given for consideration. The fact that Y has given an amount or done something for the benefit of X is consideration for X giving to Y the powers under the POA.

To take an example - X may have chosen to sell his flat to Y. In order to avoid stamp duty both may decide orally about the sale, though such a course of action may expose them to severe disabilities. Having paid the price, Y will expect that he should be able to 'transfer' his rights in the future. Since Y has not acquired any interest in the flat to be able to sell it later, he will seek a POA from X empowering him to sell the property. When Y wishes to dispose of the flat, he will exercise the powers under the POA, collect the price and keep it for himself, but effect the sale on behalf of X. This would be a sale by X to the prospective purchaser. This POA is for the benefit of Y, the attorney. Under it, Y seeks to have the powers of sale, which are the powers of an owner of property. He wishes to have the powers without making a sale-deed and himself becoming an owner. This is a POA for consideration.

Such POAs have been liable to stamp duty as if a conveyance, i.e. a percentage of the market value of that property.

Amendment of April 2008

From before amendment of April 2008 to the Bombay Stamp Act, A POA when given for consideration and authorising to sell an immovable Property attracts the same stamp duty as leviable on a Conveyance under clause (f) of Article 48 of the Bombay Stamp Act.

Explanation III to the Article provides that duty paid on such a POA shall be deducted from the duty payable on any conveyance relating to that property is executed in pursuance of power of attorney *between giver and the attorney*. Under this Explanation, stamp duty is not deducted if the attorney sells the property to another person. Before the amendment, any other POA with powers to sell immovable property, (other than one given to a developer of property) attracted a stamp duty of Rs 100.

The Amendment of 2008 now provides that a POA will attract the same duty as a conveyance if

- (i) it authorises to sell immovable property, or
- (ii) it authorises to transfer immovable property, and
- (iii) it is given without consideration or without showing any consideration

The POA will attract a stamp duty of only Rs 500 if it is given to specified relatives, i.e., father, mother, brother, sister, wife, husband, daughter, grandson, granddaughter, or is given to *such other close relative* of the giver.

There are no consequential amendments. There is no power for making rules specifying who those other close relatives will be. There is also no provision for any adjustment or deduction of stamp duty from the stamp duty payable on any conveyance that may be effected using the POA. The amendment does not state whether it would apply only in cases where the property is situated in Maharashtra.

The objective of the amendment is clearly generation of additional revenue. It is not made for check evasion of stamp duty.

The amended provision apparently applies to a POA given for sale or transfer of a immovable property specified in the POA. A general POA for sale of any immovable property of the giver falls outside the provision. In any case, it will not be possible to ascertain any stamp duty on a POA if no property is specified in it.

Some views about the Amendment of April 2008

The blanket imposition of stamp duty on all POAs by the Amendment of April 2008 is arbitrary, unjust and unfair. It will hinder and slow down transacting of immovable property.

Burdensome and unjust imposition

Substantial number of POAs are made honestly by owners because it is convenient and facilitates their transactions. The amendment disregards this factor and penalises honesty for the sake of catching the small number of dishonest evasive transactions.

One can easily surmise that a large number of POAs with powers to sell immovable property are made honestly by owners for facilitating their transactions, e.g. for sale of property away from their places of residence. Such an owner requires to find a trustworthy person, usually belonging to a place where the property is situated, or willing to go to such a place, and capable of completing transaction effectively safeguarding the interest of the giver. A relative may not always be available. Requiring payment of high stamp duty will prevent such owners from availing this facility.

Without such facility, owners may not able to make transactions with speed required for closing deals and completing transactions. This will affect the real estate market.

Discriminatory and arbitrary

The amendment discriminates between persons who have specified relatives and those who do not.

The amendment gives excessive discretion to registration and stamp authorities who can determine whether the relationship between the giver and the attorney is 'close'.

The amendment gives excessive discretion to registration and stamp authorities to determine whether the relationship as claimed by the giver and the attorney, exists between them. Registration officers will have to judge whether a particular relationship is indeed as described. Names cannot be the sole criteria. Persons from some parts of India do not have family names or surnames. Contrary to popular belief, a woman need not change her name or family name or surname after she gets married. Following documents might be considered: Birth certificates, marriage certificates, photographs of marriage, marriage invitations etc. Perhaps officers will seek affidavits of parties stating their relationships. A possible saving of duty of lakhs of rupees by showing close relationship is a very strong incentive to establish closeness of relationship one way or another.

Where the POA is given between close relatives, having it executed and authenticated before the registering officers time will be spent in establishing relationship, and will involve more paperwork, and legal expenses.

Anomalous provisions

A POA authorising to lease or mortgage or otherwise transfer immovable property is liable to stamp duty as a conveyance, rather than as a lease or mortgage.

A POA without consideration authorising to lease or mortgage or otherwise transfer immovable property is liable to stamp duty on basis of market value, whereas similar POA given for consideration does not attract such stamp duty.

Wastage of stamp duty

The giver may want to revoke the POA for various reasons: he has cancelled the sale, or decided to postpone it; the attorney is lazy; he has no longer faith his attorney; or the attorney has committed misconduct. In such a case, stamp duty is not refunded and would be wasted. This may also act as a disincentive to revocation, even in those cases where revocation is extremely necessary.

Since a POA does not compel purchasers to deal with the attorney, a sale may not come about. Stamp duty is not refunded and gets wasted.

The giver may himself find a purchaser and sell the property. The stamp duty on POA is not refunded and is wasted.

If the giver dies before the attorney makes any sale, the POA is wasted, and also the stamp duty.

If the attorney dies or becomes incapable of performing the tasks, the giver might have to give a POA once again. The stamp duty on the earlier POA will be wasted.

A transaction made by an attorney will attract stamp duty twice. First when he makes the POA, and once again when the attorney makes the sale-deed. The amendment does not seem to provide for any adjustment of the former while paying the latter.

Property situated in other state or country

Each State has its own law relating to stamp duty, and may not have any provision similar to that made by the amendment. If a POA is made in Maharashtra for sale of property situated in another State, it will require stamp duty on basis of market value, even though stamp law of that State does not require such stamp. This discriminates on the basis of givers' residence. Givers may want to cross borders to avoid payment, defeating the proposed stamp duty, and causing unnecessary inconvenience.

Where POAs are received from abroad, and are stamped on arrival in Maharashtra by a delegate of the giver, usually the attorney, they will be required to arrange for funds for payment of stamp duty.

A POA given by a giver residing in Maharashtra to a person residing abroad for sale of property abroad will also be covered by this onerous provision.

Joint owners of property

Where joint owners of property wish to sell, it is usual and necessary that some or many among them will give a POA, especially when they cannot find a time suitable to all for completing the transaction. This convenience will be lost.

Miscellaneous

In order to avoid the stamp duty, a giver might give a 'general power of attorney' without reference to any particular property, viz. he will give powers "to sell all or any properties" owned by him, instead of the specific property he intends to sell. This places the giver at risk that the attorney will have powers to sell not merely the intended property, but any of the properties owned by the giver. Where attorneys have the POAs drafted, innocent givers will be trapped.

Persons who do not wish to pay stamp duty will devise new methods of avoiding it. The amendment will only drive parties to make artificial transactions, ostensibly complying with stamp law. Such documents might not reflect the true nature of transaction, or the real intention of parties, and will cause uncertainty in relations between parties to the transaction.

Conclusion

The Amendment of 2008 imposes unjustified burden on common people of payment of stamp duty.

There may be no liability for payment of stamp duty in the following cases

- (i) a POA authorising a person to make agreements to sell, lease or mortgage immovable property, but not to sell or transfer.
- (ii) a POA for consideration with powers to lease or mortgage property;
- (iii) a general POA without specifying any particular property; in this case the giver must exercise care and revoke it after the intended transaction is completed, must ask have the original POA returned from the attorney.
