

Preface

The Law Commission received the reference dated 01/07/07 from the Ministry of Law, Justice and Parliamentary Affairs.

After receiving the reference the Commission thoroughly examined the Powers of Attorney Act, 1882 (Act VII of 1882), the Registration Act, 1998 (Act No. XV, of 1908) and the Evidence Act, 1872 (Act No. 1 of 1872)

The report as well as recommendations after being prepared, was placed before the Commission's meeting held on November 25, 2007 under the Chairmanship of Mr. Justice Mustafa Kamal, attended by Mr. Justice Md. Sirajul Islam and Dr. M. Enamul Haque Members of the Law Commission and in the said meeting it was also decided to send three copies of the report to the Government.

Noor Md. Jahangir Sarker
Secretary
Law Commission

A Report regarding a proposed amendment of the Powers-of-Attorney Act, 1882 (Act VII of 1882)

Introduction

This is a reference by the Government under section 6 (Ena) of the Law Commission Act, 1996 for a review of the Powers-of-Attorney Act, 1882 (Act VII of 1882). The text of the reference as sent to the Commission under memo no. লেঃপ্রঃ ৩৫৫/০৭ তারিখঃ ১৭ই আষাঢ়' ১৪১৪ বঙ্গাব্দ মোতাবেক ১ জুলাই' ২০০৭ খ্রিস্টাব্দ of the Ministry of Law, Justice and Parliamentary Affairs runs as follows:

“গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
আইন বিচার ও সংসদ বিষয়ক মন্ত্রণালয়
লেজিসলেটিভ ড্রাফটিং উইং
বাংলাদেশ সচিবালয়, ঢাকা।

নং ঃ-লেঃপ্রঃ ৩৫৫/০৭

১৭ আষাঢ়, ১৪১৪ বঙ্গাব্দ
তারিখঃ -----
১ জুলাই, ২০০৭ খ্রিষ্টাব্দ

বিষয়ঃ Powers-of-Attorney Act, 1882 (Act No.VII of 1882) যুগোপযোগী করার লক্ষ্যে সুপারিশ প্রদান প্রসঙ্গে।

কোন ব্যক্তি বা কারো পক্ষে প্রতিনিধি হয়ে কার্য নির্বাহের জন্য ক্ষমতা অর্পণ, প্রতিনিধি নিযুক্তি, চুক্তি, দলিল-দস্তাবেজ বা আইনের ক্ষমতাসম্পন্ন অনুরূপ ইন্সট্রুমেন্ট সম্পাদনের উদ্দেশ্যে Powers-of-Attorney Act, 1882 শীর্ষক আইনটি প্রণয়ন করা হয়। উক্ত উদ্দেশ্য পূরণকল্পে প্রতিনিধি নিয়োগ ও ক্ষমতা অর্পণ, চুক্তি, দলিল বা অনুরূপ ইন্সট্রুমেন্ট, ইত্যাদি সম্পাদিত ও কতিপয় ক্ষেত্রে রেজিস্ট্রি হয়ে থাকে। মূলত এই ধরনের দলিল বা ইন্সট্রুমেন্টের প্রাথমিক উদ্দেশ্য হচ্ছে তৃতীয় পক্ষের (যাদের সাথে এজেন্ট/প্রতিনিধি মোজারনামা দলিলে বর্ণিত কার্যাদি সম্পাদন করবে) নিকট এজেন্ট/প্রতিনিধির ক্ষমতাকে স্পষ্ট করে তোলা। এর ফলে বিভিন্ন প্রকারের অধিকার, দায়-দায়িত্ব, আইনগত বাধ্যবাধকতা সৃষ্টি হয়ে থাকে। কিন্তু উক্ত Act এ মোজারনামা দলিল (Powers-of-Attorney deed) বাধ্যতা মূলকভাবে রেজিস্ট্রেশন, মোজার দাতা (doner) ও মোজার গ্রহীতার (donee) ছবি সন্নিবেশ সংক্রান্ত

কোন বিধান নেই। ফলে অনেক সময় প্রকৃত মোক্তার দাতা (doner) ও মোক্তার গ্রহীতার (donee/ attorney) পরিচয় সম্পর্কে সংশয়ের সৃষ্টিসহ তাঁহাদের পরিচয় নিশ্চিত হওয়ার ক্ষেত্রে সমস্যা দেখা দেয় এবং সংশ্লিষ্ট মোক্তারনামা দলিলের নির্ভরযোগ্য রেকর্ডও থাকে না। এতে মোক্তারনামা দলিল আইনগতভাবে কার্যকর করার ফলপ্রসূ কোন উপায় থাকে না এবং সংশ্লিষ্ট পক্ষদের মধ্যে মোক্তারনামা সংশ্লিষ্ট বিষয়ে আইনগত জটিলতার উদ্ভব হচ্ছে। এমনকি আদালতে মামলাও দায়ের হচ্ছে।

উপরি-উক্ত সমস্যা নিরসনকল্পে উক্ত Act সংশোধনের মাধ্যমে যথাযথ বিধান সন্নিবেশ করা প্রয়োজন বলে সরকারের নিকট প্রতীয়মান হচ্ছে। বাংলাদেশের বিদ্যমান আর্থ-সামাজিক ও আইনগত অবস্থার আলোকে সার্বিকভাবে বিষয়টি অতিগুরুত্বপূর্ণ এবং এ অর্থে বিষয়টি ব্যতিক্রমী।

বর্ণিত অবস্থায় Powers-of-Attorney Act, 1882 সহ সংশ্লিষ্ট অন্য কোন আইনে সংশোধন আনয়নের প্রয়োজনীয়তার বিষয়ে (সংশোধন/পরিবর্তনের পক্ষে সুপারিশের সিদ্ধান্ত হলে প্রণীতব্য সংশোধনী আইনের খসড়াসহ) সরকার আইন কমিশনের সুপারিশ প্রত্যাশা করছে।

সুতরাং উক্ত বিষয়ে কমিশনের সুপারিশ, যতশীঘ্র সম্ভব, প্রেরণের উদ্দেশ্যে উহা কমিশনের নিকট উপস্থাপনের জন্য নির্দেশক্রমে অনুরোধ করা হলো।

(হাফিজ আহমেদ চৌধুরী)
সিনিয়র সহকারী সচিব (লেঃড্রাঃ)
ফোনঃ ৯৫৫৭৭৯১ (অফিস)।

সচিব
আইন কমিশন
পুরাতন হাইকোর্ট ভবন, ঢাকা।”

It appears from the above reference that the Government feels the need for making the power-of-attorney deeds compulsorily registerable with photographs of both the parties therein. In the absence of any provision in the existing Powers-of-Attorney Act, 1882 (Act VII of 1882) for registration of the power of attorney deeds with photographs of both the parties therein, the power-of-attorney deeds are not required to be registered under the

provisions of the Registration Act, 1908 (Act No. XVI of 1908) and as a result, it becomes difficult to identify the doner and donee of a power-of-attorney in case of any doubt about their identity and that no reliable records of such power-of-attorney deeds are kept anywhere. In such a position of the matter, legal complications sometimes arise between the parties in respect of the matters of the power-of-attorney deeds and even cases are sometimes filed in courts. To eradicate such complications, appropriate amendments are proposed to be made in the Powers-of-Attorney Act, 1882 providing for compulsory registration of power-of-attorney deeds with photographs of both the parties therein.

We have examined the provisions of the Powers-of-Attorney Act, 1882 (Act VII of 1882) with reference to the changed circumstances of the present day society. We have also examined the related provisions of the Registration Act, 1908 (Act XVI of 1908) which provides for compulsory or optional registration, as the case may be, of written instruments.

Section 17 of the Registration Act, 1908 describes the documents, which are compulsorily registerable. The list of compulsorily registerable documents as given in section 17 of the Registration Act, 1908 does not include instrument of powers-of-attorney. The power-of-attorney deeds are, thus, not compulsorily registerable under the existing laws. Section 18 of the Registration Act, 1908, however, provides that any document not required to be registered under section 17 may also be registered under this Act. This section pertains to the registration of those documents which do not require compulsory registration. The non-registration of such documents however will not affect their validity or admissibility in evidence, but in certain cases may affect rights of priority. The powers-of-attorney authorizing the donee of the power to manage, to lease, mortgage, or to sell immovable property are generally registered in our country under the provision of optional

registration of the documents as provided for in Section 18 of the Registration Act, 1908.

Under the changed circumstances prevailing in the present day society, there is now a tendency to create complications relating to the matters of powers-of-attorney. Sometimes, the donee of a power-of-attorney starts claiming his right in the property mentioned in a power-of-attorney deed which results in frivolous litigation in courts relating to the property of the power-of-attorney. The registration of power-of-attorney deeds may act as a check against such false claim on such property. The photographs of the doner and donee of each power-of-attorney will also help in determining the identity of the parties in case of any dispute relating to such power-of-attorney. Registration of powers-of-attorney with photographs will help maintain permanent reliable records in the record room of the registration office.

"It is held by the Indian High Court that power-of-attorney purporting to create an interest in immoveable property of the value of Rs. 100/- or more, must be registered. (1907) 35 Cal 845 (848-849) (SB)(The AIR Manual-Volume 30, Page 796). It may be pointed out that the Province of Sindh (in Pakistan) has already added a new provision in section 17 of the Registration Act, 1908 for making the Power-of-Attorney to sell any immoveable property, as compulsorily registerable". (source-internet)

It may be mentioned here that the agreement to sell immoveable property is not a complete transaction and does not create any right on the property mentioned in the agreement till execution and registration of a complete sale-deed in fulfillment of the terms and conditions of the agreement. Therefore, agreement to sell was not compulsorily registerable under the provisions of section 17 of the Registration Act, 1908. But in the present day society, there is a growing tendency to make a false agreement

to sell and then use it in support of a false plea in Civil Courts for establishing the right in the property. As a result, frivolous litigation is increasing. With a view to stopping such tendency, the Government has recently made an amendment in the Registration Act, 1908 by "The Registration (Amendment) Act, 2004" effective from 1st July, 2005 by inserting a new section being section 17A making a contract for sale of any immovable property compulsorily registerable. Another amendment has been made therein to the effect that the photographs of both the executant and the recipient shall be pasted on every instrument required to be registered. It will operate as an effective check to prevent the abuse of an agreement to sell and it will also help identify both the parties in time of need. The same principle may be applied in respect of power-of-attorney deeds.

Considering the above circumstances, we agree with the view expressed by the Government that there is a need for compulsory registration of power-of-attorney deeds with photographs of both the doner and donee therein for the purpose of maintaining permanent reliable records of such instruments and for identifying both the parties in time of need.

The power-of-attorney means any written instrument empowering a specified person to act for and in the name of the person executing it. But it appears that there is no such definition in the existing Powers-of-Attorney Act, 1882. The definition of a power-of-attorney will make it clear to all concerned as to what exactly a power-of-attorney means. We, therefore, recommend that a new section as section IA be added in the Act after section I giving a 'definition' of powers-of-attorney.

We have discussed above the reasons for making power-of-attorney deeds compulsorily registerable. To that end in view, we recommend for insertion of a new section as section 2A in the Act after section 2 providing

for compulsory registration of the power-of-attorney deeds with further provisions for pasting photographs of both the doner and donee on every instrument of powers-of-attorney requiring the parties to sign and put their left thumb impression across their photographs in the instrument.

Provisions for compulsory registration of the instruments of power-of-attorney will necessitate some consequential amendment in section 3 regarding revocation of a power-of-attorney and addition of a new section as section 3A providing for registration of instrument of revocation, if any, with notice to the donee of that power-of-attorney.

After insertion of a new section being section 2A as we have recommended above providing for compulsory registration of the instruments of powers-of-attorney, section 4 of the Powers-of-Attorney Act, 1882 shall become redundant and as such, we recommend for omission of section 4 from the Act.

Earlier, a married woman though a minor could appoint an attorney on her behalf under section 5 of this Act, but after the enactment of the Child Marriage Restraint Act, 1929 and the Marriage and Divorce (Registration) Act, 1974 minor marriage is neither prevalent nor allowed in our country. The concept of 'full age' has been introduced, that is, a girl must be a major at or above the age of 18 years at the time of her marriage. Therefore, there is a need to amend section 5 of the Powers-of-Attorney Act, 1882. In such a position, we recommend for amendment of section 5 by substituting the words "whether a minor or not" by the words "of full age".

After making the amendment and inserting new sections providing for compulsory registration of the power-of-attorney deeds as we have recommended above, there will then arise a need for deciding the fate of all the power-of-attorney deeds executed and registered or not registered, as the

case may be, and the acts and deeds done on the strength of those powers-of-attorney before coming into force of our recommended amendments of the Act. To meet those requirements, we recommend for addition of a new section as section 7 to be added after the repealed section 6 of the Act.

Consequent upon the proposed amendment of the Powers-of-Attorney Act, 1882 (Act VII of 1882) making the power-of-attorney deeds compulsorily registerable, the related provisions of section 17 of the Registration Act, 1908 (Act No. XVI of 1908) shall be necessary to be amended by inserting the instrument of power-of-attorney and deed of revocation of power-of-attorney in the list of compulsorily registerable documents. In that view of the matter, we recommend for inclusion of power-of-attorney deeds and deed of revocation in section 17 of the Registration Act, 1908 by way of an amendment of the Registration Act, 1908 (Act No. XVI of 1908).

After inclusion of the powers-of-attorney in the category of compulsorily registerable documents under section 17 of the Registration Act, 1908, section 85 of the Evidence Act, 1872 (Act No. I of 1872) regarding presumption of execution and authentication of a power-of-attorney shall become redundant and as such, we recommend for omission of section 85 from the Evidence Act, 1872 after implementation of this report.

Recommendations

In view of our discussions above, we recommend that an amendment be made in the Powers-of-Attorney Act, 1882 (Act No. VII of 1882) and in section 17 of the Registration Act, 1908 (Act No. XVI of 1908) and we further recommend that section 85 of the Evidence Act, 1872 (Act No. 1 of 1872) be omitted from that Act.

For convenience and ready reference, we are enclosing herewith three drafts of the three proposed Ordinance as annexures A, B and C.

(Dr. M. Enamul Hoque)
Member-2

(Justice Md. Sirajul Islam)
Member-1

(Justice Mustafa Kamal)
Chairman

Annexure- "A"

An Ordinance for proposed amendment of the Powers-of-Attorney Act, 1882 (Act No. VII of 1882)

The Powers-of-Attorney (amendment) Ordinance, 200.....

WHEREAS it is expedient and necessary further to amend certain provisions of the Powers-of-Attorney Act, 1882 (Act No. VII of 1882) for the purposes hereinafter appearing; AND

WHEREAS the Parliament now stands dissolved and the President is satisfied that circumstances exist which render immediate necessary action to amend the Powers-of-Attorney Act, 1882 ;

NOW, THEREFORE, in exercise of the powers vested in him by article 93 (i) of the Constitution, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance, namely:-

1. Short title and commencement. - This Ordinance may be called the Powers-of-Attorney (amendment) Ordinance, 200....

(2) It shall come into force at once.

2. Insertion of a new section 1A in Act VII of 1882.- In the Powers-of-Attorney Act, 1882 (Act VII of 1882) hereinafter referred to as the said Act, after section 1, a new section 1A shall be inserted, namely:-

"1A. Definition.- In this Act, "Powers-of-Attorney" include any instrument empowering a specified person to act for and in the name of the person executing it".

3. Insertion of a new section 2A in Act VII of 1882.- In the said Act, after section 2, a new section 2A shall be inserted, namely:-

"2A Registration of the Powers-of-Attorney.-(1) Notwithstanding anything contained in any other law for the time being in force, every power-of-attorney shall be in writing executed by both the doner and donee of the powers-of-attorney and registered under the Registration Act, 1908 (Act. XVI of 1908).

(2) A power-of-attorney referred to in sub-section (1) shall be presented for registration within thirty days from the date of execution of the same and the provisions regarding registration of instrument shall apply.

(3) One passport sized (40×50 mm.) photograph of both the doner and donee shall be pasted on every instrument of power-of-attorney and the parties thereto shall sign and put their left thumb impression below their respective photographs in the instrument.

Provided that if any person is incapable of signing, he shall not be required to sign."

4. Amendment of section 3 in Act VII of 1882.- In the said Act, in section 3, the words "or had revoked the power" and the "coma" and also the words "or revocation" shall be omitted.

5. Insertion of a new section 3A in Act VII of 1882.- In the said Act, after section 3, a new section 3A shall be inserted, namely:-

"3A. Revocation of power-of-attorney.- (1) The doner of a power-of-attorney may revoke his power-of-attorney in writing with notice to the donee of the power and the instrument of such revocation shall be registered under the provisions of the Registration Act, 1908 (Act XVI of 1908).

(2) A deed of revocation referred to in sub-section (1) shall be presented for registration within thirty days from the date of execution of the same and the provision regarding registration of instrument shall apply.

(3) One passport size (40×50 mm.) photograph of the doner of the power-of-attorney shall be pasted on the instrument of revocation and the doner shall sign and put his left thumb impression below his photograph in the instrument.

Provided that if any doner is incapable of signing, he shall not be required to sign.

(4) In spite of the revocation of a power-of-attorney under sub-section (1) above, the acts and deeds done, any payment made or any instrument executed by the donee in pursuance of the power-of-attorney prior to its revocation shall not be affected by reason of such revocation."

6. Omission of section 4 in Act VII of 1882.- In the said Act, section 4 shall be omitted.

7. Amendment of section 5 in Act VII of 1882.- In the said Act, in section 5, for the words "whether a minor or not" the words "of full age" shall be substituted; and thereafter the words "and of full age" shall be omitted.

8. Insertion of a new section 7 in Act VII of 1882.- In the said Act, after the repealed section 6, the following new section 7 shall be inserted, namely:-

"7. The Powers-of-attorney before this Ordinance.- (1) The powers-of-attorney which were executed and registered before the coming into force of this Ordinance shall, unless revoked, continue to be valid powers-of-attorney after the coming into force of this Ordinance.

(2) Those powers-of-attorney which were executed and authenticated but not registered prior to coming into force of this Ordinance shall become invalid after the coming into force of this Ordinance, and the parties thereto may, however, make fresh power-of-attorney, if necessary, complying with the provisions of this Ordinance.

(3) In spite of a power-of-attorney becoming invalid under sub-section (2) above, all payments made, all acts and deeds done or any instrument made under the authority of that power-of-attorney prior to the coming into force of this Ordinance, shall continue to be valid acts and deeds unless any such act and deed is otherwise declared to be invalid by a court of competent jurisdiction".

**A Draft Ordinance for proposed amendment of the
Registration Act, 1908 (Act No. XVI of 1908)**

The Registration (amendment) Ordinance, 200....

WHEREAS it is expedient and necessary further to amend certain provisions of the Registration Act, 1908 (Act No. XVI of 1908) for the purposes hereinafter appearing; And

WHEREAS the Parliament now stands dissolved and the President is satisfied that circumstances exist which render immediate necessary action to amend the Registration Act, 1908;

NOW, THEREFORE, in exercise of the powers vested in him by article 93(i) of the Constitution, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance, namely:-

1. Short title and commencement. – This Ordinance may be called the Registration (amendment) Ordinance, 200....

(2) It shall come into force at once.

2. Amendment of section 17, Act XVI of 1908.- In the Registration Act, 1908 (Act No. XVI of 1908) in section 17, in sub-section (1), after the end

of the clause (g) for "full stop" a "semicolon" shall be substituted and thereafter the following two new clauses (h) and (l) shall be added, namely:-

"(h) Power-of-attorney;

(i) Instrument of revocation of power-of-attorney."

**A Draft Ordinance for proposed amendment of the
Evidence Act, 1872 (Act No. 1 of 1872)**

The Evidence (amendment) Ordinance, 200....

WHEREAS it is expedient and necessary further to amend certain provisions of the Evidence Act, 1872 (Act N0.1 of 1872) for the purposes hereinafter appearing; And

WHEREAS the Parliament now stands dissolved and the President is satisfied that circumstances exit which render immediate necessary action to amend the Evidence Act, 1872;

NOW, THEREFORE, in exercise of the powers vested in him by article 93(i) of the Constitution, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance, namely:-

1. Short title and commencement. - This Ordinance may be called the Evidence (amendment) Ordinance, 200....

(2) It shall come into force at once.

2. Omission of section 85, Act 1 of 1872.- In the Evidence Act, 1872 (Act No. 1 of 1872), section 85 shall be omitted.