

Course Name- LL.B 4th sem
Subject- Equity
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Concept- TRUST under Indian trust Act 1882

Definition Of Trust

Section 3 of the Act defines trust as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner.

According to the **Specific Relief Act**, trust includes every species of express, implied or constructive fiduciary ownership.

Thus, the essential feature of trust is that the trustee holds the property or must exercise his rights of property in a fiduciary capacity and stands in a fiduciary relation to the “cestui que trust”

WHY DO WE FORM A TRUST?

Trust are generally, formed or created to fulfill any or more of the following Objectives:-

- For discharge of the charitable and/or religious sentiments of the author of settlor of the trust, in a way that ensures public benefit;
- For claiming exemption from Income tax U/s 10 or 11, as the case may be, in respect of incomes applied to charitable or religious purposes;
- For the welfare of the members of the family and/or other relatives, who are dependent on the settlor of the trust;
- For the proper management and preservation of a property;
- For regulating the affairs of a provident fund, superannuation fund or gratuity fund or any other fund constituted by a person for the welfare of its employees;

HOW TO CREATE A TRUST?

Trusts are created when the settlor of the property transfers property or provides benefits for the welfare of beneficiaries or for the usage of public purposes. Four essential conditions are necessary to bring into being a valid trust.

- The person who creates a trust (settlor) should make an unequivocal declaration binding on him.
- He must transfer an identifiable property under irrevocable arrangement and totally divest himself of the ownership and the beneficial enjoyment of the income from the property .
- The objects of the trust must be defined and specified.
- The beneficiaries are specified.

WHO CAN CREATE A TRUST

As per Section 7 of the Indian Trusts Act, a trust may be created by every person competent to contract and by or on behalf a minor, with the permission of a principal court of original jurisdiction. Following are eligible to create a Trust.

- Trust by an Hindu Undivided Family;
- Trust by a Minor;
- Trust by a Woman;
- Association of Persons;
- Company(eg: Debenture-Redemption Fund Trust for redemption of its debentures);

WHAT IS A PRIVATE TRUST

A trust is called a Private Trust when it is constituted for the benefit of one or more individuals who are, or within a given time may be, definitely ascertained. Private Trusts are governed by the Indian Trusts Act 1882. A Private Trust may be created inter vivos or by will. If a trust is created by will it shall be subject to the provisions of Indian Succession Act, 1925.

The following are the requisites for creation of a Trust:

- The existence of the author/settlor of the Trust or someone at whose instance the Trust comes into existence and the settlor to make an unequivocal declaration which is binding on him.
- There must be a divesting of the ownership by the author of the trust in favour of the trustee for the beneficial enjoyment by the beneficiary.
- A Trust property.
- The objects of the trust must be precise and clearly specified.
- The beneficiary who may be particular person or persons.

Unless all the above requisites are fulfilled, a trust cannot be said to have come into existence.

WHAT IS PUBLIC TRUST

A trust is called as Public Trust when it is constituted wholly or mainly for the benefit of Public at large, in other words beneficiaries in the Public trust constitute a body which is incapable of ascertainment. The Public trusts are essentially charitable or religious trusts and are governed by the general Law. The provisions of Indian Trusts Act do not apply on Public Trusts. Like the private trusts, public trusts may be created inter vivos or by will. The Indian Trusts Act does not apply to public trusts which can be created by general law. There are three certainties required to create a charitable trust are as follows

- a declaration of trust which is binding on settlor,
- setting apart definite property and the settlor depriving himself of the ownership thereof, and
- a statement of the objects for which the property is thereafter to be held, i.e. the beneficiaries.

It is essential that the transferor of the property viz the settlor or the author of the trust must be competent to contract. Similarly, the trustees should also be persons who are competent to

contract. It is also very essential that the trustees should signify their assent for acting as trustees to make the trust a valid one. When once a valid trust is created and the property is transferred to the trust, it cannot be revoked, If the trust deed contains any provision for revocation of the trust, provisions of sections 60 to 63 of the Income-tax Act will come into play and the income of the trust will be taxed in the hands of the settlor as his personal income. The difference between a public and private trust is essentially in its beneficiaries, A private trust's beneficiaries are a closed group, while a public trust is for the benefit of a larger cross-section having a public purpose.

However, there may be trusts which are a blend of both and are known as Public-cum-Private Trusts.

WHAT ARE PUBLIC-CUM-PRIVATE TRUSTS :

There may be certain trusts whose part of the income may be applied for public purposes and a part may go to a private person or persons, Such trusts are known as Public cum Private Trusts. Such trusts, in respect of the portion of the income going to private person or persons are assessable as private trusts and in respect of that portion of the income which is applied for public purposes, they shall be eligible for exemption under section 11 provided these trust are created before the commencement of Income-tax Act, 1961 i.e. before 1-4-1962. Public-cum-private created on or after 1-4-1963 shall not be eligible for exemption u/s 11.

DO WE HAVE TO REGISTER THE TRUST?

As per section 5 of the Indian Trusts Act, a private Trust in relation to an immovable property must be created by a non-testamentary instrument in writing, signed by the author of the trust or the trustee and registered(under Section 17 of Indian Registration Act) . Thus,registration of a trust is necessary when it is declared by a non-testamentary instrument. This registration would still be required, even if the instrument declaring the trust is exempt from registration under the Indian Registration Act. In case of a Private Trust declared by a will,registration will not be necessary, even if it involves an immovable property. Registration will not be required, of a trust in relation to movable property. In case of Public Trust, whether in relation to movable property or an immovable property and whether created under a will or inter vivos, registration is optional but desirable. There are two conditions for registration of a trust namely :

- An application to be made for registration in the prescribed form (Form 10A) and in the prescribed manner to the Commissioner of Income tax either before 1st July 1973 or within one year from the date on which the trust is created whichever is later
- Where the total income of the trust or institution without giving effect to the provisions of section 11 & 12 exceeds 50,000/- in any previous year, the accounts of the trust or institution for that year has to be audited by a chartered accountant or any other accountant entitled to be appointed as an auditor of companies. The report of audit should be in Form No. 10B prescribed in the Income-tax Rules, 1962 and said audit report has to be furnished along with the return of income.

In case of Charitable or religious Trust in relation to an immovable property, for claiming exemption u/s. 11 of the I.T. Act 1961 it is essential that the instrument of trust is duly registered. Registration is always desirable even if it is not statutorily required. Following are the advantages of a Registered trust:

- It becomes an official document with support and law;
- Effectuates Transmutation of possession;
- Easy conveyance of trust-property to the Trustee;

Parties To The Creation Of Trust

Author of the trust : the person who reposes or declares the confidence is called the “author of the trust”. (Section 3)

Trustee : the person who accepts the confidence is called the “trustee”. (Section 3)

Beneficiary : the person for whose benefit the confidence is accepted is called the “beneficiary”. (Section 3)

Creation Of Trust

In order to create the trust, the author of the trust should indicate with reasonable certainty by any words or acts-

1. an intention on his part to create the trust,
2. the purpose of the trust,
3. the beneficiary,
4. the trust property, and
5. should (save in the case of a trust declared by will , and of a trust of which the author is himself the trustee) transfer the property to the trustee.

The above mentioned provision under Section 6 is subject to the provision of section 5 which prescribes that no trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust and by the trustees.

Illustrations

(a) A bequeaths certain property to B, “having the fullest confidence that he will dispose of it for the benefit of C”. This creates a trust so far as regards A and C.

(b) A bequeaths certain property to B, “hoping he will continue it in the family”. This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(c) A bequeaths certain property to B, requesting him to distribute it amongst such members of C’s family as B should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(d) A bequeaths certain property to B, desiring him to divide the bulk of it among C’s children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

(e) A bequeaths a ship and stock-in-trade to B, on condition that he pays A’s debts and legacy to C. This is a condition, not a trust for A’s creditors and C.

As a general rule, any person who is legally competent to dispose of a property can create a trust over it to the extent of his power of disposition and any person who can hold or acquire property can be a trustee or beneficiary.

According to Section 7 of the Act, “a trust may be created by any person competent to contract, and with the permission of a principal civil court of original jurisdiction by or on behalf of a minor.

For the creation of a trust, no technical words are necessary. Any language may be used from which intention to create a trust appears.

Duties Of The Trustee

Trustee has the following duties-:

Duty To Execute Trust-

According to Section 11, the trustee is bound to fulfill the purpose of the trust, and to obey the directions of the author of the trust, given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

However, a trustee is not required to obey any direction which is impracticable, illegal or manifestly injurious to the beneficiaries.

Illustrations

(a) A, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(b) A, a trustee of certain land for X, Y and Z, is authorized to sell the land to B for a specified sum. X, Y and Z, being competent to contract, consent that A may sell the land to C for a less sum. A may sell the land accordingly.

(c) A, a trustee for B and her children, is directed by the author of the trust to lend, on B's request, trust-property to B's husband C, on the security of his bond. C becomes insolvent and B requests A to make the loan. A may refuse to make it.

1.Duty to inform himself of state of trust property.

According to Section 12, a trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust property to himself; and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Illustrations

(a) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(b) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case required.

Duty to protect Title to trust property

According to section 13, a trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Illustration

The trust-property is immovable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877 (3 of 1877), the trustee's duty is to cause the instrument to be registered.

2.Duty not to set up title adverse to beneficiary-

According to section 14, a trustee is under a duty not to set up or aid any title to the trust property adverse to the interest of the beneficiary.

3.Duty to act carefully-

According to section 15 a trustee is under a duty to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own; and in the absence to the contrary, a trustee so dealing is not responsible for the loss, destruction, or deterioration of the trust property.

Illustrations

(a) A, living in Calcutta, is a trustee for B, living in Bombay. A remits trust funds to B by bills drawn by a person of undoubted credit in favor of the trustee as such, and payable at Bombay. The bills are dishonored. A is not bound to make good the loss.

(b) A, trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, B, then in credit. The rents are accordingly paid to B, and A leaves the money with B only till wanted. Before the money is drawn out, B becomes insolvent. A, having had no reason to believe that B was in insolvent circumstances, is not bound to make good the loss.

(c) A, a trustee of two debts for B, releases one and compounds the other, in good faith, and reasonably believing that it is for B's interest to do so. A is not bound to make good any loss caused thereby to B.

4.Duty to Conversion of perishable property

According to Section 16, where the trust is created for the benefit of several persons in succession, and the trust property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

Illustrations

(a) A bequeaths to B all his property in trust for C during his life, and on his death for D, and on D's death for E. A's property consists of three leasehold houses, and there is nothing in A's will to show that he intended the houses to be enjoyed in specie. B should sell the houses, and invest the proceeds in accordance with section 20.

(b) A bequeaths to B his three leasehold houses in Calcutta and all the furniture therein in trust for C during his life, and on his death for D, and on D's death for E. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and B should not sell them.

5.Duty to be impartial

According to Section 17, where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

6.Duty to prevent waste

According to Section 18, where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

7.Duty to furnish Accounts and information

According to Section 19, a trustee is under a duty

(a) to keep clear and accurate accounts of the trust-property, and

(b) at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

Liability Of Trustees

1.To make good the loss which the trust property has suffered by reason of the breach of the trust

According to section 23, Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases :-

(a) where he has actually received interest;

(b) where the breach consists in unreasonable delay in paying trust-money to the beneficiary;

(c) where the trustee ought to have received interest, but has not done so;

(d) where he may be fairly presumed to have received interest.

He is liable, in case (a), to account for the interest actually received, and, in case (b), (c) and (d), to account for simple interest at the rate of six per cent per annum, unless the court otherwise directs;

(e) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate;

(f) where the breach consists in the employment of trust-property or the proceeds thereof in trade or business he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the net profits made by such employment.

Illustrations

(a) A trustee improperly leaves trust-property outstanding, and it is consequently lost; he is liable to make good the property lost, but he is not liable to pay interest thereon.

2.No set-off allowed to trustee

According to section 24, a trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-Property cannot set-off against his liability a gain which has accrued to another portion of the trust property through another and distinct breach of trust.

3.Liability for breach of trust by co-trustees

The liability of a trustee for breach of trust by co-trustees are as follows-

- **Liability on co trustee's default**– According to section 26 of the Indian Trust Act, Subject to the provisions of sections 13 and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee. But a trustee will be liable for breach of trust by his co-trustee where he is himself guilty of some neglect of duty, e.g-
 - (a) where he has delivered trust-property to his co-trustee without seeing to its proper application;
 - (b) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require;
 - (c) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.
- **Several liability of co-trustee**– According to section 27 of the act, where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

4. Contribution as between co-trustees where they jointly commit a breach of trust

Section 27 provides for, following cases where a contribution as between co-trustees will be effected:-

as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss;

if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

5. Liability of trustee where beneficiary's interest is forfeited to the government

As per section 29 of the Act, when the beneficiary's interest is forfeited or awarded by legal adjudication to the government, the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as the State Government may direct in this behalf.

RIGHTS & POWERS OF TRUSTEES (Section 31 to 45)

i) Rights to title deeds:

A trustee has a right to the possession of the trust deed and all title-deed relating to the trust property.

ii) Right to reimbursement:

A trustee is not entitled to any remuneration unless the trust deed has provided for it. However, he has a right to reimbursement of all expenses incurred by him in the execution of the trust, in its management and administration. If he has paid from his pocket, he has a first charge on the trust property.

iii) Right to indemnity from a gainer:

Where a person reaps a benefit, as a result of a breach of trust, the trustee has a right to indemnity from such a gainer.

iv) Right to Court's opinion:

A trustee may apply by petition to the principle Civil Court, for its opinion, advice or direction on any matter relating to the administration or management of the trust property, and, he is deemed to have discharged his duties if he follows the orders of the Court.

v) Right to settlement of accounts:

On completion of his duties, the trustee is entitled to have the trust accounts duly examined and settled. If nothing is due to the beneficiary, the trustee has a right to an endorsement to that effect.

vi) General Authority of the trustee:

The trustee is empowered to do all acts which are reasonable and proper, in the interest of the trust. His power or authority generally springs from the trust deed and the Trusts Act.

Powers of the Trustee:

i) Power to sell trust property:

Where the trust-deed empowers the trustee to sell the trust property, he may sell either in lots or together by public auction or private contract. This is of course subject to any direction given in the trust deed.

ii) Power to sell under special conditions:

A trustee who is selling the property may impose special conditions of sale as may be reasonable as to title etc. He may buy or re-sell property at his discretion, which must be reasonable eg. A bequeaths property to B with a direction to sell it with all speed. The trustee may use his discretion in the interest of the trust.

iii) Power of convey:

The trustee who effects the sale, has the power to convey the property sold, as may be necessary.

iv) Power to vary investments:

The trustee may vary the investments of the trust; He may invest in Government securities as required in Sec.20, or he may vary. This power is subject to any direction contained in the trust deed.

v) Power to apply minor's Property:

As regards the minor's property held by a trustee, the rule is that the proceeds are to be spent for the maintenance of such a minor, or for his education or for worship, marriage, funeral etc.

vi) Power to issue receipts:

A trustee has powers to issue receipts in writing for any money, security or other movable property.

vii) Power to compound:

The sole trustee or trustees may allow more time or accept a compromise in respect of debts due. Of course, the trustee must act in good faith

Disabilities Of Trustees

The Indian Trust Act, 1882 deals with the disabilities of Trustees under Sections 46 to 54 they are given as under-

1. Trustee cannot renounce after acceptance (Section 46)

A trustee who has accepted the trust cannot afterwards renounce it except-

- (a) with the permission of a principal civil court of original jurisdiction, or
- (b) if the beneficiary is competent to contract, with his consent, or
- (c) by virtue of a special power in the instrument of trust.

2. A trustee cannot delegate his office (Section 47)

A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless

- (a) the instrument of trust so provides, or
- (b) the delegation is in the regular course of business, or
- (c) the delegation is necessary, or
- (d) the beneficiary, being competent to contract, consents to the delegation.

3. Co-trustees cannot act singly (Section 48)

When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

4. Control of discretionary power (Section 49)

Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal civil court of original jurisdiction.

5. Trustee may not charge for services (Section 50)

A trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust, except-

- Where there is express direction in the instrument of trust; or
- there is a control entered into with the beneficiary
- where the court, at the time of accepting the trust, has sanctioned it.

6. Trustee may not use trust property for his own profit (Section 51)

A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

7. Trustee for sale or his agent may not buy (Section 52)

No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

8. Trustee may not buy beneficiary's interest without permission (Section 53)

No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal civil court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage or lease is manifestly for the advantage of the beneficiary.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

9. Co-trustees may not lend to one of themselves (Section 54)

A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.