

4. THE LAW OF TRUST

OUTLINE

PART I. What is a Trust and to what the Act applies ?

PART II. Express or Declared Trusts—

(i) Creation,

(ii) Extinction.

PART III. The Administration of a Trust.

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PART I

What is a Trust and to what the Act applies ?

II. TO WHAT KINDS OF TRUSTS THE ACT APPLIES ?

1. Section 1 says in what cases the Act shall not apply. They are:

- (i) Wakfs created by a Mohammedan.
- (ii) Mutual relations of the members of an undivided family as determined by any customary or personal law.
- (iii) Trusts to distribute prizes taken in war among the captors.
- (iv) Public or Private religious or Charitable Endowments.

2. *Explanations.*

I. Wakf.—Permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable.

Two classes of Wakfs—

- (i) Where benefit is reserved to the settlor and his family— Act VI of 1913 applies.
- (ii) Where no benefit is reserved—Act 42 of 1923 applies.

II. MUTUAL RELATIONS OF MEMBERS OF AN UNDIVIDED FAMILY.

Illus.—

1. The manager of a joint Hindu family and other members of the family.

2. A Hindu widow and a reversioner.

Their relations are not governed by the Trust Act. They are governed by customary law or personal law.

III. DISTRIBUTION OF PRIZES TAKEN IN WAR.

1. *Prize.*—A term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea or seized in port.

2. All prizes taken in war vest in the sovereign, and are commonly by the royal warrant granted to trustees upon trust to distribute in a prescribed manner amongst the captors.

3. To such a trust created for the purpose of distributing prizes the Trust Act does not apply.

IV. PUBLIC TRUSTS AND PRIVATE, RELIGIOUS OR CHARITABLE ENDOWMENTS.

Trusts are either *Public* or *Private Trusts*.

I. *Public Trusts*.—A trust is a Public Trust when it is constituted for the benefit either of the public at large or some considerable portion of it answering a particular description. A Public Trust is for an unascertained body of people though capable of ascertainment.

II. *Private Trust*.—A Private Trust is a trust created only for the benefit of certain individuals who must be ascertained or ascertainable within a limited time.

III. *The Purposes of a Public Trust*.—They fall under three heads:—

- (i) Public purposes.
- (ii) Charitable purposes.
- (iii) Religious purposes.

(1) The phrase public purposes is used in two senses :

(a) In its ordinary sense—it includes purposes. Such as mending or repairing of roads, a parish supplying water for the inhabitants of a parish, making or repairing of bridges over any stream or culvert that may be required in a parish.

(2) The Phrase Charitable Purposes—includes almsgiving, building alms-houses, founding hospitals and the like.

(3) The Phrase Religious Purpose—includes relating to religious teaching or worship—purchase or distribution of religious books, upkeep of Churches, Temples, etc.

If a Trust is a Public Trust—The Trust Act does not apply.

If a Trust is a Private Trust—Does the Trust Act apply ?

The Act applies only if the Private Trust is a trust which is not a Charitable or Religious Trust.

What is the Law that applies to a Public Trust or a Private Trust which is Charitable and Religious ? There are various enactments which apply.

1. Section 92, C. P. C.
2. The Religious Endowments Act, 1863.

3. The Religious Society's Act I of 1880.
4. The Official Trustee Act II of 1913.
5. The Charitable Endowments Act VI of 1890.
6. The Charitable and Religious Trusts Act XIV of 1920.

Different kinds of Trusts

1. Trusts fall into different classes. The class into which a trust falls depends upon the point of view a trust is looked at—

2. A trust can be looked at from three points of view—

- (i) From the point of view of the mode in which a trust is created.
- (ii) From the point of view of the constitution of the trust.
- (iii) From the point of view of the nature of the duty imposed on the trustee.

3. From the point of view of the mode in which a trust is created trusts fall into two divisions (i) Express and (ii) Constructive.

4. From the point of the constitution of a trust, trusts fall into two divisions (i) completely constituted trusts and (ii) incompletely constituted trust.

5. From the point of view of the nature of the duty imposed on the trustee trusts fall into two divisions (i) Simple Trusts and (ii) Special Trusts.

I. EXPRESS AND CONSTRUCTIVE TRUST

1. A trust can arise in two ways—

- (i) It is the result of a voluntary declaration made by an individual,
- (ii) It may be the result of a rule of law.

2. When a trust is the result of a voluntary declaration it is called an Express Trust or Declared Trust. When a trust is the result of a rule of law it is called a Constructive Trust.

3. The term Constructive Trust is used in another sense. In this sense it is used to signify a trust which is the result of a construction put upon the deed. A trust is a matter of intention. Intention may be declared in specific terms or it may be found by the Court to have been indicated by the party on a proper construction of the deed. In the latter case the trust is sometime called a Constructive Trust.

4. Two things have to be remembered in connection with a constructive trust used in this sense.

(i) Such a Constructive Trust is some times contrasted with an Express Trust. This is quite wrong. Such a Constructive Trust is really an Express Trust and is not to be contrasted with it. A trust is none the less an Express Trust because the language used by the settlor is ambiguous or clumsy, if, on the true construction of that language the Court comes to the conclusion that a trust must have been *intended*.

(ii) A trust which is constructive in the sense that the intention is deduced by constructing the document must not be confused with a Constructive Trust which is the result of the operation of the law. In the former there is an intention to create a trust and in that sense it is the result of the voluntary act of the party. In the latter there is no intention to create a trust. It is the creation of law and not of an act of the party.

Constructive Trusts fall into two sub-divisions :—

(i) Resulting Trusts.

(ii) Non-Resulting Trusts.

The difference between the two will be considered later when dealing with Constructive Trusts. They have one thing in common—they are both the result of the operation of law and not the result of an act of party.

II. COMPLETELY CONSTITUTED TRUSTS AND INCOMPLETELY CONSTITUTED TRUSTS.

1. A trust is said to be completely constituted when the trust property is *vested* in the Trustees for the benefit of the beneficiaries. When there is a mere declaration of a trust but the property is not vested in the Trustee the trust is incompletely constituted.

2. The question whether a trust is completely constituted or not is of the *utmost* importance where no valuable consideration is given for its creation.

3. *If value is given* it is immaterial whether the trust is perfect or not, for as equity looks on that as done which has been agreed to be done an imperfect conveyance for value will be treated a contract to convey and the Court will see that it is perfected.

4. *If no value is given* there is no equity and the Court will not grant any assistance to a person seeking to enforce.

5. If there is a complete transfer of property although it is voluntary yet the legal conveyance being effectually made the trust will be enforced by the Court.

6. There are two ways in which a trust may be completely constituted:

- (i) The settlor may convey the property to the trustees.
- (ii) The settlor may declare himself to be a trustee of it.

7. Distinction between complete and incomplete trust—

- (i) A completely constituted trust is one in which the trust property has been finally and completely vested in the trustees.
- (ii) A trust is incompletely constituted when the trust property has not been finally and completely vested in the trustees.

NOTE.—All trusts arising under wills are completely constituted, though may be either executed or executory—

- (iii) A settlor must take all due steps to do all that it is his duty to *vest* the property in the trustee, and the instrument of conveyance must also contain a declaration of trust, if the settlor's intention is to escape defeat.

8. Consequences arising from this difference—

- (i) An incomplete trust will be enforced if it is for valuable consideration. It will not be enforced if it is voluntary, i.e., without valuable consideration.

- (ii) Valuable consideration in the law of trust, as in the law of contract, is some valuable thing assessable in terms of money, with the proviso that marriage, and also forbearance to sue is so considered.

- (iii) A distinction exists between valuable consideration and good consideration. The phrase good consideration is applied to natural love and affection. Such a consideration though good is not valuable.

- (iv) A good consideration does not make an incompletely constituted trust enforceable at the instance of a volunteer. It serves to rebut a resulting trust.

(v) How far marriage is a consideration :

- (i) If the settlement is made *before* and in consideration of marriage, it is made for valuable consideration. So it is also, if made after marriage, but in fulfilment of an ante-nuptial agreement to settle.

- (ii) But if the settlement is made after marriage, and not in pursuance of an ante-nuptial agreement, it is voluntary.

(VI) *Who are within the marriage consideration :*

(i) The only persons within the marriage consideration are the actual parties, the husband and the wife, and the issue of that marriage.

(ii) All other persons are volunteers and cannot enforce the provisions of a settlement *as against the settlor* so far as the transfer of property is still incomplete, e.g., an agreement to settle after—acquired property.

9. *Does the Indian Trust Act recognize this distinction between complete trust and incomplete trust—*

Simple and Special Trusts

1. A Simple Trust is a trust in which a trustee is a mere passive custodian of the trust property, with no active duties to perform.

2. A Special Trust is a trust in which a trustee is appointed to carry out some scheme particularly pointed out by the settlor and is called upon to exert himself actively in the execution of the settlor's intention.

3. A Simple Trust is spoken of as a passive trust and Special Trust is spoken of as an active trust.

4. Where a Simple Trust exists, the beneficiary, provided that he is *sue juris* and absolutely entitled, has a right to be put into actual possession of the property and he enjoys the further right of compelling the trustees to dispose of the legal estate in accordance with the beneficiary's instruction.

5. Special Trusts are divided into—(i) Ministerial and (ii) Discretionary.

6. In both the trustees have positive duties to perform.

7. The point of distinction is that in a Ministerial Trust the duties are such that the trustee is not called upon to exercise *prudence* while in a discretionary trust a trustee is required to exercise *prudence*.

PART II
EXPRESS OR DECLARED TRUST

- CHAPTER I. Two kinds of Declared Trusts—
(i) Executed.
(ii) Executory.
- CHAPTER II. The Creation of an Express Trust.
- CHAPTER III. The Revocation of an Express Trust.
Declared
- CHAPTER IV. The Extinction of an Express Trust.

CHAPTER I

Two kinds of Declared Trusts

Executed and Executory

An Express Trust is either an *Executed Trust* or is an *Executory Trust*.

I. EXECUTED AND EXECUTORY TRUSTS

1. The expressions Executed and Executory as used in relation to contract have not the same meaning which they have when used in relation to trust.

2. When used in relation to a contract they refer to the carrying out of the contract. When used in relation to a trust they refer to the creation of a trust as distinguished from its carrying out.

3. In the sense in which the term is used in contract every trust is executory until it is over. But that is not the meaning in which the word is used in relation to trust.

4. When the words *Executed* and *Executory* are used in connection with a trust they have different meaning.

(1) A trust is an *Executed Trust* when the author of the trust has not only designated the persons who are to benefit by the trust but has also indicated the *interests* which they are to take in the trust property.

(2) A trust is said to be an Executory Trust when the author of the trust has only designated the persons who are to benefit by the trust but has not indicated the interests which they are to take in the trust property but has left it to be defined by another person by another instrument.

Illus.—On the marriage of *A* and *B* it is agreed between them that certain property shall be settled on trust for them and for their children.

NOTE.—Here the parties who are to benefit by the trust are defined—They are *A* and *B* and their children—

(1) But what benefits *A* and *B* their children are to take is not defined.

(2) Therefore, it is an Executory Trust.

(3) The line of cleavage between an Executed Trust and an Executory Trust is different from the line of cleavage between a completely constituted trust and an incompletely constituted trust.

(4) The line of cleavage between a completely constituted trust and an incompletely constituted trust is:- in the former the property is vested in the Trustees upon trust; in the latter the property is not so vested.

(5) The line of cleavage between an Executed Trust and an Executory Trust is that in the former the interests of the beneficiaries are defined when in the latter they are not so defined.

(6) That being so an Executory Trust may be a completely constituted Trust.

II. PARTIES TO A TRUST.

1. Apparently there are three parties to the transaction of a trust—

- (i) The party who makes the trust.
- (ii) The party who accepts the trust.
- (iii) The party for whose benefit the trust is made.

2. The party who makes the trust is called “the author of the trust”. The party who accepts the trust is called the trustee. The party for whose benefit the *trust* is made by the author and accepted by the trustee is called the beneficiary.

3. Is it necessary that the three parties *should* be distinct and separate and that one of three cannot occupy the role of any two of them ? The answer to this question is *some* of them can play the role of two.

- (i) The author of the trust and the beneficiary of the trust must be distinct and separate.
- (ii) The trustee and the beneficiary must be distinct and separate.
- (iii) The author of the trust need not be distinct and separate from the Trustee..

4. The reasons why some parties can occupy the role of two in one and some cannot are important.

(i) The making of a trust results in the creation of two different estates in the property which is the subject-matter of the trust—the legal and the equitable. A trust lasts as long as these two interests remain separate, (ii) If the legal and equitable estates happen to meet in the same person, the equitable is forever extinguished by being absorbed in the legal. In other words, where the legal and the equitable interests are co-extensive and

vested in the same person the equitable merges in the legal interests which means that the trust comes to an end.

There are two principles to be borne in mind

(i) There is no trust if it does not create a separate equitable interest.

(ii) There is no trust if the separate legal and equitable interest become merged.

5. Applying these two principles we reach the following conclusion—

(i) There is no merger when the author of the Trust and the trustee are the same. Therefore, they need not be distinct.

(ii) There is no creation of a separate equitable estate when the author of the Trust and the beneficiary are the same. Therefore, they must be distinct.

(iii) There is merger when the trustee and the beneficiary are the same. Therefore, they must be distinct.

To sum up. The author of the trust and the trustee may be one and the same person. But the beneficiary must always be a distinct person separate from the author of the trust as well as from the trustee.

6. So far we have taken simple cases where the parties are single individuals. What happens when the parties are multiple parties, and where some of them play double role.

Illus.

(i) A and B are the beneficiaries of a trust. Of them A is also a trustee. Is such a trust valid ?

(ii) A and B are beneficiaries of a trust. Of them A is the author of the trust. Is such trust valid ?

7. The answer to the first question is in the affirmative. It is found in Section 6 which defines a trust. The definition does not give an answer to the Second question. Yet such a trust is invalid.

CHAPTER II

(i) The Creation of an Express Trust

I. CONDITIONS FOR THE CREATION OF A VALID TRUST.

For the validity of a declared Trust the following *four* conditions prescribed by law must be satisfied.

(i) Section 6.

(1) There must be necessary parties to the trust.

(2) The language of the settlor must be such that the Court can find from it, as a fact,

- (a) an intention to create a trust;
- (b) of ascertainable property ;
- (c) in favour of ascertainable beneficiaries and
- (d) for an ascertainable purpose.

(ii) Sections 7-8.

The trust property must be of such a nature as to be capable of being transferred and settled in trust.

(iii) Section 4.

The object of the trust must be lawful.

2. The English Law of Trust differs from the Indian Law in regard to the creation of a trust. According to Snell the creation of a trust requires three certainties,

- (i) Certainty as to intention.
- (ii) Certainty as to trust property.
- (iii) Certainty as to beneficiary. According to Underhill the creation of a trust requires *four* certainties, those mentioned by Snell and one more namely.
- (iv) The purpose of the trust.

The English Law does not require the transfer of the trust property to the trustee. But the Indian Law does.

(ii) Certainty as to intention

(i) The intention to create a trust may be by words or acts.

(ii) These are illustrations which show how a trust could be created by the acts of the author of the trust.

Illus.

(i) A father opening an account in his book in the name of his son in which money is credited in the name of his son.

9 Bom. 125

(ii) A buying shares in

5 Bom. 268

17 Col. 620 (628)

3. Examples of trust created by words are unnecessary. The question is what kind of language is necessary to show there is a certainty to show that there was intention to create a trust—

(i) No technical expressions are needed for the creation of a trust. The matter is one of construction. The question, therefore, which has to be determined is whether upon construction of the will or deed as a whole, the testator intended that the person to whom property was given should take as a mere trustee or should take beneficially, subject to a mere superadded expression of a wish or desire, which the testator may have thought would be sufficient to influence the donee, but which was not intended to and does not impose upon him any obligation. Question is did the author of the trust merely express a wish that the trustee should do a particular thing or did he impose an obligation upon him to do a certain thing. If an obligation was in fact intended then obviously he had the intention to create a trust.

(iii) The language used may be either *precatory* or *imperative*.

(i) The words request, recommend, desire, hope, etc., are precatory words.

(ii) Such words cannot be said to indicate an intention to create a trust, because they do not show an intention to impose an obligation upon the trustee.

(iii) Under the English Law such precatory words were held to constitute a trust and the trusts were called precatory trust. But the modern tendency is against.

(iii) Certainty as to beneficiary

1. The beneficiary must be specified or described sufficiently as to be capable of identification.

2. *Illustrations of uncertainty.*

(i) Estate given to A with the direction that he would continue it in the family—family uncertain.

(ii) To the settlor's relations—relations uncertain.

3. *Illustrations of sufficient description*

(i) Descendants-held to be sufficient description and therefore not uncertain

3. **Certainty of Purpose**

1. How the property is to be applied must be specified.

2. Illustrations of uncertainty of purpose.

(i) To consider certain persons.

(ii) To be kind to them.

(iii) To make ample provision for them.

(iv) To remember them.

(v) To do justice to them.

(vi) To take care of his nephew as might seem best in future.

(vii) To use property for herself and her children and to remember the Church of God and the poor.

3. The purpose of the trust means the way in which the beneficiaries are to be benefitted the way in which the property is to be applied.

4. **Certainty as to trust property**

1. The property which is to be the subject-matter of the trust must be indicated with reasonable certainty. It must be specified or sufficiently described so as to be capable of identification.

Illus.

(i) A bequeathes certain property to B—directing him to divide the *bulk* of it among the children of C. There is no creation of a trust because the property is not indicated with reasonable certainty.

(ii) A gives property in trust for his wife and directs that such part of it as may not be required by her shall, after her death, be held in trust for his children.

(iii) A gives property in trust for his servants with a direction to reward them according to their deserts out of such parts of my estate as may not have been sold or disposed of by her.

Conclusion

1. Thus, it must be clear that the settlor intended to create a *definite* trust over *definite* property for *definite* persons. No trust can arise in the absence of an intent to create a definite equitable obligation giving definite equitable rights to definite beneficiaries.

2. It will, however, be noticed that the failure to nominate a definite person as a trustee does not invalidate the trust. Where a trust is clearly intended, then (subject to the rules as to voluntary trust), the mere omission to appoint a trustee will not invalidate the trust: for equity never allows a trust to fail for want of a trustee. So, if no trustee is appointed or if the trustee appointed fails, either by death, or disclaimed or incapacity or otherwise the trust does not fail, but fastens upon the conscience of any person (other than a purchaser for value without notice) into whose hands the property comes and such person holds it as a passive trustee, whose only duty is to convey it to new trustees when properly appointed.

3. The effect of uncertainty as to property or as to beneficiary or purpose of the trust is different:

(i) Where the trust is affected by uncertainty as to property the trust is void. As there is no property capable of identification there is nothing to litigate about.

(ii) Where the trust is affected by uncertainty as to the beneficiary or the purpose the trust is void. As there is no person named as a beneficiary no one can come forward to enforce it.

(iii) Where the property is described with sufficient certainty, and the words actually used, or the surrounding circumstances make it clear that although the donor has not sufficiently specified. The objects of his bounty or the way in which the property was intended to be dealt with yet he never meant the trustee to take the entire beneficial interest, the Law implies a resulting trust in favour of the donor or his representative.

II. TRUST PROPERTY MUST BE CAPABLE OF TRANSFER.

1. *What property is capable of transfer ?*

2. The answer to this question is to be found in section 6 of the Transfer of Property Act.

3. Property which can be transferred may be subject-matter of a trust.