

Chapter XV
Trustees—Their rights and powers

“At one period the ‘conscience’ of the trustee was so severely scrutinized that ordinary honest execution of a trust became a matter of considerable difficulty; and it was not till 1887 that doctrines... (e.g., ‘overrighteousness of equity’) were tempered with common sense, not to say mercy.”

—*Learoyd v. Whiteley*, 12 App Cas 727

C.K. Allen: *Law in the Making*, cited at p. 418.

SYNOPSIS

- | | |
|---|---|
| A. Rights | 2. Powers and Duties |
| 1. Text of Sections 31 to 35 | 3. Nature of Powers |
| 2. About Rights and Powers | 4. General Authority of a Trustee (Section 36) |
| 3. Right to Title Deed (Section 31) | 5. Statutory Powers of a Trustee |
| 4. Right to Reimbursement of expenses (Section 32) | 6. Power to Sell in lots, etc. (Sections 37, 38, 39) |
| 5. Right to Indemnity against Beneficiary Personally (Section 32) | 7. Power to vary Investments (Section 40) |
| 6. Right to Indemnity from Gainer by Breach of Trust (Section 33) | 8. Power with regard to Maintenance of Minor Beneficiaries (Section 41) |
| 7. Right to seek Court's Direction (Section 34) | 9. Power to give Receipts (Section 42) |
| 8. Right to Settlement of Accounts (Section 35) | 10. Power to Compound (Section 43) |
| B. Powers | 11. Vesting and Suspension of Power (Sections 44 and 45) |
| 1. Text of Sections 36 to 45 | |

A. RIGHTS

1. TEXT OF SECTIONS 31 TO 35

B1. Right to title-deed.—A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property.

B2. Right to reimbursement of expenses.—Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a Principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fails, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment of the amount of such expenses.

Right to be recouped for erroneous overpayment.—Where a trustee has by mistake made an over-payment to the beneficiary, he may reimburse the trust-

property out of the beneficiary's interest. If such interest fails, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.

33. *Right to indemnity from gainer by breach of trust.*—A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary the trustee has a charge on his interest for such amount.

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

34. *Right to apply to court for opinion in management of trust-property.*—Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on any present questions respecting the management or administration of the trust-property other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

35. *Right to settlement of accounts.*—When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

2. ABOUT RIGHTS AND POWERS

In the strict sense of the term, to ascribe a right to a person is to imply that some other person is under a corresponding duty. Used in a wider sense, to say that a man has a right to something is roughly to say that it is his right to obtain it. This may entail that others ought to provide him with it, or that they ought not to prevent him from getting it, or merely that it would not be wrong for him to get it. Thus in the strictest sense *rights constitute the correlatives of duties*; in its generic sense it connotes and may be defined as *any advantage or benefit conferred upon a person by a rule of law*. Of rights in this sense there are four distinct kinds: (i) rights (in the strict sense), (ii) liberties, (iii) powers, and (iv) immunities.¹

1. Salmond: *Jurisprudence*, Chap. 7.

We are concerned here with the rights and powers of trustees. A right exists when law *limits the liberty of others* in my behalf, and a power exists when law *actively assists me* in making my will effective. In other words, what others *ought to do* towards me is my right; what *I may do innocently* is my liberty; but what *I can do effectively* is my power.

The rights and powers of trustees have been laid down in Chapter IV, Sections 31 to 45 of the Indian Trusts Act. Accordingly a trustee is entitled (i) to have the title deeds of the trust-property in his possession, (ii) to be reimbursed of the expenses incurred in respect of the property of the trust, (iii) to seek the court's opinion, (iv) to have the accounts of the trust-property examined and settled, and (v) to be indemnified from the gainer by breach of trust.

Apart from the above rights, one has to remember that a trustee has one supreme and extraordinary right, and that is a right conferred by law upon him that he can give a valid title to a *bona fide* purchaser from him without notice even though his act of alienation may be one resulting from his breach of trust. He has also those rights which a trust instrument confers upon him or which are given to him or recognised by equity, which he is to exercise for the benefit of the beneficiaries. The Indian Trusts Act gives him the following rights.

3. RIGHTS TO TITLE DEED (SECTION 31)

In the eyes of the law, a trustee is the owner of the trust estate and therefore he is entitled to have in his possession the instrument of trust and all the other documents of title relating solely to the trust-property. When a trust is created there must be a transfer of property to the trustee or else no trust can come into existence. When the title deeds relating to property are not delivered up to the trustee, a trustee has a right to secure them so that the same may not be used otherwise and so that he can be safe and the property secured.

4. RIGHT TO REIMBURSEMENT OF EXPENSES (SECTION 32)

It is the right of a trustee to be reimbursed from the trust-property, as regards all expenses properly incurred in connection with the execution of the trust, or realization, preservation, protection of the trust-property and support of the beneficiary. Such expenses if incurred out of his pocket shall be the first charge over the trust-property and before such property is disposed of this charge must be settled. If the trust-property fails to pay for these expenses, they would be recovered from the beneficiary personally. The same is the case with overpayment made erroneously to the beneficiary by a trustee.

In order that a trustee may recover the expenses from the beneficiary personally, the beneficiary must be *sui juris* and must not have disclaimed his beneficial interest in the trust. As expressed by Lord Eldon, such a charge being in respect of expenses incurred in respect of due discharge of duties of the office of a trustee, it is not considered to be a profit obtained by the trustee from his office and, therefore, even though the instrument does not provide for it, it shall

be reimbursed.² To be recoverable, such charges must fulfil two conditions: (i) they must be in the execution of the trust, and (ii) they must be reasonable and not speculative or oppressive. Only the good faith of a trustee, short of the above two conditions left unfulfilled, is not helpful to him.

5. RIGHT TO INDEMNITY AGAINST BENEFICIARY PERSONALLY

As pointed out by Nathan³, a trustee's right of indemnity in respect of expenses properly incurred, e.g., in respect of costs, a call on shares, solicitor's, stockbroker's or auctioneer's charges, is a right of indemnity against the *trust-estate*, not against the *beneficiary*. Hence the trustees of an ordinary club are entitled to be indemnified by the club property, not by the club members.⁴ But in the following circumstances a trustee's indemnity extends beyond the estate to the beneficiary personally.

First, where the trustee accepted the trust at the request of the beneficiary. Secondly, where the beneficiary was the creator of the trust. Thirdly, where the beneficiary is a sole beneficiary *sui juris* and entitled absolutely,⁵ and fourthly, where there is apparently also a personal indemnity against several beneficiaries, provided they are all *sui juris* and collectively entitled absolutely and the expense was incurred at the request of all of them. Section 32, para 3 implies this position.

6. RIGHT TO INDEMNITY FROM GAINER BY BREACH OF TRUST (SECTION 33)

A person gaining an advantage from a breach of trust must indemnify the trustee to the extent of the benefit obtained by him from the breach. Such a person must not be a trustee but if he is a beneficiary, his beneficial interest will stand charged for such amount. A trustee committing a fraud and obtaining a benefit from his breach of trust is not entitled to be indemnified.

7. RIGHT TO SEEK COURT'S DIRECTION (SECTION 34)

Opinion, advice or direction of a principal Civil Court of original jurisdiction can be sought by a trustee by an application in that regard, on any present questions of management or administration of trust-property. And a trustee so acting according to court's opinion shall be deemed to have discharged his duties in that respect. But on questions of detail, difficulty or importance, no such petition for court's advice can be filed. It is for the court to decide whether the questions are worth summary disposal or otherwise. Section 34 is an enabling section. It does not take away powers from trustees.⁶ Under this section the court will not decide as to who is entitled to be a trustee.⁷

2. *Warral v. Harford*, 8 Ves 8; *Bennet v. Wyndham*, 4 DF & J 259.

3. *Equity Through the Cases*, p. 617.

4. *Wise v. Perpetual Trustee Co.*, 1903 AC 139.

5. *Hardoon v. Belilios*, 1901 AC 118.

6. *D.K. Sain v. Smt Nandarani Dassi*, AIR 1970 Cal 292.

7. *Krishna Kumar Keosa v. Krishanlal*, AIR 1979 JK 13.

8. RIGHT TO SETTLEMENT OF ACCOUNTS (SECTION 35)

On completion of his duties as a trustee, he is entitled to have the trust accounts examined and settled and to obtain an acknowledgment that nothing is due to the beneficiary under the trust.

B. POWERS

1. TEXT OF SECTIONS 36 TO 45

^B 36. *General authority of trustee.*—In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions, if any, contained in such instrument, and to the provisions of Section 17, a trustee may do all acts which are reasonable and proper for the realization, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

37. *Power to sell in lots, and either by public auction or private contract.*—Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

38. *Power to sell under special conditions: Power to buy-in and re-sell.*—The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy-in the property or any part thereof at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Time allowed for selling trust-property.—Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Illustrations

- (a) A bequeaths property to B, directing him to sell it with all convenient speed and pay the proceeds to C. This does not render an immediate sale imperative.
- (b) A bequeaths property to B, directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of C. This does not authorize B, as between him and C, to postpone the sale to an indefinite period.

39. *Power to convey.*—For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

40. *Power to vary investments.*—A trustee may, at his discretion, call in any trust-property invested in any security and invest the same on any of t'

securities mentioned or referred to in Section 20, and from time to time vary any such investments for others of the same nature:

Provided that, where there is a person competent to contract and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing.

41. *Power to apply property of minors, etc., for their maintenance, etc.*—Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in any of the securities mentioned, or referred to in Section 20, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen:

Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the person and property of minors.

42. *Power to give receipts.*—Any trustee or trustees may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering, the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

43. *Power to compound, etc.*—Two or more trustees acting together may, if and as they think fit—

- (a) accept any composition or any security for any debt or for any property claimed;
- (b) allow any time for payment of any debt;
- (c) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust; and,

- (d) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

44. *Power to several trustees of whom one disclaims or dies.*—When an authority to deal with the trust-property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

45. *Suspension of trustee's powers by decree.*—Where a decree has been made in suit for the execution of a trust, the trustee must not exercise any of his powers except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

2. POWERS AND DUTIES

In the preceding chapter we have noticed that powers are different from duties in so far as powers are discretionary while duties are imperative. The difference between them lies in the nature of the act one is obliged to do. A duty is to be performed, according to Strahan, whether one likes it or not, or whether it is wise to do so or not. In powers or discretions, one is bound to think and exercise his judgment as to whether it is wise to do a thing or not and to act accordingly.

3. NATURE OF POWERS

For proper and efficient discharge of their duties by trustees, vesting of power in them is necessary. Exercise of power depends upon the nature of a trust and the character and situation of the beneficiary. In case of special trusts and in case of beneficiaries not being *sui juris* the exercise of power is bound to vary. In case of absolute power to the trustee the court cannot compel him to exercise it, but the court will see that it is not exercised improperly in case it is proposed to be exercised. In case of power coupled with duty, its proper and timely exercise will be compelled⁸ by a court but the manner and method of its exercise cannot be a matter of control by the court. Powers must be exercised for the benefit of a trust and its exercise must be *bona fide*, reasonable and

8. See Section 49, Indian Trusts Act, 1882.

impartial. The Indian Trusts Act, 1882 lays down the powers of a trustee in Sections 36 to 45.

4. GENERAL AUTHORITY OF A TRUSTEE (SECTION 36)

Over and above the powers given to a trustee by the instrument of trust and by this Act, a trustee has been given a general authority by this Act by virtue of which he "may do all acts which are reasonable and proper" for

- (i) the realization, protection or benefit of the *trust-property*, and
- (ii) for the protection and support of a *beneficiary who is not competent to contract*.

Of course this general authority is subject to the following restrictions: (i) restrictions contained in the instrument, (ii) provisions of Section 17 (a trustee to be impartial), and (iii) restriction as to leasing of trust-property.

The underlying principle behind granting such wide powers to a trustee is very clear. For this purpose one has to anticipate and foresee that a time may come or occasions may arise during the administration of a trust which demand proper but immediate decision; and it is very likely that on that decision, depends the benefit or loss to, either the trust-property or to the beneficiary.⁹ In cases of emergency or necessity, when it is not possible to obtain sanction of a trustee's action from the beneficiaries (i) because they are not *sui juris*, or (ii) because they are away, or (iii) because they suffer from a disability which prevents them from consenting, or (iv) because they have not come into existence and therefore no sanction can be obtained at all, or (v) because seeking opinion from a court is very expensive and time-consuming and by the time the opinion is obtained the opportunity is lost, in all such cases liberty of reasonable action is granted to the trustee which he may utilise taking into consideration the importance of the situation. But a trustee cannot do acts which are unreasonable, unnecessary and problematical. He may get the property of trust repaired¹⁰ or may make improvements¹¹ therein but cannot make merely ornamental improvements. He can improve but cannot rebuild residential property. He can thus do all proper and reasonable acts suitable for the realization, protection and benefit of the property and for the protection and support of the beneficiaries who are not *sui juris*. These two points, benefit to the property and protection and support of the beneficiary, are the guiding principles on which he may act. Still, however, in such cases a trustee is not to act capriciously but has to exercise his sound discretion.

5. STATUTORY POWERS OF A TRUSTEE

These statutory powers are enlisted in Sections 37 to 45. They are (i) power to sell; (ii) power to sell under special circumstances; (iii) power to convey; (iv) power to vary investments; (v) power to apply property of minors, etc., for their

9. *Ward v. Ward*, (1843) 2 HLC 784.

10. *Bellinger v. Bellinger, Re*, (1898) 1 Ch 534.

11. *Dalim Kumar Sain v. Smt Nandarani Dassi*, AIR 1970 Cal 292, 310.

maintenance; (vi) power to give receipts; and (vii) power to compound. Sections 44 and 45 provide for joint power and suspension of a trustee's power.

6. POWER TO SELL IN LOTS, ETC. (SECTIONS 37, 38 AND 39)

As decided in *Murlidhar Narayan v. Dattajirao*¹², there is no express power conferred by the Indian Trusts Act upon the trustee to sell the trust-property. A trustee as such, therefore, has no right to sell the trust-property. If he sells it the vendee's title will be impeachable and challenged either by a beneficiary or anyone claiming through him. But, if he is empowered to sell as Sections 37 and 38 say, he may sell the property in lots, by auction or on any special condition. He can thus convey the property under Section 39 and complete the sale. While selling the trust-property he has to act in a manner most advantageous to the trust estate and must use all due diligence with reference to the time for sale, the manner of sale and the value of the property in question. He may sell subject to prior charges or not, either together or in lots, by public auction or private contract and either at one time or at several times. If the trust deed provides otherwise those directions have to be followed. As Section 38 provides, he can buy in and resell and may insert special conditions but in all such cases of sale and investment of trust money in purchase of property he must exercise reasonable discretion as to the time of effecting the sale or purchase. As the Illustrations to Section 38 connote, an immediate sale may not be imperative but a trustee cannot postpone the sale for an indefinite period.

As decided in *Shirinbai M. Dalal, Re*,¹³ *Manilal Hargovan, Re*,¹⁴ and *De Souza v. Daphtary*¹⁵, circumstances may arise which the author of the trust did not contemplate and therefore the instrument of the trust cannot direct or does not provide; in such a situation of real emergency the court under its extraordinary jurisdiction will accord sanction to the acts of trustees, which are beneficial to and necessary for, the protection of the trust estate. It has been cautioned that this kind of jurisdiction is of an extremely delicate nature and therefore it must be made use of with the greatest possible care and caution. In short, what is termed as "expedient" for the management or administration of the trust-property must be sanctioned by the court.

7. POWER TO VARY INVESTMENTS (SECTION 40)

We have seen in the previous chapter that a trustee has a duty to convert perishable property into income-bearing property and this is intimately connected with the economics of investment. Section 40 of the Indian Trusts Act in this regard gives power to a trustee to vary investments. To invest means "to employ money in the purchase of anything from which interest or profit is expected". A trustee while investing has to bear in mind one thing, and that is, the investment must produce income and maintain the capital. Thus a purchase

12. 53 Bom LR 883; AIR 1952 Bom 106.

13. 21 BLR 41; 43 Bom 519.

14. 25 Bom 353; 3 Bom LR 411.

15. 25 BLR 617.

of a house for occupation is held not to be an investment.¹⁶ It is for this reason that power is usually given expressly to a trustee to make such a purchase.¹⁷ The Indian Trusts Act, 1882, Section 40 gives power to a trustee to vary investments and thus gives the trustee an area of choice within the principle of advantageous investments or the economics of investment.

As the section goes, a trustee at his discretion can call in the trust-property already invested and reinvest the same in any of the securities mentioned under Section 20. He can do so from time to time. But where the beneficiary is competent to contract and is entitled to the trust income for his life or is entitled to any greater estate, his consent in writing is a must for the trustee varying investments. This means that where the beneficiary is a minor, a trustee can vary investments, but when the beneficiary becomes competent to contract a trustee cannot exercise this power without written consent of the beneficiary.

8. POWER WITH REGARD TO MAINTENANCE OF MINOR BENEFICIARIES (SECTION 41)

A trustee has power to pay to the guardians of a minor beneficiary, either the whole of the income of the trust-property or a part of it, as is suitable to the occasion for the minor's maintenance, education, advancement in life, religious worship, marriage or funeral. And whatever remains from the income thereafter may be invested by him as required under Section 20 of the Act. If the income accruing from the trust-property is insufficient for the purpose, the trust-property or the corpus may be so applied with the previous permission of the court.

9. POWER TO GIVE RECEIPTS (SECTION 42)

A trustee can pass a valid receipt for the money, etc., received by him and the receipt so obtained shall discharge the payer from all the liabilities with regard to it thereafter.

10. POWER TO COMPOUND (SECTION 43)

Two or more trustees jointly or a sole trustee so authorised, may accept any composition or any security for any debt or property, allow time for payment of any debt, compromise, compound, abandon, submit to arbitration or settle any debt, account, claim or thing relating to the trust and for this purpose do everything that is necessary. In so acting if they have observed good faith they will be free from any liability.

11. VESTING AND SUSPENSION OF POWER (SECTIONS 44 AND 45)

Authority given to several trustees to act may be exercised by the continuing trustees when one of them dies or disclaims, unless there is an indication to the contrary in the trust deed (Section 44). In case a decree is made for execution of a trust, a trustee is not to exercise any of his powers except in

16. *Power, Re.* 1947 Ch 572; *Peczenik's S.T., Re.* (1964) 1 WLR 720.

17. Hanbury: *Modern Equity*, Chap. 17.

conformity with such decree. But he can do so with the permission of the court that has given the decree or an appeal court where an appeal against the decree is pending.

Chapter XVI
Trustees—Their disabilities

“A trustee cannot delegate his trust. If confidence has been reposed in him by a dead man he cannot throw upon the shoulders of somebody else that which has been placed on his shoulders. On the other hand, in the administration of a trust, a trustee cannot do everything for himself, he must to a certain extent make use of the arms, legs, eyes and hands of other persons and the limit within which he is confined is that a trustee may follow the ordinary course of business provided that he runs no needless risk in doing so.”

—Bowen, L.J., in *Speight v. Gaunt*, (1883) 9 App Cas 1

“It is not usual for trusts to be administered in court, for the court exercises a general controlling influence over all trustees, and has power to give directions and determine questions affecting the trustees and beneficiaries without making an order for administration . . . notwithstanding that the trustees claim to exercise their discretion without the interference of the court.”

“However wide the language of such (power) clauses they give the trustee an absolute discretion in appearance only; as in the case of all discretionary powers, he must act honestly and with ordinary prudence.”

—*Re Lucking's W.T.*¹, (1968) 1 WLR 866, 874

SYNOPSIS

- | | |
|---|--|
| 1. Text of Sections 46 to 54 | 6. Not to use Trust-property (Section 51) |
| 2. Trustees cannot Renounce (Section 46) | 7. Trustees must not be Purchasers (Section 52 and 53) |
| 3. Trustees cannot Delegate (Section 47) | 8. Co-trustees cannot lend to one of themselves (Section 54) |
| 4. Co-trustees cannot act Singly (Sections 48 and 49) | |
| 5. No right to Remuneration (Section 50) | |

1. TEXT OF SECTIONS 46 TO 54

46. Trustee cannot renounce after acceptance.—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.

47. Trustee cannot delegate.—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.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.

¹ *Snell's Principles of Equity*, pp. 204, 216, 226.

Illustrations

- (a) A bequeaths certain property to B and C on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. B dies. C may bequeath the trust-property to D and E upon the trusts of A's will.
- (b) A is trustee of certain property with power to sell the same. A may employ an auctioneer to effect the sale.
- (c) A bequeaths to B fifty houses let at monthly rents in trust to collect the rents and pay them to C. B may employ a proper person to collect these rents.

~~48.~~ *Co-trustees cannot act singly.*—When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

49. *Control of discretionary power.*—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.

50. *Trustee may not charge for services.*—In the absence of express directions to the contrary contained in the instrument of trust or of a contract to the contrary entered into with the beneficiary or the court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust.

Nothing in this section applies to any Official Trustee, Administrator-General, Public Curator, or person holding a certificate of administration.

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

52. *Trustee for sale or his agent may not buy.*—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.

53. *Trustee may not buy beneficiary's interest without permission.*—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.

Trustee for purchase.—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.

54. *Co-trustees may not lend to one of themselves.*—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.

2. TRUSTEES CANNOT RENOUNCE (SECTION 46)

Nobody can be compelled to accept the office of trustee against his will.² A person appointed as trustee who wishes to disclaim should do so by deed, as this provides a clear evidence of the disclaimer.³ However, a disclaimer may be implied; apathy will be evidence of an intention to disclaim, provided the apathy is consistent. But if the trustee meddles with the estate, his conduct will be construed as an acceptance. Once he has disclaimed he can no longer accept. Once he has accepted he can no longer disclaim, but he may retire.⁴

The first trustees are appointed either by the settlor or by the testator by a deed or will as the case may be. After once accepting the trust responsibility, it is not given to the trustee to at once disclaim the trust, because it is an obligatory office, an office of confidence and trust. But this does not mean that he can be compelled to work there forever. Section 46 of the Indian Trusts Act, therefore, lays down clearly that: "A trustee who has accepted the trust cannot afterwards renounce it". But he can do so only in three cases, and they are (i) by court's permission, (ii) by consent of beneficiaries competent to contract, and (iii) by a provision in the trust-deed. The object of the section is to indicate the obligatory and onerous nature of the office which once accepted cannot be abruptly forsaken or abdicated. The section therefore covers the question of office of a trustee with which his functions and duties are intimately connected.

The office of a trustee is attached with the duties of a trustee and those duties are either positive or negative. Chapter V, Sections 46 to 54 of the Indian Trusts Act enumerate these negative duties, which call upon a trustee not to do certain things which he is capable of doing, because, on the whole, it is in the interest of the trust and the beneficiaries that a trustee should refrain from doing certain things damaging to the trust. Thus by accepting the office, a trustee imposes upon himself these disabilities. On one side there is abrupt disclaimer by a trustee and on the other there is interest of the trust and the confidence reposed in a trustee by the author. Between these two ends, the law takes the middle course so that the working of the office which is of a continuous nature may not suffer but can go on smoothly, systematically and in an efficient manner. It is for this reason that a trustee is not allowed a premature and an unlawful retirement. If he does so the responsibility lies heavily upon him and he gets into trouble.

3. TRUSTEES CANNOT DELEGATE (SECTION 47)

As expressed by Lord Langdale in *Turner v. Carney*⁵, a person entrusted with a fiduciary duty does not fulfil it if he simply lays it on the shoulders of someone else: he remains liable for the other person's default. This is the basic rule. But an inflexible view of this rule was never accepted and therefore there are exceptions recognised in English law. In 1754 *per* Lord Hardwicke in *Ex p.*

2. But a person can, of course, become a constructive or resulting trustee against his will.

3. *Holder v. Holder*, 1968 Ch 353 (an executor).

4. Hanbury: *Modern Equity*, p. 296.

5. (1841) 5 Beav 515.

*Belchier*⁶ and thereafter in two famous cases of *Speight v. Gaunt*⁷ and *Learoyd v. Whiteley*⁸ delegation was made permissible if the trustees could show that it was reasonably necessary in the circumstances or was in accordance with ordinary business practice. By the Trustees Act, 1925 in England this has been accepted but the principle of acceptance of the need for delegation rests on a different line of thinking. Now delegation is accepted there as a normal method of performing the duties incidental to trusteeship.⁹ Section 23(1) of the Trustees Act in England has now widened the powers of the trustees to delegate and "revolutionised the position of a trustee or an executor so far as regards the employment of agents. No doubt he should use his discretion in selecting an agent and should employ him to do acts within the scope of the usual business of an agent".¹⁰

In India the law is more or less the same on this point as has been laid down by Section 47 of the Indian Trusts Act, 1882. A trustee under this section cannot delegate (i) his office, or (ii) any of his duties either to a co-trustee or to a stranger¹¹ unless—

- (i) it is so *provided* by the trust-deed, or
- (ii) it is in the *regular course of business*, or
- (iii) the delegation is *necessary*, or
- (iv) it is *consented* to by the competent beneficiary.

The section has given an Explanation that if an act by an agent is only of a ministerial nature, not involving use of independent discretion, that cannot be said to be a delegation.

The section thus first states the general principle '*delegatus non potest delegare*' and then lays down exceptions to it so that in proper cases delegation could be made. A trustee delegating his duties in contravention of these provisions will be liable for a breach of trust and the acts of a delegate will not only become void¹² but he also will be liable as a constructive trustee to the beneficiary.¹³

In India, the general rule that a delegate cannot delegate his powers has been relaxed by the section as it has been relaxed in England by the Trustees Act, 1925, Section 23. Thus a trustee can obtain professional assistance and an expert's advice and also get the ministerial or clerical work done by employing an agent, because a trustee is not supposed to be an expert in all matters. A necessity to employ an agent may arise, and the same may be a legal necessity or a moral necessity.

6. 1754 Amb 218.

7. (1883) 9 App Cas 1.

8. (1887) 12 App Cas 727.

9. Section 23(1), Trustees Act, 1925.

10. *Vickery, Re*, (1931) 1 Ch 572; Hanbury: *Modern Equity*, pp. 346-348.

11. *Atmaram Ranchod v. Gulamhusein*, 13 Guj LR 828(FB).

12. *Alexander v. Alexander*, 2 Ves 643.

13. *Mara v. Brown*, (1896) 1 Ch 199 (CA).

In employing an agent a trustee should follow the ordinary course of business and should run no risk.¹⁴ His conduct in this respect would be compared to that of an ordinary prudent person in his own affairs. It is the measure by which a trustee's conduct would be measured.¹⁵ If it falls below that standard, he will be responsible.

Where a trustee leaves trust funds to an agent who afterwards misappropriates them or where he advances more money than usual on mortgage property and leaves valuation of the property in the hands of his agent leaving him alone without supervision, or where he leases out property on his agent's recommendations, at a lower and inadequate rent, he will be liable because he did not exercise the care that a prudent person takes in ordinary course of business in his own affairs.

But where a trustee entrusts a bank with the work of collecting interest on securities, or where money is remitted through a bank, the trustee will not be liable, this being the most regular, convenient and the safest mode that a prudent person would employ. Obtaining advice on taxation matters from experts and to hand over taxation work to them is the only mode and method that a reasonable person would employ and, moreover, it is all the more necessary to do so as he does not possess expert knowledge; in such matters therefore he will not become liable if something goes wrong and a loss occurs to the trust-property.

The question of a trustee's liability in such cases revolves round one point, and that is whether the delegation made by him was proper or not. If it was proper he is not liable, if otherwise, he is liable. A delegation to be proper must pass through the following tests—

- B*
- (i) circumstances must justify the delegation;
 - (ii) the trustee in employing an agent must have behaved as a prudent person behaves or acts in ordinary course of business in his own matters;
 - (iii) agent employed by him should be proper and fit for the job, well-versed and competent in his profession; and
 - (iv) the delegation so far as its nature, duration and scope permits, should not last for a period longer than required.

If this is done, he is free from liability

4. CO-TRUSTEES CANNOT ACT SINGLY (SECTIONS 48 AND 49)

Where there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides. Section 48 accepts the principle that each trustee should be active in the administration of the trust and that a "sleeping" trustee is not recognised. Hanbury¹⁶ points out that a trustee who concurs with his co-trustees has, in so agreeing, as much

14. *Speight v. Gaunt*, (1883) 9 App Cas 1 and *Re Weall*, (1889) 42 Ch D 674.

15. *Ibid.*

16. *Modern Equity*, pp. 294-295.

'acted' as those others, and thus will be equally liable with them to beneficiaries who suffer loss if a breach results. Nor will the concurring trustee necessarily escape liability when his co-trustee was a solicitor, though he may escape if, after considering the matter, he reasonably deferred to what could legitimately be regarded as superior knowledge. But blind trust cannot safely be placed in a co-trustee. For although there is no rule that trustees are vicariously liable for the acts of co-trustees, a non-active trustee may himself be liable for neglecting to take steps necessary to have prevented the breach.¹⁷

The above position points to one basic proposition of law that when the administration of a trust is vested in co-trustees they are one single unit, they form a collective entity and therefore they must act jointly¹⁸ unless the instrument of trust provides otherwise. "A trustee cannot act singly" is therefore a corollary of the well-known rule that "a trustee cannot delegate". As explained by Maitland their powers, interests and authority are equal and undivided. At the same time one must note that all of them are suffering from the same disability that "a trustee cannot delegate" and, therefore, they must act jointly and not singly. Moreover, all trustees are entrusted with the trust office alike by the author of the trust and therefore each one must exercise his individual discretion and judgment, without remaining a "sleeping" trustee.

Their office being a joint one they cannot act by majority¹⁹ unless they are trustees of a charitable trust. A trustee cannot advance a defence that he was outvoted by a majority or that he was bound to act according to the majority decision, because a majority binds neither a dissenting minority nor the trust estate.

In *Re Mayo*²⁰, for instance, one trustee of a trust for sale wished to sell, two to postpone. The trustees were by virtue of the trust to sell under a *duty* to sell, but possessed *power* to postpone. Simonds, J., held that their duty to sell prevailed unless they were unanimous in exercising their power to postpone. They were not unanimous on this point; the view of the single trustee who wished to sell prevailed, and the other two were directed to join in the sale.²¹ *Luke's* case points to the same dictum that to bind a trust, the decision or the act must be the act of all.²²

Control of trust-property is, therefore, the control of all as a result of which breach of trust or misappropriation of one brings liability for all.²³ In so far as money receipt is concerned, it should be a joint receipt of all. Co-trustees as a rule must join while passing a money receipt but this does not make them liable unless they allow the money received by one to remain in his hands for a longer

17. Hanbury : *Modern Equity*, p. 294-95.

18. *Atmaram Ranchhodhbhai v. Gulam Husein*, 13 Guj LR 828.

19. *Manmohandas v. Janki Prasad*, 47 BLR (PC) 250; AIR 1945 PC 23.

20. 1943 Ch 302.

21. See also *Luke v. South Kensington Hotel*, (1879) 11 Ch D 121; Hanbury: *Modern Equity*, p. 295.

22. *Kunhan v. Narayan*, 20 MLJ 201.

23. *Ranganathan v. Periakuppan*, AIR 1957 SC 815.

period than necessary so as to give him a chance to misapply or to misappropriate the same. This position of co-trustees is distinctly different from that of co-executors.²⁴ In co-executors the law, taking into consideration their wide powers, draws an inference that all those who sign a money receipt are liable for the amount. Section 48 of the Act implies and incorporates this situation. As seen in *Re Mayo's case*, if the co-trustees do not exercise their discretionary power reasonably, and in good faith, it can be controlled and guided by the court on suitable occasions. This is what is explained by Section 49 of the Act. Moreover, a trustee cannot exercise his powers arbitrarily and sell the trust-property for Rs. 25,000 when he had an offer of Rs. 35,000. In such cases,²⁵ the court would definitely control them.

5. NO RIGHT TO REMUNERATION (SECTION 50)

A trustee has no right to charge remuneration for his services, i.e., trouble, skill and loss of time in executing the trust. But, as the section goes, if the instrument of trust so directs, or if the trustee has contracted with the beneficiary for this purpose or if it is so contracted with the court at the time of accepting the trust, a trustee may charge for his services. The section altogether does not put a ban or does not prohibit a trustee from charging but says that a "trustee may not charge for services".

English law speaks similarly. It says that a trustee acting voluntarily is not paid; it does not matter whether his services are of a personal nature or of a professional nature. "It follows, therefore, that a trustee can only claim remuneration if he can show a specific entitlement to it". But "it will appear that the basic principle (serving without charging) is much honoured in its breach".²⁶ According to English law, if the remuneration is authorised by the trust instrument, or the statute, or the court, or for litigious work by solicitor trustees, or authorized by contract, the same can be charged.²⁷

This principle of no remuneration follows from the larger principle that a trustee cannot extract profit from his office as a trustee.

Section 50 provides this and also explains the exceptions to this position wherein a trustee can get remuneration. Thus a trustee can get out-of-pocket expenses, which include the payment of agent's fees wherever their employment is justified, calls on shares and the proper costs of litigation. To an official trustee, administrator-general, public curator or persons holding a certificate of administration, this section does not apply. They are therefore entitled to remuneration. Such expenses are a charge upon the property and in some cases against the beneficiaries personally. As Section 32 of the Act provides, a trustee is entitled to reimbursement and indemnity for all expenses properly incurred in

24. *Townley v. Sherborne*, (1634) BR 35; *Brice v. Stocks*, (1805) 11 Ves 319.

25. *M.V. Ramasubbier v. Manicka Narsimachari*, AIR 1976 SC 671, 673.

26. Hanbury: *Modern Equity*, p. 366.

27. *Cradoc v. Piper*, (1849) 1 Mac & G 664, followed in *Shivramdas v. Nerurkar*, 39 BLR 633: AIR 1937 Bom 374.

the execution of the trust and for the benefit of trust-property and the beneficiaries.

In *K.T. Doctor v. CIT*²⁸ a question was raised whether the concept of lifting the veil can be resorted to in case of Trusts. The court observed that the lifting of or piercing of veil is an exercise which is not permissible in the field of law of trusts. It is permissible in the case of a company with a view to find out the real persons behind the corporate body, but in the case of trustees, they are under legal obligation to carry out the objects of the trust and to act in accordance with the deed of trust subject to overall provisions of the Indian Trusts Act and if they fail in their duty or if they do not carry out certain activities as trustees, they are accountable in their capacity as trustees.²⁸

6. NOT TO USE TRUST-PROPERTY (SECTION 51)

As provided by Section 51, a trustee may not *use or deal with* the trust-property (i) for his own profit, or (ii) for any other purpose unconnected with the trust.

All the acts of a trustee must be directed towards and must point to one thing, and that is, benefit to the trust and the beneficiary. This section is thus concerned with the acts of a trustee or his dealings with the trust-property which should not be for his own benefit or profit or for any other purpose unconnected with the trust. Looking from a different angle, we may say that a trustee must not put himself in a situation whereby his duty as a trustee and his personal interest may come into conflict. If he goes ahead in this fashion unrestrained, he will definitely gain from the trust-property or would make a profit out of it, either by investing the trust money with him for his personal benefit in his personal business or by using the trust-property for his personal gain. Benefit thus gained by a trustee by bypassing his disabilities, by committing a breach of trust, will not, as a general rule, be allowed to remain with him and he will have to account for it or to hold it for the beneficiaries, because this is an unjust enrichment secured by misusing his position as such. This general rule is an immutable one and it applies not only to express trustees but also to all those persons who are in a fiduciary position. Thus no one can extract an undue advantage from his fiduciary position. This general rule is the legitimate origin or source of the following two sub-rules:

(i) that a trustee may not buy beneficiary interest (Sections 52 and 53), and

(ii) that a trustee may not charge for his services (Section 50).

In *Chandler v. Bradley*²⁹, trust moneys were lent on a mortgage. The mortgagor being of an eccentric character, devised the equity of redemption of the mortgage to the mortgagée-trustee. It was held that the devise of the equity of redemption belonged to the trust as it was by reason of the trust that the trustee was in that position. This explains that a benefit obtained by a trustee by

28. ITR 269/1978, dt. 9-1-1980: GLT XVII 59-60.

29. (1897) 1 Ch 315.

using his office as such is not his, but belongs to the beneficiary. Hanbury³⁰ has explained this position very neatly under the heading 'Incidental Rights' by trustees as under:

"Accordingly, profits may come to a trustee in many ways. Those which come to him by reason of his being a trustee must be handed over to the beneficiaries; indeed the rule applies to many fiduciary agents who are not trustees.³¹ It is often said that a fiduciary who is required to account for such a profit becomes a constructive trustee. But such statements often repeat the fallacy of arguments because the main question for consideration in such cases is the liability or accountability of the trustee rather than the trust. This is so even though the courts have sometimes found a trust, and though the property in question was sometimes vested in the defendant. In none of them, however, did the question arise whether the defendant was a trustee as *opposed* to being accountable."

A duty to account is a personal liability; a constructive trust is a proprietary remedy. In short, the liability to account is a different question from that of a constructive trust.

On the same principle, the rule in *Keech v. Sandford*³² prevents a trustee from keeping for his own benefit a renewal of a lease which he was able to obtain for himself by reason of his being a trustee of the original lease; and even though the trustee had tried unsuccessfully to obtain a renewal for the benefit of his infant *cestui que trust*. Where trustees have obtained remunerative directorship by virtue of their position as trustees, they were held liable to account for the remuneration.³³ Thus incidental profits coming to trustees in a variety of ways must always be disgorged. Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage whether in money or money's worth to himself personally through the execution of his trust, he will not be permitted to retain, but will be compelled to make it over to his constituent.³⁴ In *Brown v. I.R.C.*³⁵, a Scottish solicitor was compelled to account for interest earned by deposits of his clients' money.

The same principle holds good where a trustee competes with the trust business. This is really a situation wherein a trustee places himself in a position where his duty and interest may conflict. As declared in *Re Thomson*³⁶, one possible area of conflict is where the trustee operates in business in competition with the trust. The rule applies to other fiduciaries who are not trustees. A partner cannot compete with the partnership business unless he has consent of

30. *Modern Equity*, Chap. 20, pp. 366-372.

31. *Aberdeen Town Council v. Aberdeen University*, (1877) 2 App Cas 544; *Re Macadam*, 1946 Ch 73.

32. 1726 Sel Cas King 61.

33. *Re Macadam*, 1946 Ch 73.

34. *Huntingdon Copper Co. Case*, (1872) 4 R.

35. 1965 AC 244.

36. (1930) 1 Ch 203; Hanbury; *Modern Equity*, p. 371.

the other partners. It is a question of fact in each case whether or not the activity is in conflict with the fiduciary duty.

Summarising the situation, we must say that a trustee must not use his position as a trustee to obtain any secret profit either by arrangement or by any other contrivance surreptitiously. But where a beneficiary abandons the profit from a trust and the trustee obtains it by his own labour, the trustee can keep it with himself and need not hold it in trust for the beneficiary.³⁷ Similarly, he should not make use of the trust-property or deal with it in a manner profitable to him and he should not deal with the trust-property for any other purpose unconnected with the trust. When he does so, he has to account for the profit thus obtained. In the last chapter about trust, you will see that the Indian law has made attempts to enumerate broadly circumstances under which a person may be placed in the position of a trustee in reference to another. These "obligations in the nature of trusts" are not different from the implied and constructive trusts found in the decision of the English equity courts.³⁸ (For details as to fiduciary relationship and its types and instances see Chapter 20 *infra*.)

7. TRUSTEES MUST NOT BE PURCHASERS (SECTIONS 52 AND 53)

No trustee whose duty it is to sell trust-property, nor his agent employed for the purchase may, (i) buy the trust-property, or (ii) any interest therein, on his own account or as agent for third person (Section 52). As laid down by Section 53 no trustee, and any person who has recently ceased to be a trustee, may without court's permission, (i) buy, or (ii) become a mortgagee or lessee of the trust-property or any part thereof, unless the transaction is manifestly for the advantage of the beneficiary. (iii) Similarly, no trustee whose duty it is to buy or to obtain a mortgage or lease for the beneficiary may do so for himself (Section 53).

A trustee, as the sections lay down, may not place himself in a position where *trafficking in the trust-property* may prove to be an irresistible temptation. The general rule is that trustees are not to become the owners or lessees of trust-property. This rule is independent of any question of inadequacy of any price, or unfairness or undue advantage; the sale may have been at auction and the trustee may have taken the bidding well above the reserve price, but he is still caught by the rule which derives from his status and position and not from his conduct in the particular case.³⁹ Nor does it matter that he left the decision to sell and the manner of sale wholly to his co-trustee; nor that he retired from the trust before making an offer. *His responsibility as trustee is such that he must not contemplate the purchase at all.*⁴⁰ Even after retirement, for a considerable period the rule affects a trustee.⁴¹ Even if a person in a

37. AIR 1925 Pat 68 (FB).

38. *Re Thomson*, 1930 Ch 203; *Boardman v. Phipps*, (1967) 2 AC 46; *Reading v. Attorney-General*, 1951 AC 507; Hanbury: *Modern Equity*, pp. 369 to 378; M.C. Setalvad: *Common Law in India*, pp. 60-61.

39. *Campbell v. Walker*, (1800) 5 Ves Jr 678; *Ex p. Lacey*, (1802) 6 Ves Jr 625.

40. Hanbury: *Modern Equity*, p. 368.

41. Hanbury: *Modern Equity*, p. 369.

fiduciary position is otherwise entitled to purchase, yet, if he effects the purchase secretly in another person's name, such a purchase cannot be allowed to stand.⁴²

But the rule is not an inflexible one: in proper cases it has been relaxed in England.⁴³ A beneficiary is given a generous time to discover the position and the rule cannot be got around by sales to nominees or a purchaser with notice of the circumstances. In the words of Snell,⁴⁴ "that a trustee may not purchase the trust-property" has never been the true rule, which is that a purchase of trust-property by a trustee is voidable at the instance of any beneficiary. It is the absolute right of the beneficiary to have the conveyance set aside within a reasonable time after he discovers the circumstances; and it matters not whether the purchase by the trustee was from himself alone, as sole trustee, or from his co-trustee". The burden lies on the trustee to show that every possible advantage has been gained for the trust.⁴⁵

We may, for the purpose of proper understanding, divide the subject under two heads:

- (a) cases wherein a trustee purchases or attempts to do so from himself and
- (b) cases wherein the purchase is the result of an agreement between the trustee and the beneficiary.

The general rule regarding (a) has been explained above while that regarding (b) has been stated thus by Hanbury⁴⁶:

"Equity's view is less stringent when dealing with a purchase by a trustee of the beneficial interest of a beneficiary. This is a type of transaction which is carefully watched; the onus is on the trustee to show 'that he gave full value, and that all information was laid before the *cestui que trust* when it was sold'. The principles of undue influence apply; but it is open to a trustee in this type of case to show that the whole transaction was conducted at arm's length. This must however be distinctly proved."

When can a Trustee purchase?

We can now summarise and say that (i) where the sale is by a public auction and the trustee has obtained court's permission, (ii) where a trustee is a bare trustee (i.e., not actual but a nominal trustee) and has not to perform any duties, (iii) where he has disclaimed his office of trusteeship, (iv) where there is an offer from a beneficiary to sell and there is a fair dealing between them⁴⁷, and (v) where a trustee has given more than a market price for the trust-property⁴⁸, he can purchase it.

42. *Peari Mohan v. Manohar*, 23 BLR 913, 914-15 (PC); AIR 1922 PC 235.

43. *Holder v. Holder*, 1968 Ch 353.

44. *Snell's Principles of Equity*, p. 239.

45. *Plowright v. Lambert*, (1885) 52 LT 646.

46. *Modern Equity*, p. 369.

47. *Dovgan v. McPherson*, 1902 AC 197.

48. *Ex parte Lacey*, 6 Ves 625.

But on the principle laid down in the well-known decisions of *Keech v. Sandford*⁴⁹ and *Fox v. Mackreth*⁵⁰, a trustee can sell trust-property to a joint stock company of which he is a shareholder. Besides, when there are repeated requests from beneficiaries and with great unwillingness a trustee purchases the property of the trust⁵¹, in both these types of cases the sale cannot be set aside. But it must be noted that the onus lies in such cases on the trustee to prove that the transaction was fair, bona fide and with disclosure of the facts.⁵²

*Fox v. Mackreth*⁵³ and *Pooley v. Quilter*⁵⁴ are the leading cases explaining the above principle. In the first case, Mackreth, the trustee himself, purchased the trust-property for a certain price. Before the contract of sale was completed he sold it to a third party at a higher price. Fox, the beneficiary, sued Mackreth for recovery of the profit earned by him and it was held that Mackreth should return the profits and in the meantime must hold it for the beneficiary in a constructive trust.⁵⁵ In the second case, P, a creditor of H, a bankrupt, sold his claim against H to W. P later discovered that W had purchased as trustee for Q, the assignee in bankruptcy of H. P sought to have the sale to W set aside. Held, the sale must be set aside and Q must refund to the bankrupt's estate dividends received by him. The rules as to a purchase by a trustee from him *cestui que trust* applied with still greater force to a purchase, for his own benefit, by an assignee of a bankrupt's estate from a creditor of the estate. It is therefore most fittingly remarked by Lord Eldon in *Ex p. Lacey case*⁵⁶ that, it is "not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself".

Section 53 is very clear and lays down a situation that a trustee may not buy or become a lessee⁵⁷ or mortgagee unless the court so permits, and the court will permit only in those cases where the transaction is apparently for the advantage of the beneficiary. So in the second head (b) of the principle explained before, the prohibition is not absolute but it is less stringent. It appears that Section 53 is not so clearly worded as to cover situations of both the types (a) and (b), but covers situations as explained under head (b) only.

8. CO-TRUSTEES CANNOT 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, or on the personal security of himself or one of his co-trustees.

49. 1726 Sel Cas King 61.

50. (1788) 2 Bro CC 400.

51. *Morse v. Royal*, 12 Ves 355.

52. *Coaks v. Boswell*, 11 AC 232.

53. (1788) 2 Bro CC 400.

54. (1858) 2 De G & J 327; Cracknell: *Law Students' Companion*, Case No. 242.

55. See *Jankiram Ayyar v. Nilkamba Ayyar*, 1954 MLJ 486.

56. (1802) 6 Ves Jr 625.

57. See *Madhavrao Jwajirao Scindia v. Sambhajirao Chandrajirao Angre*, (1988) 1 SCC 692; 1988 SCC (Cri) 234; AIR 1988 SC 709; 1988 Cri LJ 853.

This situation is similar and in fact closer to the one discussed under the preceding disability that trustees must not be purchasers. The same principles therefore must apply.

SUMMARY

A trust is an obligatory affair; its office is fraught with duties, discretions, disabilities, rights and powers. A duty is imperative. It has to be performed and no option exists there. Positive duties demand certain acts while negative duties require abstinence from a trustee. Negative duties are what are termed as disabilities. Accordingly,

- (i) a trustee cannot renounce his office;
 - (ii) cannot delegate his office;
 - (iii) cannot act singly (if there are two or more trustees);
 - (iv) may not charge for his services;
 - (v) may not use trust-property;
 - (vi) cannot set up an adverse title to trust-property;
 - (vii) must not misuse his position as a trustee to get an advantage from the trust-property or dealings therewith;
 - (viii) cannot profit out of a trust;
 - (ix) cannot compete with the trust business;
 - (x) may not buy trust-property either from himself or from a co-trustee;
 - (xi) may not buy beneficiary interest without court's prior permission; and
 - (xii) may not lend money to one of co-trustees.
-

Chapter XVII

Rights and Liabilities of the Beneficiary

"I think that principle is repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge."

—Lord Langdale, M.R., in *Saunders v. Vautier*, (1841) 4 Beav 115

"A trustee commits a breach of trust if he fails to do what his duty requires, or if he does what he is not entitled to do."

"Breaches of trust are almost infinitely various. They range from the fraudulent conversion of trust funds to purely technical failures of duty which harm nobody and transactions (such as some investments in unauthorised securities) which result in a substantial profit for the trust."

—*Snell's Principles of Equity*, Chap. 9, p. 272

"It is not for the trustee to dictate to the *cestui que trust* in what shape he will make his claim."

—Maitland: *Lectures on Equity*, Chap. XIV, p. 221

SYNOPSIS

1. Text of Sections 55 to 69
2. General
 - A. Rights of the Beneficiary (Sections 55-61)
 - (i) Right to Rents and Profits (Section 55)
 - (ii) Right to Specific Execution (Section 56)
 - (iii) Right to Terminate a Trust (Section 56)
 - (iv) Right to Inspect and Take Copies (Section 57)
 - (v) Right to Transfer Beneficial Interest (Section 58)
 - (vi) Right to Sue for Execution of Trust (Section 59)
 - (vii) Right to Proper Trustees (Section 60)
 - (viii) Right to Compel to any Act of Duty (Section 61)
 - B. Remedies of the Beneficiary (Sections 62-67)
 - (i) General
 - (ii) Right to Action against Trustee Personally (Section 67)
 - (iii) Difference between a Proprietary and a Personal Remedy
 - (iv) Right of "Following Trust's Property" (Sections 63-66)
 - (v) Equities Attached to "Right of Following Trust Property" (Section 62)
 - C. Liability of the Beneficiary (Sections 68-69)
 - (i) Impounding of Beneficial Interest
 - (ii) Bar to Remedies for Breach of Trust

1. TEXT OF SECTIONS 55 TO 69

55. Rights to rents and profits.—The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

56. *Right to specific execution.*—The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest:

Right to transfer of possession.—and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all are of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

Illustrations

- (a) Certain Government securities are given to trustees upon trust to accumulate the interest until *A* attains the age of 24, and then to transfer the gross amount to him. *A* on attaining majority may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.
- (b) *A* bequeaths Rs 10,000 to trustees upon trust to purchase an annuity for *B*, who has attained his majority and is otherwise competent to contract. *B* may claim Rs 10,000.
- (c) *A* transfers certain property to *B* and directs him to sell or invest it for the benefit of *C*, who is competent to contract. *C* may elect to take the property in its original character.

57. *Right to inspect and take copies of instrument of trust, accounts, etc.*—The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust property and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

58. *Right to transfer beneficial interest.*—The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest:

Provided that when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

59. *Right to sue for execution of trust.*—Where no trustees are appointed or all the trustees die, disclaim, or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

60. *Right to proper trustees.*—The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly

protected and held and administered by proper persons and by a proper number of such persons.

Explanation I.—The following are not proper persons within the meaning of this section:—

A person domiciled abroad; an alien enemy; a person having an interest inconsistent with that of the beneficiary; a person in insolvent circumstances; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

Illustrations

- (a) A, one of several beneficiaries, proves that B, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from B's being in insolvent circumstances, or that he is incapacitated from acting as trustee. A may obtain a receiver of the trust-property.
- (b) A bequeaths certain jewels to B in trust for C. B dies during A's lifetime; then A dies. C is entitled to have the property conveyed to a trustee for him.
- (c) A conveys certain property to four trustees in trust for B. Three of the trustees die. B may institute a suit to have three new trustees appointed in the place of the deceased trustees.
- (d) A conveys certain property to three trustees in trust for B. All the trustees disclaim. B may institute a suit to have three trustees appointed in place of the trustees so disclaiming.
- (e) A, a trustee for B, refuses to act, or goes to reside permanently out of India or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. B may institute a suit to have A removed and a new trustee appointed in his place.

61. *Right to compel to any act of duty.*—The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust.

Illustrations

- (a) A contracts with B to pay him monthly Rs 100 for the benefit of C. B writes and signs a letter declaring that he will hold in trust for C the money so to be paid. A fails to pay the money in accordance with his contract. C may compel B on a proper indemnity to allow C to sue on the contract in B's name.
- (b) A is trustee of certain land, with a power to sell the same and pay the proceeds to B and C equally. A is about to make an improvident sale of the land. B may sue on behalf of himself and C for an injunction to restrain A from making the sale.

62. *Wrongful purchase by trustee.*—Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must

(a) account for the net profits of the property, (b) be charged with an occupation-rent, if he has been in actual possession of the property, and (c) allow the beneficiary to deduct a proportionate part of the purchase money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

- (a) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or
- (b) entitles the beneficiary to have the property declared subject to the trust or retransferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

63. *Following trust-property—into the hands of third persons; into that into which it has been converted.*—Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations

- (a) A, a trustee for B of Rs 10,000, wrongfully invests Rs 10,000, in the purchase of certain land. B is entitled to the land.
- (b) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust money so misemployed.

64. *Saving of rights of certain transferees.*—Nothing in Section 63 entitles the beneficiary to any right in respect of property in the hands of—

- (a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed; or
- (b) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

Nothing in Section 63 applies to money, currency notes and negotiable instruments in the hands of a bona fide holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872 (9 of 1872), Section 108, or the liability of a person to whom a debt or charge is transferred.

65. *Acquisition by trustee of trust-property wrongfully converted.*—Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, the property again becomes subject to the trust, notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

66. *Right in case of blended property.*—Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

67. *Wrongful employment by partner-trustee of trust-property for partnership purposes.*—If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations

(a) *A and B are partners. A dies, having bequeathed all his property to B in trust for Z, and appointed B his sole executor. B, instead of winding up the affairs of the partnership, retains all the assets in the business. Z may compel him, as partner, to account for so much of the profits as are derived from A's share of the capital. B is also answerable to Z for the improper employment of A's assets.*

(b) *A, a trader, bequeaths his property to B in trust for C, appoints B his sole executor, and dies. B enters into partnership with X and Y in the same trade, and employs A's assets in the partnership business. B gives an indemnity to X and Y against the claims of C. Here X and Y are jointly liable with B to C as having knowingly become parties to the breach of trust committed by B.*

68. *Liability of beneficiary joining in breach of trust.*—Where one of several beneficiaries—

- (a) joins in committing breach of trust, or
- (b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or
- (c) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or
- (d) has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her

beneficial interest, nothing in this section applies to such property during her marriage.

69. *Rights and liabilities of beneficiary's transferee.*—Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

2. GENERAL

A trust is controlled not only by the instrument of trust and the court, but also by the beneficiaries and the rules of equity. As Snell observes, a trustee is, in a sense, a servant of the beneficiary and in carrying out his duties and in exercising his powers or discretions which are confined to him, he is guided by the instrument of trust and the rules of equity; he is bound and entitled to use his own judgment and is not ordinarily obliged to consult the wishes or to accede to the importunities of the beneficiary. In suitable cases the court will also guide him and control his actions.¹ In other words a trustee is the owner of trust property for the purpose of its administration and for no other purpose. The beneficiary has a right to obtain his beneficial interest or interest against the trustees as owner of the trust property.² Thus one may say that there is a fourfold control on the trustees and the rights and powers of the beneficiaries may be viewed in this background. One has to remember that some of the rights and liabilities of the beneficiaries have already been considered while discussing what has been termed as the duties, disabilities and the liabilities of the trustees. Sections 55 to 69 of the Indian Trusts Act lay down some more rights and liabilities of the beneficiaries. The result would be some overlapping here and there, but this defect of overlapping is originally associated with the English law. The rights of the beneficiaries are (i) right to rents and profits (Section 55); (ii) right to specific execution of the trust (Section 56); (iii) right to transfer of possession of trust property (Section 56); (iv) right to inspect and take copies of the instrument of trust, accounts, etc. (Section 57); (v) right to transfer his beneficial interest (Section 58); (vi) right to sue for execution of trust (Section 59); (vii) right to proper trustees (Section 60); (viii) right to compel his trustee to any act of duty (Section 61); (ix) right to recover trust-property from the trustee (Sections 62, 63 and 65); (x) right of following the trust-fund (Section 63); (xi) right in case of blended property (Section 66); and (xii) right to hold a partner-trustee of trust-property liable for partnership business (Section 67).

A beneficiary is liable when he joins in breach of trust with the trustees (Section 68).

A. RIGHTS OF THE BENEFICIARY

(i) Right to Rents and Profits (Section 55)

A beneficiary is entitled to the rents and profits of the trust-property. This right lasts so long as the trust-property exists or so long as the trust is not validly

1. *Butt v. Kelson*, 1952 Ch 197.

2. *State Bank of India v. Special Secretary, Land*, 1995 Supp (4) SCC 30.

terminated and it is controlled by the instrument of trust. Section 62 of the Act makes a trustee liable for breach of trust and consequently to account for the net profits, occupation rent the deterioration of the trust-property, as the case may be.

(ii) Right to Specific Execution (Section 56)

The beneficiary is entitled to have the intention of the author of the trust specially executed to the extent of his interest. A trustee is thus bound to carry out the specific execution of the author's intention.

He is a servant of the trust and therefore when a *sui juris* beneficiary requires him to transfer the trust-property to himself, he is bound to obey the directions even though it is not in consonance with those of the author of the trust. The section further provides that in case of more than one beneficiary, if all of them are *sui juris* and they all are of one mind, they may require the trustee to deliver the trust-property to them or to such persons as they direct. The main condition in both these cases is that a beneficiary or beneficiaries must be entitled to the *whole* of the beneficial interest. As expressed by Hanbury³, any adult beneficiary *sui juris* may deal with his equitable interest under the trust in any way he wishes; and may consent to the trustee dealing with the trust-funds in a way which affects his interest.⁴

(iii) Right to terminate a trust (Section 56)

From the above provision of Section 56 it is clear that adult beneficiaries who together are absolutely entitled to the trust-property may terminate the trust and demand that the fund be handed over to them; but not if any interests are outstanding.⁵ Illustration (a) to Section 56 of the Act is based on the well-known rule laid down in *Saunders v. Vautier*⁶. Beneficiaries may wish to do so for various reasons. In *Saunders case*, the beneficiary wished to terminate an accumulation which was to continue until he reached the age of 25; he was able to claim the fund at 21. Moreover, if property is given to A for life and then to B, and both A and B are adults, they may each wish to have capital immediately available and may agree to split up the fund. As noted by Hanbury, the most potent fact that persuades them to do so at the present time is the possibility of avoiding liability for estate duty on the death of A.⁷ Thus by a timely decision to divide and share each will gain and the loser is the Revenue. Therefore, as Nathan's editor O.R. Marshall points out:⁸ "If property is given to a person of full age, any restriction on his enjoyment of it is inconsistent with his absolute interest. Hence a beneficiary *sui juris* and entitled absolutely can call for a transfer. . . and he may do so even if the settlor purports to remove this right. So

3. *Modern Equity*, p. 379.

4. *Saunders v. Vautier*, (1841) CR & Ph 240.

5. Hanbury: *Modern Equity*, p. 379.

6. (1841) CR & Ph 240. See also *Gosting v. Gosting*, 1859 Johns 265.

7. Hanbury: *Modern Equity*, p. 380, citing Beattie: *Elements of Estate Duty*, 6th Edn. For Methods of Division, see Hanbury: *Modern Equity*, pp. 380-382.

8. Nathan: *Equity Through the Cases*, pp. 546-547.

also several beneficiaries who are all *sui juris* and between them entitled absolutely may call for a transfer, if they act together. Even beneficiaries who are entitled in succession can combine to call for a transfer provided they are *sui juris* and are collectively entitled absolutely. The rule in *Saunders v. Vautier* operates also in favour of a charity.⁹ But it does not apply where other persons have an interest in the accumulation of income which the beneficiaries are seeking to stop. Nor does it give beneficiaries the right to control the trustee in the exercise of any discretion conferred upon him by statute or the trust instrument.¹⁰

A married woman who is a sole beneficiary has no such right to terminate a trust, which is an exception to this rule. But this disability requires to be removed in view of the recommendations of the Law Commission.

(iv) Right to inspect and take copies of trust instrument, etc. (Section 57)

The beneficiary has a right as against a trustee and other persons claiming under him (a) to inspect the instrument of trust, (b) the documents of title relating solely to the trust-property, (c) the vouchers (if any) by which they are supported, and (d) the cases submitted and opinion taken by the trustee from the court.

The idea underlying this right is that the beneficiary must be in complete know of the trust and its administration. As the trustee has a right to have the custody of the documents relating to the trust-property, so the beneficiary has a corresponding right to look into the documents, i.e., the instrument of trust and documents of title to trust-property and to obtain copies (of course, by payment of due charges) thereof. Opinion of the court sought and obtained by a trustee must also be shown to the beneficiaries and their copies given if they want it. Thus by exercising this right a beneficiary will be able to have a full and accurate account of the trust-funds, its administration, the trust-property and its title deeds, which will enable him to safeguard his interest and prevent a breach of trust which may be in the offing. A beneficiary may take inspection through his solicitor.¹¹

(v) Right to Transfer Beneficial Interest (Section 58)

Section 58 gives the beneficiary a right to transfer his beneficial interest. For this purpose the beneficiary must be competent to contract (*sui juris*). He can transfer his interest if he is the full owner of the interest but this right is circumscribed by his personal law and the general law of the land in this regard. This he can do without intervention of the trustees. Section 56 gives him a right to get transfer of possession from trustees and this section gives him a further right in continuation of that right, and that is of transfer of his interest to others.

9. *Wharton v. Masterman*, 1895 AC 186. But see *Re Levy*, (1960) 1 All ER 42 (CA) for contra opinion that the principle does not apply to a bequest to charity.

10. *Re Brockbank*, 1948 Ch 206. See also *Snell's Principles of Equity*, pp. 224-225.

11. *Kemp v. Burn*, (1863) 4 Giff 348.

He can, therefore, also assign his interest,¹² and the assignee shall have the right and is subject to the liabilities of the beneficiary in respect of such interest (Section 69).

One must also note that Sections 56 and 58 both make a common provision in respect of a married woman, so that when property is transferred for her benefit (she being a sole trustee) these sections do not enable her to transfer the property to anyone which deprives her of her beneficial interest therein. This is a discriminatory disability imposed upon a female beneficiary which requires to be removed as recommended by the Law Commission.

(vi) Right to Sue for Execution of Trust (Section 59)

Where the execution of a trust becomes impracticable due to non-appointment, death, disclaimer or discharge of a trustee or for any other reason, the beneficiary may file a suit for execution of the trust. Under the circumstances, and until a new trustee is appointed, the court will execute the trust. This provision is but the logical corollary-in-action of the well-known equitable maxim "equity will not allow a trust to fail for want of a trustee"¹³ or "a trust never fails for want of a trustee". The intention of the author of the trust will not be allowed to fall flat because of the want of trustees due to peculiar circumstances and the court will carry on the trust execution.

(vii) Right to Proper Trustees (Section 60)

It is the right of a beneficiary that the trust-property is held, protected and administered by proper persons and by a proper number of persons.

In so far as proper persons are concerned the following are not proper persons within the meaning of this section:

- (a) a person domiciled abroad,
- (b) an alien enemy,
- (c) a person having a conflicting interest with that of the beneficiary,
- (d) a person in insolvent circumstances,
- (e) unless the personal law of the beneficiary allows otherwise, a married woman, and
- (f) a minor.

The section at the outset makes it clear that in making an appointment the court considers the wishes of a settlor and the beneficiaries, whether the interests of the proposed trustee conflict with those of the settlor or of the beneficiaries, or whether the appointment will promote or impede the execution of the trust.¹⁴ The court will not appoint a person under disability or those who are not proper persons. Beneficiaries, solicitor, husband or wife are not proper persons because their interest and duty conflict, but as observed by Snell, where such an

12. See chapter on Priorities and Assignments.

13. See *A.G. v. Lady Downing*, Wilm 21, 22.

14. *Snell's Principles of Equity*, p. 196.

appointment is advantageous to the trust, the court will make it though it may be slow to do so.

Where the trust-property is not properly protected or administered or held by a trustee, and where this is due to his deliberate conduct or as a result of his negligence or misconduct, the court, if it is satisfied that the continuance of the trustee is not in the interest of the trust, may remove him even though proof of such a charge or disqualification is not forthcoming. In short, a trustee should not be ambitious of a trust, when he can get nothing but trouble by it.¹⁵ As decided in *Re Tempest*¹⁶ by Lord Justice Turner, (a) where the instrument of trust specifically informs not to appoint a particular person as a trustee, the court will not override the author's wishes, (b) a court cannot appoint a trustee taking into account interests of certain beneficiaries only and in contravention of the author's wishes, (c) a court must take into account the nature of the trust, the function of the trustee and the interest of the beneficiaries and whether the appointment will promote the trust or impede it, before it makes any such appointment.

Where receipt and custody of money is involved, the number of trustees should be at least two, as the section itself lays down. It is therefore provided in the section that not only must 'proper persons' be appointed to the trust, but also that a proper number of such persons be appointed thereto where required.

(viii) Right to compel to any act of duty (Section 61)

A trustee can be compelled to perform his duties because there is no discretion therein for him. He may also be restrained by the beneficiary from committing any contemplated or probable breach of trust.¹⁷ This section is connected with the conduct of the trustee in reference to the trust administration. If he is slack and indifferent or misconducts himself, thereby causing loss to the trust-property by his act or omission, e.g., by not defending the trust-property, not preventing a trespass or delaying in renewing a lease, he can be compelled to do so and can be proceeded against by the beneficiary under this section. With the court's permission the beneficiary can use the name of the trust and file a suit under this section.

B. REMEDIES OF THE BENEFICIARY

(i) General

Sections 62 to 67 which now follow are intimately connected with the breach of trust by a trustee which he may commit in various ways, namely, by wrongfully purchasing trust-property (Section 62), by holding the trust-funds inconsistently with the trust (Section 63), by acquiring trust-property wrongfully converted (Section 65), by blending trust-property wrongfully with his own (Section 66) and by wrongful employment of trust-property for his partnership

15. Lord Nottingham in *Uvedale v. Etrick*, 2 Ch Cas 130.

16. LR 1 Ch 485.

17. *Balls v. Strutt*, 1 Hare 146; *Bowen v. Phillips*, (1897) 1 Ch 174.

business (Section 67). We shall have to consider this conduct of a trustee in the background of the rights and remedies available to a beneficiary.

A beneficiary may adopt a breach of trust and accept all the benefits arising therefrom or may condone the breach and bear the consequences thereof. This type of conduct suggests that the beneficiary has nothing to complain about since he has reconciled with the situation. But where a breach of trust is neither adopted nor condoned the question of action and relief may arise. It is also so where there are more than one beneficiaries and all are not competent to contract or are not prepared to condone or adopt. It does not lie in the trustee to say that the breach has benefitted the trust and therefore the court must accept the benefit and reject the breach. A breach of trust is an evil in itself and therefore such dangerous doctrines must be rejected by all means.¹⁸ For every breach of trust a beneficiary has a twofold remedy:

- (a) relief against the trustee himself personally, called a personal remedy against the trustee; and
- (b) relief against the trust-property or the property into which the trust-property has been converted. This is called a *proprietary remedy* against the trust-property.

As Snell points out¹⁹, in case of a threatened or actual breach of trust, there are four heads of remedies to be considered, namely—

- (a) an injunction to restrain the breach;
- (b) a personal remedy against the trustee;
- (c) a proprietary remedy against the trust-property; and
- (d) (probably) a personal remedy against those who have received the trust-property.

This topic of a trustee dealing wrongfully with the trust-property and the rights and remedies of the beneficiary to proceed against him to recover the property, in whatever form it may have been, is an important one, as explained by Sections 62 to 67. Let us take one concrete example.

- (a) *T* is a trustee. *B* is a beneficiary. *X* is the trust-property. *T* in breach of trust sells *X* to a third party *T-1*, for Rs 30,000.

Under the circumstances if *B* either by his act or omission does not adopt or condone the breach he may sue *T* and recover the loss to the trust.

- (b) Now if *T-1* transfers the property *X* to *W* and *W* to *Y* and so on, the beneficiary may exercise his right to follow the trust-property into subsequent hands in whatever form it may be.

(ii) Right to action against trustee personally (Personal Remedy)

We have to keep in mind Section 23 here whereunder a trustee is liable to account not only for what he might receive but for his wilful default and also for

18. *Mariyam Bibi v. Natharsa Rawther Trust*, AIR 1978 Mad 272.

19. *Snell's Principles of Equity*, p. 272.

the interest thereon. Personal liability of a trustee is essentially a liability for his own acts and defaults and not for those of others. The subject of breach of trust has been considered before and accordingly a trustee has to compensate the trust for the loss caused by him. His personal liability is therefore of a compensatory nature, and it is enforced against him irrespective of his fraud, intention, efficiency or otherwise and it does not depend on the nature of his lapse or default whether it is of a serious nature or not. The ultimate aim of enforcing such a liability is not to punish a trustee but to compensate the loss caused to the trust. In the foregoing example therefore neither worries as to who has purchased the trust-property from the trustee nor who files a suit against T-1, because he can recover the loss from the trustee.

Thus, as laid down in Section 67, a partner-trustee employing trust-funds in his partnership business is himself liable in his personal capacity to the beneficiary. Of course, if other partners have notice of the breach of trust and allow this situation to take place, they are jointly and severally liable for the breach of trust. The personal liability of a trustee in case of more trustees than one, is joint and several. In case of fraud even a bankrupt trustee is not discharged.²⁰

(iii) Difference between a proprietary and a personal remedy

A proprietary remedy available to the beneficiary is more powerful than a personal remedy because of the following reasons:

- (a) The plaintiff's demand does not depend, in the former, on the solvency of the defendant; so that if the defendants become insolvent, even then the property can be recovered by the plaintiff and he obtains priority in comparison to the rights of other creditors. In the latter it is not so.
- (b) A plaintiff in the former is entitled to the accretions to the property and its higher value, in the latter the question does not arise.
- (c) A plaintiff pursuing a proprietary remedy can receive interest from the date the defendant obtained it; in case of personal remedy interest is granted from the date of the decision.
- (d) Proprietary remedy generates a right *in rem* whereas a personal remedy gives a right *in personam* only, which is narrower than a right *in rem*.

Sections 62 and 65 explain a beneficiary's *right to recover trust-property from the trustee* and Section 63 his *right to recover trust-property from alienee*.

Where therefore (a) a trustee wrongfully buys trust-property (Section 62), or (b) after wrongfully disposing of the trust-property he thereafter acquires the same for himself (Section 65), in both these cases the beneficiary gets the right to trace the property in its original character in the trustee's hands.

20. *Mora v. Brumt*, (1896) 1 Ch 199.

Where a trustee wrongfully alienates trust-property (Section 63), a personal remedy against him is quite inapt; a proprietary remedy is therefore a proper one. But this will not avail against a transferee in good faith for consideration and without having notice of the trust (Section 64).²¹

(iv) Right of "following trust-property" (Sections 63, 64, 65 and 66)

In a proprietary remedy the plaintiff claims his right to a particular property or a part of it with the defendant. But if the property in question is not in the same form, or if it is sold away and with its proceeds the defendant has purchased some other property, or if he has blended the property with his own, how far can the plaintiff press his claim and succeed? According to Keeton, (a) if the trust-property is not in its original form but its proceeds with the trustees can be identified, or (b) if the property or its proceeds are with a third party, or (c) with another beneficiary and can be identified, the same can be recovered to that extent. Moreover, the property must be such that can be followed and the beneficiary must have a right to follow. Also, the 'following' should not produce an inequitable result. In short, the property to be followed must be identifiable and there must exist a nexus between the right to follow and the property followed.

Under Section 63, a beneficiary can follow the trust-property (a) into the hands of third person where it has come into his hand inconsistently with the trust. A transferee in good faith for consideration and without notice is an exception to this. The transferee must have such character either when the purchase money was paid or when the conveyance was executed. (b) He can also follow the property into the hands of a transferee for consideration from such a transferee [as said in (a) above]. But (c) a beneficiary cannot follow money, currency notes and negotiable instruments into the hands of a bona fide holder to whom they have passed in circumstances, and (d) nothing in Section 63 shall affect the liability of a person to whom a debt or a charge is transferred. (e) Moreover, the section explains that a judgment creditor of a trustee attaching and purchasing trust-property is not a transferee for consideration²² (Section 63-64). (f) The beneficiary may require the transferee either to formally admit that the property is comprised in the trust, or may institute a suit for a declaration. (g) If the transferee of the trust-property is a volunteer the property can be followed into his hands irrespective of the fact of his having notice of the trust or not.²³ (h) A person purchasing trust-property without notice from a purchaser with notice may put forward and plead his own bona fides as a defence and it will constitute a good defence. (i) One more important point is that as between a trustee and his beneficiary a suit to follow trust-property is not barred by limitation. (j) Money, currency notes, etc., cannot be followed (Section 64). But this idea has not gained ground in England and it is therefore rejected. The reason for rejection seems

21. *Thorndike v. Hunt*, (1859) 3 De G & J 563.

22. *Dayal v. Jivraj*, 1 Bom 237.

23. *Spurgeon v. Collier*, 1 Edn. 55.

to be that the basis on which money, etc., has been excluded from being followed is not due to the nature of the property concerned but of its having passed into the hands of a bona fide holder. Therefore, subject to the exceptions contained in Section 64, they can be followed and this idea is well supported by the decisions in *Thorndike v. Hunt*²⁴ and *Re Hallett Estate*²⁵. (k) If the trustee committing a breach of trust makes good the loss so made out of his estate and thereafter becomes bankrupt, his conduct of transferring the funds to repay the loss will not be taken as a fraudulent preference by him.²⁶ (l) This right to follow trust-property which is converted and is in the hands of a trustee or his legal representative or a legatee is available so long as the trust-property exists or is in an "identifiable" state or can be "earmarked", e.g., where A, a trustee, wrongfully invests trust-funds in purchasing land, a beneficiary is entitled to the land. (m) Where a trustee first sells wrongfully (i.e., converts) the trust-property and then becomes an owner of the same by acquiring it, the property so acquired will again become subject to the trust, notwithstanding any want of notice on the part of an intervening transferee in good faith or consideration (Section 65). (n) A beneficiary will have a charge on the whole fund where a trustee wrongfully mingles the trust-property with his own. In England, the beneficiary is entitled to the "whole" or "all" unless the trustee can prove it to be his own; in India he has only "a charge" thereon to the extent of the amount due²⁷ (Section 66). (o) A trustee may blend trust-property either by purchasing property partly with his funds and partly with the trust-fund; or by paying trust-funds into his own banking account, thus making it difficult to identify. In such cases the dispute would be decided on the principles laid down in *Re Hallett Estate case* and the rule in *Clayton case*²⁸ (that "a person will be presumed to draw out first the money he first paid in") will not be applied to such a situation because it is productive of unexpected and unjust results here.

(v) Equities attached to "Right of following Trust Property" (Section 62)

Where a trustee wrongfully purchases trust-property, as explained by Section 62, a beneficiary whose right it is to recover the same and to get it re-transferred from the trustee must, according to the provisions of Section 62 and also on the maxim that one who seeks equity must do equity, repay the purchase money with interest and expenses properly incurred by the trustee. At the same time the trustee must also account for (a) the net profits of the property, he will (b) be charged with the occupation rent of the property in his possession, and also he (c) should allow the beneficiary to deduct *pro rata* purchase money for the deterioration of the property. Of course, the section saves the rights of a lessee by enacting exceptions therein.

24. (1859) 3 De G & J 563.

25. (1880) 13 Ch D 696.

26. *Lister v. Stubbs*, 45 Ch D 1.

27. *Ghosh v. Macintosh*, 4 Cal 908; *Lipton v. White*, 15 Ves 432.

28. (1816) 1 Mer 572.

C. LIABILITY OF THE BENEFICIARY (SECTION 68)

(i) Impounding of Beneficial Interest

Section 68 fixes the liability of a beneficiary joining the breach of trust. Where a beneficiary (a) joins in committing the breach, or (b) knowingly obtains an advantage therefrom without the consent of the other beneficiaries, or (c) does not take proper steps to protect the interests of the other beneficiaries when he knows of a breach of trust, committed or intended, and conceals the same, or (d) has deceived the trustee and induced him to commit a breach thereby, he will render his interest in the trust-property liable to be impounded until the loss caused is compensated. When all the beneficiaries join the breach, all are liable under this section and the trustee is in a stronger position so far as his defence for liability is concerned.

Impounding a beneficiary's interest means that it will be applied so far as it will go towards providing an indemnity to the trustee in respect of the breach.²⁹ In other words, it means not allowing the beneficiary (or all who claim under him) to receive any part of the trust-fund till the loss is compensated. Legal interest cannot be impounded; it is the equitable interest that is impounded. Interest of a feme covert not having power of anticipation is an exception to this liability. Moreover, it is important to note that impounding cannot operate as against bona fide transferees for valuable consideration (Section 68).

Looking from a different angle, a beneficiary who was *sui juris* and with full knowledge of facts and its consequences concurred or acquiesced in the breach, cannot proceed against a trustee for breach of trust.³⁰ But concurrence implies capacity and so, unless guilty of fraud, a beneficiary who concurred in the breach can successfully proceed against the trustee if at the time of the breach he was an infant, or even being of full age was under undue influence of his parents and they were profiting from the breach.³¹ Thus participation in, or consent to, a breach of trust where there was freedom of decision or release or acquiescence by the beneficiary in the breach and its after-effects, give the trustee an opportunity to come out, without blot, of his liability. A beneficiary getting an advantage from the breach has to compensate and therefore must indemnify the trustee to the extent of the benefit received. Till then the trustee will have charge on the beneficiary's interest for such amount. Section 68 gives a remedy to the beneficiary to proceed against another defaulting beneficiary.

(ii) Bar to remedies for breach of trust

A beneficiary's right of action, i.e., his remedy, is lost in one of the following ways—

- (a) by lapse of time, i.e., by law of limitation;
- (b) by continued acquiescence in the breach; or

29. Hanbury: *Modern Equity*, p. 406.

30. See *Re Panling's Settlement Trusts*, 1964 Ch 303.

31. For details see Hanbury: *Modern Equity*, pp. 403-414 and *Snell's Principles of Equity*, pp. 278-283.

- (c) by concurrence therein; or
- (d) by subsequent confirmation of the breach; or
- (e) by release of the trustee from his liability (*see* Section 23 of the Indian Trusts Act).

Section 69 imposes the same liabilities and gives the same rights to the transferee of a beneficiary.

Chapter XVIII

Appointment and Discharge of Trustees

"... in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust. . . In exercising so delicate a jurisdiction as that of removing trustees. . . their main guide must be the welfare of the beneficiaries."

—Story on Equity, Section 1289, quoted
in *Letterstedt v. Broers, Nathan:*
Equity Through the Cases,
No. 114, p. 498

SYNOPSIS

1. Text of Sections 70 to 76
2. Initial Trustees
3. Vacation of Office (Section 70)
4. Discharge of Trustee (Section 71)
5. Petition for Discharge (Section 72)
6. Removal of a Trustee (Section 73)
7. Appointment of New Trustees (Section 73)
8. Selection of New Trustees: Rules (Section 73)
9. Result of new appointment (Sections 75 and 76)

1. TEXT OF SECTIONS 70 TO 76

70. *Office how vacated.*—The office of a trustee is vacated by his death or by his discharge from his office.

71. *Discharge of trustee.*—The trustee may be discharged from his office only as follows:—

- (a) by the extinction of the trust;
- (b) by the completion of his duties under the trust;
- (c) by such means as may be prescribed by the instrument of trust;
- (d) by appointment under this Act of a new trustee in his place
- (e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract; or
- (f) by the Court to which a petition for his discharge is presented under this Act.

72. *Petition to be discharged from trust.*—Notwithstanding the provisions of Section 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

73. *Appointment of new trustees on death, etc.*—Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months absent from India, or leaves India for

the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

- (a) the person nominated for that purpose by the instrument of trust (if any), or
- (b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

74. Appointment by Court.—Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under Section 73, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

Rule for selecting new trustees.—In appointing new trustees, the Court shall have regard—(a) to the wishes of the author of the trust as expressed in or to be inferred from the instrument of trust; (b) to the wishes of the person, if any, empowered to appoint new trustees; (c) to the question whether the appointment will promote or impede the execution of the trust; and (d) where there are more beneficiaries than one, to the interests of all such beneficiaries.

75. Vesting of trust-property in new trustees.—Whenever any new trustee is appointed under Section 73 or Section 74, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.

Powers of new trustees.—Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

76. *Survival of trust.*—On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

2. INITIAL TRUSTEES

The ability to be a trustee is co-extensive with the capacity to hold property¹ and accordingly, an alien may be a trustee according to English law. There a woman may also become a trustee. Since every person capable of holding property may be a trustee, a married woman subject to the provisions under Section 60 in India can also be a trustee even without her husband's consent and would herself be liable for a breach of trust. Her husband will not be liable for the breach unless he intermeddles in the affairs or the administration of the trust. An infant cannot be a trustee because he is not vested with discretion but where the trust does not involve using of discretion and where the personal law of the beneficiary does not prohibit, an infant can be a trustee.² That a married woman is not proper as a trustee is a provision which requires reconsideration in the light of the facts of advanced education of women and her position and status of equality in society.

The first trustees will ordinarily be appointed by the settlor or testator in the deed or will creating the trust. Provided that the deed is effective to constitute the trust or the disposition in the will is adequate to identify the testator's assets as trust assets, a trust will not fail for want of trustees.³

Since a trust will not fail if the settlor or testator has failed to appoint trustees, or if the appointed trustees refuse to act or are unable to act, or have ceased to exist, still, however, a trust may be so framed that, as decided in *Re Lysaght Hill case*⁴, its operation is conditional upon specific trustees undertaking the trust as where there was a charitable trust for medical students who were to be selected and closely supervised by the Royal College of Surgeons as trustees.⁵

The Indian Trusts Act, 1882 in Sections 10 and 70 to 76 makes provision for the qualification, appointment and discharge of trustees. Accordingly, a person appointed as a trustee may accept the appointment or may not. It depends upon his own free will to accept the appointment or not because no one can be compelled to be a trustee or is bound to be a trustee (Section 10). But once

1. Section 10, Indian Trusts Act, 1882.

2. Section 60, Indian Trusts Act, 1882.

3. Hanbury: *Modern Equity*, p. 297.

4. *Snell's Principles of Equity*, p. 191, citing *Re Lysaght Hill v. Royal College of Surgeons*, 1966 Ch 191.

5. *Ibid.*

trusteeship is accepted, one is bound to carry out its duties, because a trust is obligatory and a trustee has got to act.

It may happen that the sole trustee or the trustees first appointed may disclaim the trust,⁶ or decline to act as trustees. If the trust contains provisions for the discharge of such trustees and new appointment of fresh trustees, the emergent situation can be met successfully by acting according to the instructions in the deed. But where no such provisions are forthcoming or if they are, they are incomplete or ineffective, the situation requires a solution which can be arrived at by the help of law.

3. VACATION OF OFFICE (SECTION 70)

As provided by Section 70, the office of a trustee is vacated by his death or by his discharge from his office.

4. DISCHARGE OF TRUSTEE (SECTION 71)

A trustee may be discharged from his office—

- (i) by the extinction of the trust,
- (ii) by completion of his duties under the trust,
- (iii) by such means as are prescribed in the trust instrument,
- (iv) by appointment of new trustee in his place,
- (v) by consent of himself and the beneficiary or beneficiaries, as the case may be, or
- (vi) by the court in response to a petition presented by him under Section 72 of the Act.

5. PETITION FOR DISCHARGE (SECTION 72)

Even though a trustee is bound to carry out the trust and to obey the directions of the author of the trust, he may present a petition to a court for his discharge. On finding that the reasons advanced by the trustee are valid and sufficient, *i.e.*, disability to give attention to trust administration due to continuous illness, or for some other reasons beyond his control, the court will discharge him accordingly and order the costs of the petition to be paid out of the trust-property. If the reasons are not sufficient, he will not be discharged unless and until a proper person to take his place is found. Where there are sufficient reasons for discharge, the court will give an immediate discharge and order the costs to be paid from the trust-property, but where there are no sufficient reasons, the release of a trustee will not be immediate and would be delayed until a proper person is found; the costs in such a situation will have to be borne by the trustee himself. One more point to be noted here is that in the latter situation the property remains vested in the first trustee till a new appointment is made.

6. Section 10, Indian Trusts Act, 1882.

6. REMOVAL OF A TRUSTEE (SECTION 73)

In *Letterstedt v. Broers*⁷, it was expressed by Lord Blackburn that "friction or hostility between the trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees", but since there was very little to guide their Lordships, they were compelled to have recourse to general principles.

"As Story says: 'But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust-property or (i) to show a want of honesty, or (ii) a want of proper capacity to execute the duties, or (iii) want of reasonable fidelity.' In exercising so delicate a jurisdiction as that of removing trustees. . . their main guide must be the welfare of the beneficiaries."⁸

In India, Section 73 makes provision for removal of trustees in cases (i) where any trustee is absent from India for a continuous period of six months, or (ii) leaves India for the purpose of residing abroad, or (iii) is declared an insolvent, or (iv) being old and infirm is unfit or personally incapable to act as a trustee, or (v) accepts an inconsistent trust. All these categories can be properly included under the second category in the preceding para. Cases of want of honesty and want of reasonable fidelity are many. But in all such cases the trustees are removed, they do not retire, because retirement is voluntary and at one's request, whereas removal is compulsory and against one's desire or wishes. Section 71 enumerates situations wherein a retirement is granted, while Section 73 operates when trustees are removed and new appointments are made.

7. APPOINTMENT OF NEW TRUSTEES (SECTION 73)

As the section explains, new trustees in place of initial or first trustees or other trustees can be made,

- (i) by the person nominated for that purpose by the instrument of trust, or
- (ii) by the author of the trust if he be alive and competent to contract, or
- (iii) by the surviving or continuing trustees or trustee, or
- (iv) by the legal representative of the last surviving and continuing trustee, or
- (v) with the consent of the court by the retiring trustees, if they all retire simultaneously, or
- (vi) with the consent of the court, by the last retiring trustee.

The power to nominate a trustee, as said above, is to be exercised in the order given; each preceding person having a superior or preferential power than the one following. If no appointment of a trustee can be made under Section 73,

7. (1884) 9 App Cas 371; Nathan: *Equity Through the Cases*, No. 114, p. 497.

8. *Ibid.* p. 498.

the court will appoint trustees under Section 74 on the application of the beneficiary for that purpose.

8. SELECTION OF NEW TRUSTEES: RULES (SECTION 74)

In appointing new trustees the court shall have regard to—

- (i) the wishes of the author of the trust, as expressed or to be inferred from the instrument of trust;
- (ii) the wishes of the person (if any) empowered to appoint new trustees;
- (iii) the question whether it will promote or impede the execution of the trust; and
- (iv) to the interest of all the beneficiaries where there are more than one.

These rules were expressed by Turner, L.J., in *Re Tempest*⁹ and the Indian law runs on its close analogy. In doing so, he said, the court acts upon and exercises its discretion which is not arbitrary, but based on general rules and principles, which are not very easy to apply to the varying circumstances of each particular case. But the following rules apply to all cases of appointment of new trustees.

The first rule is “that the court will have regard to the wishes of the persons by whom the trust has been created. If the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be a trustee of the instrument, there cannot, as I apprehend, be the least doubt that the court would not appoint to the office a person whose appointment was so prohibited, and I do not think that upon a question of this description any distinction can be drawn between express declarations and demonstrated intention”.¹⁰

The next rule is “that the court will not appoint a person to be a trustee with a view to the interest of some of the persons interested under the trust, in opposition either to wishes of the testator or to the interest of others of the *cestui que trust*. . . It is of the essence of the duty of every trustee to hold an even hand between the parties interested under the trust. Every trustee is duty-bound to look to the interests of all, and not of any particular member or class of members of his *cestui que trust*”.

The last rule is “that a court in appointing a trustee will have regard to the question whether his appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be carried into execution”.¹¹

It was, therefore, rightly said by Warrington, J. in *Re Wrightson*¹², “that you must find something which induces a court to think either that the trust property

9. 1 Ch App 485 (Turner & Knight Bruce, L., JJ.); Nathan: *Equity Through the Cases*, No. 113, pp. 492-493.

10. *Ibid.*

11. *Ibid.*

12. (1908) 1 Ch D 789, 803.

will not be safe, or that the trust will not be properly executed in the interest of the beneficiaries". In the same way, bankruptcy of a trustee is, as a general rule, a ground for his removal¹³ but as decided in *Satya Kinkar case*¹⁴ in India, wherein *Barker case*¹⁵ was followed, bankruptcy would not *ipso facto* discharge him from his office. He remains competent to work unless he is removed by the court.¹⁶

9. RESULT OF NEW APPOINTMENT (SECTIONS 75 AND 76)

The consequence of the new appointment of a trustee under Section 73 or 74 would be that the trust property which was so far vested in the surviving or continuing trustees would now be vested in the new trustee, either solely or jointly with the surviving or continuing trustees or trustee. The newly-appointed trustee shall have the same powers, authorities and discretions in regard to trust administration as the originally nominated trustee and he will act accordingly. As Section 76 provides, on the death or discharge of one of several co-trustees the trust survives and the trust property passes to the others unless provided otherwise by the trust.¹⁷

13. *Re Barker's Trusts*, (1875) 1 Ch D 43.

14. *Satya Kinkar v. Kiron Chandra*, AIR 1954 Cal 432.

15. *Re Barker's Trusts*, (1875) 1 Ch D 43.

16. *Satya Kinkar v. Kiron Chandra*, AIR 1954 Cal 432.

17. See *Jarat Kumari Dassi v. Shubhakaran Khemani*, AIR 1960 Cal 489.

Chapter XIX

Extinction of Trusts

"... It is not the province of the court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a court of justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper."

—Jessel, M.R., in
Dutton v. Thompson, (1883) 23 Ch D 278

SYNOPSIS

- | | |
|------------------------------------|-----------------------------|
| 1. Text of Sections 77 to 79 | (b) Power of Revocation |
| 2. Extinction (Section 77) | (c) Trust created by a will |
| 3. Revocation (Sections 78 and 79) | (d) Trust created otherwise |
| (a) Meaning | |

1. TEXT OF SECTIONS 77 TO 79

77. *Trust how extinguished.*—A trust is extinguished—

- (a) when its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise; or
- (d) when the trust, being revocable, is expressly revoked.

78. *Revocation of trust.*—A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only—

- (a) where all the beneficiaries are competent to contract—by their consent;
- (b) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust; or
- (c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

Illustration

A conveys property to B in trust to sell the same and pay out of the proceeds the claims of A's creditors. A reserves no power of revocation. If no communication has been made to the creditors, A may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

79. *Revocation not to defeat what trustees have duly done.*—No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

2. EXTINCTION (SECTION 77)

The Indian Trusts Act, 1882 makes provision for the extinction of trusts under Sections 77, 78 and 79. Section 77 lays down four situations when a trust is extinguished. Accordingly, a trust is extinguished—

- (i) when its purpose is *completely fulfilled*; or
- (ii) when its purpose *becomes unlawful*; or
- (iii) when the fulfilment of its purpose *becomes impossible* by destruction of the trust property or otherwise; or
- (iv) when the trust, being revocable, is *expressly revoked*.

A valid express trust, whether it be private or public, comes to an end in any one of the abovesaid four situations. It is natural that the life of a public trust is longer than that of a private one but from the viewpoint of extinction of trust there is no such difference.

Suppose a trust is created for A and property is transferred to X as a trustee to hold it in trust and to apply it for the maintenance and education of A up to graduation and to hand over the corpus to A after he attains majority. Under the circumstances after graduation of A and on his attaining majority the trust has fulfilled its purpose completely. Accordingly, it must come to an end under Section 77(a) when its purpose is fulfilled. In the above example if there was a provision that after A's graduation the remaining property will go to certain persons, the purpose is not fulfilled unless and until the residue reaches its ultimate and proper destination.

To be legal, a trust must have a lawful object or purpose. A purpose lawful at the initial stage may become unlawful afterwards due to some new legislation coming into force. The purpose, therefore, cannot be accomplished, being unlawful. In such cases a trust is extinguished from the date when its purpose became unlawful. Thus while an initial unlawfulness does not allow a trust to come into existence, a supervening unlawfulness turns a lawful purpose into an unlawful one whereby a trust is extinguished under Section 77(b).

Similarly, under Section 77(c) when the fulfilment of the purpose becomes impossible by destruction of the trust property or otherwise, a trust is extinguished. In the first example where a trust is created for A, if he dies, the trust comes to an end. Similarly, when there is a litigation by Z against X in regard to his claim to trust property and Z becomes successful in getting the property, the trust is extinguished as there is no trust property now. The destruction of the trust property may take place in any other way also, e.g., on account of flood, lightning and other natural calamities.

In the last instance a trust is extinguished when it is revoked (Section 77).

3. REVOCATION (SECTIONS 78 AND 79)

Section 78 enumerates the circumstances when a trust may be revoked. A trust created by a will may be revoked at any time at the pleasure of the testator,

for a will is inherently ambulatory. But a trust which is created otherwise than by will may be revoked—

- (i) by consent of all the beneficiaries where all of them are competent to contract;
- (ii) by expressly providing in the instrument of trust for a power of revocation: by exercising such a power a trust may be revoked;
- (iii) when its purpose is the payment of author's debts, it can be revoked at any time prior to communication of the arrangement to the creditors.

(a) *Meaning.*—To revoke is to annul something by recalling or taking back, and to annul is to make void legally. To revoke is, therefore, to make void legally a document by recalling it or taking it back.¹ It may mean the undoing of a thing already granted in writing by making it legally ineffective. So long as the trust created has not become fully operative, it remains within the settlor's competence to withdraw any part of the property from trust or to vary its terms etc., but once it starts operating without assistance or interference from the settlor, he has no right to make any variation therein, as he is then divested of all his powers, and interests in and dominion over the trust. He consequently cannot revoke it. In other words a settlor cannot revoke a completely constituted trust unless the settlement reserves a power of revocation.

(b) *Power of Revocation.*—As explained by Snell,² there are cases where a trust even though completely constituted may be revoked by the settlor, or set aside by third parties. These cases fall under four heads,³ of which revocation is one.

A settlor cannot revoke a completely constituted trust unless a power to do so is reserved in the instrument. One should note that a mere absence of power of revocation from a voluntary trust or the presence of it by unusual provisions is not any ground for setting it aside, provided that those provisions were brought to the settlor's notice and were understood by him. "It is not the province of the court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a court of justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper."⁴

Other grounds for revocation may be (i) fraud or undue influence in obtaining the settlement, or (ii) the execution of the settlement under a fundamental mistake or misapprehension as to its effect,⁵ or (iii) illusory trusts may also be revoked by the settlor.⁶

1. Funk and Wagnalls: *Standard Handbook of Synonyms, Antonyms & Prepositions*, p. 107.

2. *Snell's Principles of Equity*, pp. 126-127.

3. (i) Revocation, (ii) Conveyance to defraud creditors, (iii) Voluntary conveyance to defraud a subsequent purchaser, and (iv) Bankruptcy of the settlor.

4. *Per Jessel, M.R.*, in *Dutton v. Thompson*, (1883) 23 Ch D 278.

5. *Strauss v. Sutro*, 1948 LJR 33; *Bullock v. Lloyds Bank Ltd.*, 1955 Ch 317.

6. See Chap. 12, *supra*.

One who seeks to set it aside on the above grounds must discharge the onus of proving it. If the settlor is proved to be a free agent, it cannot be set aside, but a settlement for value can very rarely be set aside, for marriage is a valuable consideration.

(c) *Trust created by a will.*—A trust created by a will can be revoked at any time by the author, during his lifetime but thereafter it cannot be, because after the author's death the will begins to speak and the trust immediately comes into existence.

A trust for the payment of its author's debts can also be revoked at any time before it is communicated to the creditors (because up to that time it is simply an uncommunicated arrangement and not really a trust).⁷

(d) *Trust created otherwise.*—A trust created by a non-testamentary instrument may be revoked by means of a power of revocation expressly reserved by the author in that instrument or it may be revoked when all the beneficiaries are competent to contract and they so consent.

When a trust is revoked, the revocation will not affect the acts of the trustees duly done in execution of the trust so as to defeat or prejudice those acts (Section 79).

7. See Chap. 12, *supra*.