



UTTARAKHAND

Judicial Services Exam

CIVIL JUDGE (Junior Division)

Uttarakhand Public Service Commission (UKPSC)

Law

Part - 1



UTTARAKHAND JUDICIAL SERVICES

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Indian Trust, Easement and Equity

Definition of Trust

The definition of 'TRUST' which has been taken from the New York Civil Code, has been modified to avoid the risk of concluding trust with bailments. Section 3 of the Indian Trust Act defines trust as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and the owner by the owner or declared and accepted by him for the benefit of another or of another and the owner. The Act also give a definition of 'breach of trust 'and'notice'; and all definitions in the Indian Contract Act of expressions used in the present Act are applicable to this Act. According to the Specific Relief Act, trust includes every species of express, implied or constructive fiduciary ownership.

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

Creation of trust

In order to create a trust , the author of the trust should indicate with reasonable certainty by any words or Act (1) an intention or his part to create a trust, (2) The purpose of the trust, (3) the beneficiary (4) the trust property , and (5) should, (save in the case of a trust declared by will , and of a trust of which the author is himself the trustee) transfer the trust property to the trustee.

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

Further, the section says that no trust in relation to movable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

Thus, a specific oral declared by Will or the author himself is to be the trustee. In other cases, transfer of the property is also essential.

ILLUSTRATIONS

1. A bequeaths certain property to B," having the fullest confidence that he will dispose it of for the benefit of C". This creator a trust so far as regards A and C.
 2. A bequeaths certain property to 3," hoping he will continue it in the family". This does not create a trust as the beneficiary is not indicate with reasonable certainty.
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3. A bequeaths certain property to B, requesting him to distribute it amongst such members of C's family as B should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty
4. A bequeaths certain property to B desiring him to divide the bulk of it among C's children. This does not create a trust for the trust property is not indicated with sufficient certainty.

Parties To The Creation of Trust

Three persons are necessary for the creation of a trust. There should be a person to repose or declare confidence, known as the "author of the trust". Author person should accept the confidence as proposed to be reposed in by the author of the trust. He called the 'trustee'. Thirdly, the person for whose benefit, the confidence is accepted by the trustee, known as the 'beneficiary'. Where the author of the trust declares and accepts the confidence himself, he also becomes a trustee.

The Capacity To Create Trust

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

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

For the creation of a trust, no technical words are necessary. Any language may be used from which intention to create a trust appears. Trust are also created by the operation of law. The example of implied trust under the Indian trust Act are as under:

According to section 81, where the owner of a property transfer or bequeaths it, and it can not be inferred consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representatives.

Duty To Conversion of Perishable Property

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

Duty To Be Impartial

According to section 17 a trustee is under a duty to be impartial where there are more beneficiaries than one and must not execute the trust for the advantage of one at the expense of another.

Duty To Prevent Waste

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

Duty To Furnish Accounts

A trustee is under a duty: to keep clear and accurate accounts of the trust property; and at all reasonable times, at the request of the beneficiary to furnish him with full and accurate information as to the amount and state of the trust property.

But where the trust involves the exercise of discretion, it is necessary that he must be a person competent to contract. All who are capable are not necessarily fit to be a trustee. A person domiciled abroad, an alien enemy, a person having an interest inconsistent with that of the beneficiary, a person in insolvent circumstances, and a minor are not capable of being appointed as trustee.

In the case of a trustee, however, many other considerations arise in addition to the bare capacity holding property. In the first place, he may be prevented from exercising powers of administration or management unless he has legal capacity to make disposition of property and enter into contracts. Secondly, though he has full capacity, it may be undesirable that he should act as a trustee either because would be in a position where his duty and interest would conflict or because of some personal disqualification, such as permanent residence out of the jurisdiction, bankruptcy, conviction for dishonor incapacity through age, illness or mental difficulty. In all these cases, the court will remove a trustee and appoint a new trustee.

Liability of Trustees

Sections 23 to 29 of the Indian Trust Act, 1882 deal with the liabilities of a trustee.

(1) To make good the loss which the trust-property has suffered by reason of the breach of trust (section 23)

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

In certain conditions the trustee may be held liable not only to make good the loss sustained by the beneficiary but also to pay interest. A trustee committing a breach of trust is not liable to pay interest except in the following cases:

- (a) Where he has actually received interest;
- (b) Where the breach consists in unreasonable delay in paying trust-money to the beneficiary;
- (c) Where the trustee ought to have received interest, but has not done so;
- (d) Where he may be fairly presumed to have received interest;
- (e) Where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at same rate, or for the net profits made by such employment.

(2) No set-off, allowed to trustee

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

(3) Liability for breach of trust by co-trustees

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

- (i) **Liability on co-trustee's default:** -According to section 26 of Indian Trust Act, subject to the provisions of sections 13 and 15, one trustee is not as such liable for a breach of trust committed by his co-trustee but a trustee will be liable for breach of trust by his co-trustee where he is himself guilty of some re of duty, e.g.

- (a) Where he has delivered trust-property to his co-trustee without seeing to its proper application;
 - (b) Where he allows his co-trustee to receive trust property and fails to make due enquiry as the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require.
 - (c) Where he becomes aware of a breach of trust committed or intended by his co-trustee and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.
- (ii) **Several liabilities of co-trustee** - According to section 27 of the Indian Trust Act, where co-trustee jointly commits a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.
- (4) **Contribution as between co-trustees where they jointly commit a breach of trust**
Section 27 provides for, following cases where a contribution as between co-trustees will be affected
- (a) As between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter or his legal representative to the extent of the assets he has received, to make good such loss;
 - (b) If all be equally guilty, one or more of the trustees who has had to refund the loss may compel the others to contribute;
 - (c) Nothing, however, authorizes a trustee who has been guilty of fraud to institute a suit to compel contribution.
- (5) **Liability of trustee where beneficiary's interest is forfeited to Government**
Section 29 says that where beneficiary's interest is forfeited or awarded by legal adjudication Government, the trustee is bound to hold the trust property to the extent of such interest for the benefit of such person in such manner as the State Government may direct in this behalf.
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Disabilities of Trustees

The Indian Trust Act, 1882 deals with the "disabilities of trustees" under sections 46 to 54 they are given as under:

- (i) **Trustee cannot renounce his office after acceptance:-** A trustee who has accepted the trust can't 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.

- (ii) **Trustee cannot delegate his office:-** The maxim "delegates non-protest delegate" applies also to a trustee and he himself being a person to whom the office of confidence is delegated cannot delegate to his own nominee to discharge the duties. Section 47 of the Indian Trust Act says that a trustee cannot delegate his office or any of his duties. Section 47 of the Indian Trust Act says that 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 delegation.

Thus, the trustee cannot as a rule, delegate the performance of his duties to other unless the trust instrument specifically authorizes delegation for any purpose. And if he shifts his duties on to a stranger or even to a co-trustee, he remains liable for any consequential loss to the trust estate.

- (iii) **Co-trustee cannot act singly:-** According to section 48 when there are more trustees than one all must join in the execution of the trust, except where the instrument of trust otherwise provides.

- (iv) **Control of discretionary power:-** Section 49 states that where a discretionary power conferred on a trustee is not exercised it diligently and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

The Court, thus, has jurisdiction to interfere with the discretionary power of a trustee where it is found has not exercised it diligently and in good faith. But, influence, can be availed only on a properly instituted suit. The Court may, if necessary, interfere by injunction. If the act complained of would be irremediable, the Court will interfere as a matter of course.

- (v) **No right to remuneration:-** A trustee has no right to remuneration for his trouble, skill and loss of time for executing the trust, except
- (a) Where there is express direction in the instrument of trust, or
 - (b) There is a control entered into with the beneficiary: or
 - (c) Where the court, at the time of accepting the trust, has sanctioned it
- (vi) **Trustee may not use trust property for his own benefit or profit:-** A trustee may not use or deal with a trust property for his own benefit or for any other purpose unconnected with the trust, because equity prohibits a trustee from making any profit by his management directly or indirectly. In administering the trust, the trustee must act for the beneficiaries and not for himself in antagonism to the interests of the beneficiaries, he is prohibited from using the advantage of his position to gain any benefit for himself at the expense of the '*cestui que trust*' and from placing himself in any position where his self-interest will, or may, conflict with his duties as trustees
- (vii) **Trustee for sale his agent may not buy:-** Section 52 provides that no trustee whose duty 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.
- (viii) **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. And no trustee whose duty it is to buy or to obtain a mortgage or lease of it, or any thereof, for himself.
- (ix) **Co-trustees may not lend to one of themselves:-** Section 54 provides that a trustee or co-trustee whose duty it is to invest trust money or 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
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Rights of Beneficiaries

The rights of the beneficiaries, under the Indian Trust Act are provided in sections 55 to 69. They are as follows:-

- (i) **Right to rents and profits:-** The beneficiaries have a right to the rents and profits of the trust property in such share or subject to such limitations as may have been provided for in the instrument of trust. The beneficiaries have in certain cases, not merely the rights to rents and profits of the trust property but also to the corpus or the trust property itself e.g., if there is only one beneficiary and he is sui juris, he may compel the trustee to put him in possession of the trust property.
- (ii) **Right to specific execution:-** The beneficiary has the right to have the intention of the author of the trust specifically enforced to the extent of his particular interest. 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 of one mind, he or they may require the trustee to transfer the trust property to him or to such person as he or they may direct.
- (iii) **Right to put an end to the trust:-** If there is only one beneficiary, or if there are several and they are all of one mind and not under any disability, the execution of the trust in accordance with the terms of the trust instrument may be arrested, and the trust may be modified or extinguished.
- (iv) **Right to inspect and take copies of trust instrument, 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 copies 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.
- (v) **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.
- (vi) **Right to sue for execution of trust:-** When 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 become impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so -- may be possible be executed by the Court until the appointment of a trustee or a new trustee

(vii) **Right to proper trustees:-** The beneficiary has a right subject to the provisions of instrument of trust that the trust property shall be properly protected and held administered by proper persons and by a proper number of such persons. Accordingly, where a trustee is or becomes subject to any disability or disqualification or is unable to devote his time and attention to the trust or does not otherwise act reasonably and fairly, the beneficiary may institute a suit for the removal of such a trustee and for the appointment of a new trustee in his place. If the Court is satisfied that the continuance of a particular trustee would not be conducive to the proper administration of the trust, it may remove him even though there is no charge or proof of misconduct or personal disqualification.

(viii) **Right to compel the trustee 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 a contemplated or probable breach of trust.

Liabilities of the Beneficiaries

According to section 68 of the Act, if one of several beneficiaries (a) joins in the breach of trust, or (b) knowingly obtains any advantage there from without the consent of the other beneficiary, or (c) become aware of a breach of trust and either conceals it or does not take steps to protect the interest of other or deceives the trustee and thereby induces him to commit a breach, the other beneficiaries are entitled to have all his beneficial interest impounded until the loss occasioned by the breach has been compensated Every person to whom a *cestui que trust* has transferred his interest, has the rights and is subject to liabilities of the beneficiary.

Further section 33 of the Indian Trust Act provides that where a trustee commits a breach of trust at the instigation or with the consent of one or some of the several beneficiaries under a trust, such beneficiary is liable for the loss caused thereby to the trust estate and the other beneficiaries are entitled to have all his beneficial interest under the trust impounded until the loss caused by the breach has been compensated

Right to follow the trust property

According to section 63 of the Act, 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 therefore can be breach in his hands, or the hands of his legal representative or legatee, the beneficiary, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Advantages Gained by Qualified Owner

Under section 90 where a tenant for life, co-owner, mortgagee, or other qualified owner of any property by availing himself of his position as such, gains an advantage in derogation of the rights of other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred and to an indemnity by the same persons against liabilities property contracted, in gaining such advantage

In law, the advantages by the qualified owner must be held to be for the benefit of the persons interested; *Namdev Shripati Nale v. Babu Ganapati*, (1997) 5 SCC 185

Law of Tort

Law of Torts

Introduction

The law of tort is a special branch of law governing actions for damages for injuries to certain kinds of rights i.e., as rights of personal securities, property or reputation.

It is also often said that a wrong which is not a crime, which is not a breach of contract or which is not a breach of trust, is a wrongful tort. An act twisted, crooked, which is not straight and lawful, is tort.

The word "tort" is derived from the Latin word 'tortum', meaning 'twist'. Like all other wrongs, tort is a wrongful act whereby the wrongdoer commits the breach of a legal right vested in some individual.

Tort is a civil wrong, but not all civil wrongs are torts. Thus, broadly speaking, though loosely-those civil wrongs which do not fit in any defined category of civil wrongs, are torts.

Definition of Tort

To define tort clearly and satisfactorily is an ambitious task due to the practical problems which obstruct writers in framing a precise definition. Following are the attempts made by various Justices to define tort

- (a) **Winfield:**- "Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for un-liquidated damages."
- (b) **Pollock:**- "The law of torts in civil wrongs is a collective name for the rules governing many species of liability which although their subject-matter is wide and varied have certain broad features in common, enforced by the same kind of legal process and are subject to similar exceptions."
- (c) **Fraser:**- It is infringement of a right in rem of private individual giving a right of compensation at the suit of the injured party.
- (d) **Prof. Bangia:**- "Tort is a civil wrong which is redressible by an action for unliquidated damages, and which is other than a mere breach of contract or breach of tort."

Section 2 of the Limitation Act, 1963:-

"Tort is a civil wrong which is not exclusively a breach of contract or breach of trust."

Nature of a tort: Nature of a tort can be best understood by distinguishing

1. Tort and crime
2. Tort and breach of contract
3. Tort and breach of trust

Tort	Crime
1. There is an infringement of private or civil rights of individual.	1. There is a breach of public rights which affect the whole community.
2. The forum of redressal is a civil court.	2. Proceedings are to be initiated in a criminal court.
3. The suit for damages is filed in the court against the wrongdoers by the plaintiff himself.	3. Proceedings are initiated against the accused by the State.
4. The main aim is to re-compensate the plaintiff for the loss suffered by him from the wrongful act of the defendant.	4. The main aim is to punish the accused if convicted to set example that such crime is not repeated in future.

Tort	Contract
1. There is a breach of duty which is fixed by law.	1. There is a breach of duty which is fixed by the contracting parties.
2. Motive for breach of duty is immaterial.	2. Motive for breach of contract is often taken into consideration.
3. There is a violation of a right in rem i.e., a right vested in some determinate person and available against the whole world.	3. A breach of contract is an infringement of a right in <i>personam</i> i.e. a right available only to a some definite person and in which society has no concern
4. Damages are generally unliquidated and are determined by the court on the facts and circumstances of the case.	4. Damages are fixed according to the terms and conditions of contract.

Tort and Breach of Trust

Only similarity between breach of trust, breach of contract and tort is that claim is usually for monetary compensation. In the case of breach of trust, the damages may be liquidated: they may as well be unliquidated. Again, in the case of breach of trust, there exists a relationship of trustee and beneficiary between the two, but it is not so in tort. Trust is a breach of law of property, while tort is not.

General Conditions of Liability In Tort

Following are the conditions on which tortious liability is determined

1. Wrongful act or omission
2. Resultant damage (legal)
3. Legal remedy

1. **Wrongful Act or Omission:-** A tortious act may be positive or negative, in either case act must be one which is regarded by law as unlawful. When a person has a legal duty to perform, and if he fails to do it, he can be made liable.

If the act complained of does not violate legal right of another person, it is not a tort. Violation of moral, social and religious duties does not come under the category of torts. Thus, in tort the plaintiff has to prove that his legal rights have been violated by the act of the defendant.

2. **Resultant Legal Damage:-** Mere act or omission or failure to do duty will not be a tort, unless it results in some injury to the person suing, or violation of his legal right. But it is not every damage that is an injury in the eyes of law. There may be a wrong caused to a person but, if actual legal damage is not caused to him, no action in tort will be maintainable. "Legal damage" neither identical to "actionable damage" nor it is necessarily "pecuniary".

Thus, if a legal right has been violated, remedy must be provided. This is expressed thus, *injuria sine damno*. If there is no violation of legal right, even though the act of one party causes harm or injury to the other, no action can be filed: *damnum sine injuria*, or damage without the violation of legal right is not actionable in a court of law.