

UNIT II

OUTLINE-

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Appointment of Original Trustee

The original trustee is appointed in the following manner-

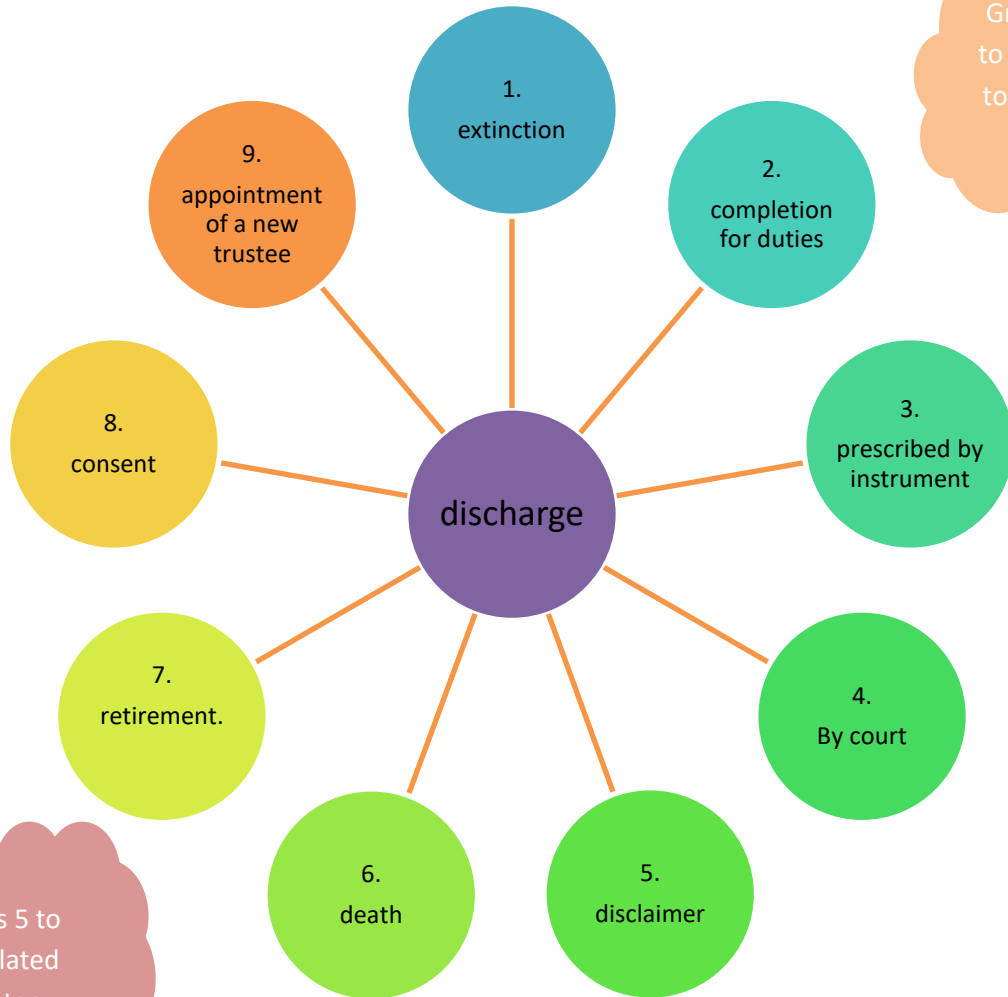
- i- By express declaration by the author with regard to creation of trust.
- ii- Thereafter, acceptance of the trust by the trustee by words or actions.

Discharge of Trustee

- 1- **Disclaimer by the trustee-** a trustee may within reasonable period disclaim the trust i.e. even after his appointment but before acting in capacity of the trustee.
- 2- **Death of the trustee**
- 3- **Retirement of trustee**
- 4- **Grounds of Discharge of the trustee under Sec 71-**

Sec 71 of Indian Trust Act following are the only grounds of discharge of trustee-

- a. By extinction of trust
- b. By completion for duties under the trust
- c. By such means as may be prescribed by instrument if trust
- d. By appointment of a new trustee
- e. By consent of himself and the beneficiary (where there are more than one beneficiaries, by consent of all of those who are competent to contract)
- f. By court to which petition of his discharge is presented



Grounds 1 to 4 related to external factor

Grounds 5 to 8 are related to trustee

Removal of the trustee by court-

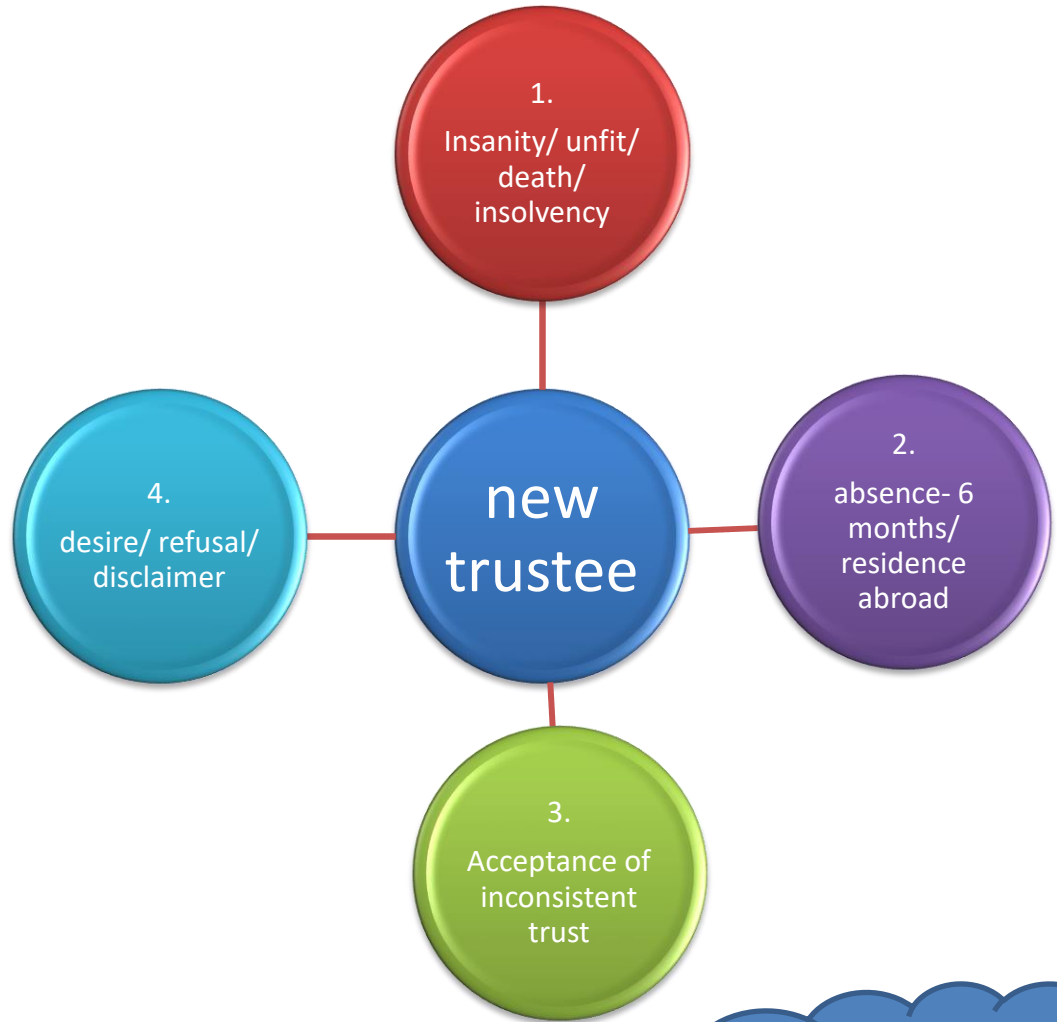
The court has an inherent power to remove the trustee and appoint new one in his place whenever in opinion of the court the interest of the beneficiary so requires. Grounds of removal by court may include-

- Moral turpitude
- Trustee commits breach of trust
- Trustee becomes bankrupt
- Trustee shows himself to be unfit for office by want of honesty, fidelity, capacity etc.

Appointment of new Trustee-

According to Sec 73 of ITA, new trustee can be appointed in substitution of or in succession of the original trustee in following cases-

- 1- Disclaimer by the original trustee
- 2- Death of trustee
- 3- Absence from Indian for 6 months
- 4- Leaving India for the purpose of residing abroad
- 5- Insolvency of the trustee, when considered as a ground by the competent court
- 6- Desire to be discharged
- 7- Refusal to act as trustee
- 8- Unfit or personally incapable to act in trust
- 9- Acceptance of inconsistent trust
- 10- Insanity of the trustee



1-
3 grounds- personal for trustee

2.
On availability of trustee

3.
Unique ground

4
3 grounds on his reaction to trust

As provided under Sec 73, **a new trustee may be appointed by-**

- 1- The person who has been nominated for that purpose by the instrument of trust
- 2- If there is no such person or no person is able and willing to act, the author of trust if he is alive and competent to contract
- 3- The surviving or continuing trustees or legal representative of the last surviving trustee
- 4- With the consent of the court by the retiring trustees (if they are retiring simultaneously) or by the last retiring trustee
- 5- By the court- if all of the abovementioned avenues to appoint the trustee have failed or if the then the court may appoint him on petition (not a suit) by a beneficiary to a principal civil court of original jurisdiction for appointment of new trustee or trustees.

In making such an appointment the court shall have regard to-

- Wishes of the author expressed or inferred from the instrument of the trust
- Wishes of the person empowered to appoint new trustee
- The question whether appointment will promote or impede the execution of the trust
- Where there are more beneficiaries than one, the interest of all such beneficiaries.

When a new trustee is appointed all the trust property vested in the original trustee or his legal heirs now vests in the new trustee and he shall have same powers, authorities and duties as were conferred on the original trustee by the instrument.

Rights of a Trustee

- i. To have possession of the trust property.
- ii. To get reimbursement of expenses incurred in maintaining the trust property.
- iii. To apply to the court, for its opinion, advice or direction in the management of the trust property.
- iv. To have the accounts of the trust property examined and settled on completion of the duties.
- v. On completion of his duties, to have a written acknowledgement from the beneficiaries saying there are no dues from him to the beneficiaries.

Powers of Trustee

The trustee is empowered to take action for the welfare of the trust property to:

- i. Sell the trust property together or in lots, by public auction or private contract. This can be sold together or at different times.
- ii. Do the above within a reasonable time, i.e. sell the property and invest the trust money to purchase any other property.
- iii. Convey the trust property through a valid and registered sale deed.
- iv. Invest the trust money and monitor the investments.
- v. Use the trust property for the maintenance, education or advancement of a minor beneficiary, if any.
- vi. Give a written receipt for any money, securities or other movable property, which is paid, transferred or delivered, to him.
- vii. When there are two or more trustees, any one may be authorized to execute the trust. In that case the authorized trustee can:
 - a. Accept security for a debt,

b. Allow time for payment of a debt,

c. Compromise, abandon, submit to arbitration or settle any debt relating to the trust.

The disabilities of a trustee are:

i. Once he has accepted the trust; he cannot refuse to act as a trustee.

ii. A trustee cannot delegate his duties to another or a co- trustee.

iii. A trustee should not use the trust property for his own profit or any other purpose, unconnected with the trust.

iv. A trustee cannot buy the trust property on his own account or as an agent of a third person.

v. A trustee cannot act unilaterally but must consult his co-trustees, if any.

vi. Co-trustees should not lend the trust money to each other.

vii. A trustee is not allowed to make a set-off of a loss against a gain he may have made with the use of trust property.

The duties and liabilities of trustee are-

Duties of Trustee-

i) **To execute the trust.** The primary duty of the trustee is to fulfil the 'purpose' of the trust and to obey the directions of the Author of the trust, given at the time of its creation.

Exceptions:

a. Modification is allowed with the consent of all the beneficiaries (if all of them are legally competent). If beneficiary is not competent, the consent may be given by the concerned court.

b. Trustee need not obey a direction which is illegal, impracticable or injurious to the beneficiaries.

eg. A, a trustee is authorised to sell by public auction. He cannot sell under a private contract.

ii) To act with diligence

A trustee must acquaint himself with the nature and circumstances of the trust property; he must obtain a transfer to his name of trust property. He must get back moneys invested in insufficient or hazardous security.

eg. A, B & C are trustees. Certain moneys are in the hands of B & C longer than required. A must not allow these moneys to be with B & C any longer.

iii) To secure title

The trustee should maintain and defend all suits and take other reasonable steps to preserve and to protect the title of the property should not set up a title adverse to the interest of the beneficiary

iv) Standard of care

The trustee should use as much care and diligence in the management of the trust property as a man of ordinary prudence could deal in respect of his own property. This is the standard of care fixed by law. If he so acts, he will not be responsible for any loss, destruction or deterioration of the trust property.

- eg. i) A, a trustee is to sell a trust property by auction after duly advertising. He fails to advertise, but sells without due diligence and care. A is liable for losses, if any.
- ii) A the trustee of B, fails to pay the premiums though he had funds on hand. The policy is forfeited. A is liable for the losses.

v) Conversion:

When the trust is for the benefit of several persons in succession, under the doctrine of conversion, the trustee should convert any wasting or perishable property into a property of a permanent and profitable character.

vi) Impartiality:

When there are two or more beneficiaries, the trustee should be impartial. He should not execute the trust for benefit of one at the expense of the other.

vii) To prevent waste:

When a trust is created for the benefit of several persons in succession, then the trustee should take all measures to prevent any act of the beneficiary-in possession, which is destructive or permanently injurious to the property.

viii) Accounts:

The trustee should maintain clear and accurate accounts of the trust property and should furnish full and accurate information thereof.

ix) Investment:

When the trust consists of money and cannot be immediately applied for the purposes of trust, then the money must be invested in the State or Central Government securities, and in no other. This is subject to the direction of the trust deed.

Liabilities of the Trustee-

Liability for breach of trust

Breach of trust means a breach of any duty imposed on a trustee, by any law for the time being in force. It includes the violation of any direction given in the trust-deed. The trustee is liable to make good the loss sustained by the beneficiary or the trust property, due to breach committed by the trustee.

Trustee is liable to pay interest, in the following instances:

- a) When he has actually received interest, but has not accounted for it.
- b) Where he ought to have received, but has failed to collect,
- c) Where he causes unreasonable delay in paying to the beneficiary.

The rates of interest must be as per the trusts Act. He must pay actual interest received in (a) and pay simple interest in (b) & (c) above. But, he must pay compound interest if a breach committed by him in not investing in the moneys as per the Trust Act or in not using in trade or business as required under the trust deed.

Eg.-

1. A trustee allows trust property in the hands of X, improperly for a long time and is lost. A is liable to make good the loss, but he is not liable to pay interest.
2. A, a trustee keeps trust money for one year without making investment in securities. He is liable to pay interest.
3. A, a trustee is directed to invest in mortgage of immovable property. A fails. He is liable for trust money and interest.

It is subject to the following exceptions-

1- Fraud was committed by the beneficiary or had full knowledge thereof.

2- Not liable to predecessor's default: A trustee is not liable for the defaults committed by his predecessor. He is liable only for his default or breach of trust.

3- Not liable for Co-trustee's defaults: The general rule is that a co-trustee is not liable for the acts of the other trustees. This is subject to exceptions:

1. failing to observe the proper application of trust property, by other trustees,
2. failure to make enquires duly or
3. concealing the breach of failure to take steps to protect the beneficiary's interest.

Hence, the trustee is liable, in these cases for the acts of the co-trustees.

Several Liabilities & Contribution: The trustees are jointly and severally liable for the breaches committed by them. They must make good the loss. Each trustee has a right contribution from others. However, a trustee who commits a fraud is barred from instituting a suit for contribution.

Right & Liabilities of the Beneficiary (CES QUI TRUST)

Rights of the Beneficiary-

The general rule is that the beneficiary has no estate or interest in the trust property. He has only the right to sue the trustee.

- i) **Rights to the rents & Profits:** The beneficiary has a right to the rents and profits, where the deed directs the rents and profits are to be paid to the beneficiary.
- ii) **Right to specific execution:** The beneficiary has a right to have the intention of the author of the trust "specifically executed" as per the trust deed. If the deed so directs, the beneficiary or beneficiaries (who are legally competent) may require to get the trust property transferred to him or them (Exception a married woman cannot claim such a transfer)

Eg. 500 security bonds are entrusted to the trustee, A, to accumulate the interest and to pay the gross amount to B, the beneficiary on his attaining 21 years. B, at 21, may require the transfer of the entire property to him.

- iii) **Rights to inspect:** The beneficiary has a right to inspect and to take out copies of trust deed, title deed, the accounts and vouchers etc. after giving due notice to the trustee.
- iv) **Right to transfer beneficial interest:** The beneficiary, if legally competent, may transfer his interest inter vivos or by will He may mortgage or deal with as his own property; This is subject to the trust deed. A married woman has no such right.
- v) **Right to sue:** The rule is that a trust should not fail for want of a trustee. Hence, where no trustees are appointed, or where all die, or disclaim or discharged under law, or where for any other reason a trust cannot be executed or becomes impossible, the beneficiary may institute-a suit in the court. The Court shall execute the trust, until the trustees are appointed.
- vi) **Right to have proper trustees:** A beneficiary has a right to proper trustees or for a proper number of trustees, subject to the trust deed. This right is essential as the cestui que trust depends on the faith and integrity of the trustee. It is natural that it must be

in the hands of proper custodians of the confidence reposed in them. Persons disqualified: Alien enemy, insolvent persons, persons domiciled abroad, a married woman and a minor. Administration: Where the trust involves the receipt and custody of money, there must be at least two trustees. eg. B, a beneficiary proves that A, the trustee is in insolvent circumstances or that he has improperly sold a part of trust property. B may obtain a receiver of the trust property from the court.

- vii) **Right to compel to act:** The beneficiary has a right to compel the trustee to perform his duty and to refrain him from doing any act which may result in a breach of contract. A, a trustee is about to sell trust property, in violation of the trust deed, at a low price. B, the beneficiary may sue for an injunction to restrain A from selling.
- viii) **Right to remedy against wrongful purchase by trustee:** Where a trustee has made a wrongful purchase of the trust property, the beneficiary has a right to sue for a declaration that the property is a trust property or to get retransferred to the trust.
- ix) **Doctrine of Tracing:** This means the beneficiary has a right to follow the trust property which has gone to third persons, against the intentions of the trust. In such a case, he may sue for a declaration that such a property is part of the trust property. If such property has been disposed of and the money or other property can be traced in the hands of the transferee or his legal representatives, or legatees etc., the beneficiary, has his rights as in the trust deed, and, hence, may get back the property to the trust, if the property can be identified. A, trustee without authority invests Rs.20,000/- in purchasing a piece of land. B, the beneficiary is entitled to it.

Liabilities of Beneficiaries:

The Trusts Act deals with the circumstances, wherein the beneficiary, as a privy to the breach of trust, becomes liable. He is liable:

- i- when he actually joins in the breach of trust
- ii- when he obtains advantage from a breach (without the consent of other beneficiaries).
- iii- when he becomes aware of a breach, but conceals it without taking any steps.

- iv- when he deceives the trustee and induces him to commit a breach. Impounding: In such a case, the interest of such a beneficiary may be impounded till the loss to the trust estate is made good. Even if the interest is assigned, it may be impounded.

However, the transferee without notice, who takes for full consideration in good faith is protected.

Extinction of Trust-

The trust is extinguished:

- i) when the purpose is completely fulfilled.
- ii) when its purpose becomes unlawful.
- iii) when the fulfilment becomes impossible by destruction of property.
- iv) when the first, being revocable, is expressly revoked by the author.

Revocation of Trust:

- i) A trust created by the testator under a will may be revoked at the pleasure of the testator.
- ii) Any other trust, not created under a will, may be revoked.
 - a. By beneficiaries consent (if all are legally competent)
 - b. If revocation is expressly reserved by the author, under the trust deed.
 - c. if trust is oral, with right to revoke the trust can be revoked.
 - d. when a trust is created for the payment of the debts of the author of the trust and not yet communicated to the creditors, then the author may revoke at his pleasure.

Eg.- A, is a trustee to sell the property and to pay the creditors from the proceeds. If creditors are not informed, author may revoke. But, if they are parties to the agreement, the trust cannot be revoked.