SEPARATION DEED

Preliminary Note

A Separation Deed is an arrangement between husband and wife to live apart on certain conditions. Such a deed used to be rare amongst Indians. In England also, in old times such an arrangement was not enforced by courts as being against public policy, but the view gradually gained ground that it was better that husband and wife should privately agree to live apart than that they should be compelled to bring their disputes before the public in the courts.

With the advancement in Indian social structure and the constitutional guarantee of 'equality before the law' as well as the passing of the Hindu Marriage Act in 1955, the concept of agreed separation is gradually gaining acceptance. Though marriage amongst Hindus still continues to be a religious sacrament yet the law has introduced such major changes as to permit judicial separation (Sec. 10), nullification of marriage (Sec. 11 & 12) and divorce (Sec. 13), and under a later amendment, even divorce by mutual consent (Sec. 13B). Similar provisions exist in the Special Marriage Act. The provisions of the Hindu Adoptions and Maintenance Act, 1956 (Sec. 18) and Code of Criminal Procedure, 1973 (Sec. 125) also contemplate separate living by mutual consent or in specified circumstances. Thus execution of a deed of separation can be useful so that neither party may be able to accuse the other of "desertion". Welfare of the children, their education and upbringing, their preferences depending on their age and understanding should be a primary consideration. Both husband and wife might agree, as was ordered in the undernoted case[1], to give their individual though divided attention to the children.

How Drafted

The deed should be executed either as a deed poll or as an agreement between husband and wife, and both should consent to live apart on conditions to be expressly stated therein, and the agreement should be revocable on a reconciliation between the parties and on the commencement of cohabitation. Such deed is executed either after the parties have actually commenced to live apart or immediately before actual separation, because a deed which is not followed immediately by actual separation will be void, as an agreement for future separation.

Trustees

As even a married woman may now contract as a *feme sole*, (*i.e.*, in the same manner as an unmarried woman), and hold property, the joining of trustees

1 *Chandrakala Menon* v. Capt. *Vipin Menon*, JT 1993 (1) SC 229, (1993) 2 SCC 6.

is not necessary. If, however, trustees are joined, as in many cases that may be considered desirable, the wife should make a covenant with the husband as well as with the trustees. The creation of a trust may be useful particularly where the husband proposes or agrees to pay a lump sum which may be so invested by the trustee(s) that a monthly return therefrom is sufficient to pay maintenance to the wife and any children left into her custody under the arrangement.

Annuity

An annuity is generally granted to the wife for her maintenance but it is made to determine on the wife becoming unchaste. An express condition is, however, necessary to that effect.

Stamp Duty

A separation deed is an agreement and is chargeable with stamp duty as such (*see* Note on "Agreements"). If a clause for payment of annuity is incorporated and the agreement is attested, an additional *ad valorem* duty at the rate of that payable on a bond on the total amount of allowance payable during the period of first twelve years should be paid (Sec. 25 (*c*) Stamp Act).

Registration

Registration of a separation deed is not compulsory.

PRECEDENTS

1—Separation Deed between Husband and Wife

THIS DEED OF SEPARATION made on the————day of ——— BETWEEN AB, etc., (hereinafter called "the husband") of the one part AND CD, etc., (hereinafter called "the wife") of the other part.

WHEREAS unhappy differences have arisen between the husband and the wife and they have mutually agreed to live apart from each other and to enter into the arrangement hereinafter contained.

AND WHEREAS the husband has by the wife three children namely, EF, GH and JK.

NOW THIS DEED WITNESSES and the parties hereto mutually agree as follows :

1. The wife may at all times hereafter live separate and apart from the husband in all respects free from the control and authority of the husband.

2. Neither of them the husband and wife shall molest or interfere with the other nor will bring a suit for restitution of conjugal rights against the other.

3. The wife shall at all times hereafter have the sole custody and control of the aforesaid children and of their education and upbringing during their minority but shall allow the husband at all convenient and reasonable times free access and communication with them (or, the wife shall hereafter have the sole custody and control of the aforesaid children, provided that they shall as and when they respectively attain the age of ——— years be placed at the expense of the husband at such school as he shall from time to time determine and such of the said children as shall for the time being be at school shall pass their holidays at such places and in such manner as the husband shall direct).

4. The husband shall pay to the wife during her life and so long as she shall continue to live a chaste life and perform and observe the conditions and terms herein contained the monthly allowance of Rs.————for her maintenance on the 1st day of each month in advance.

5. The husband shall pay to the wife along with the monthly payments stipulated in clause 4 hereof a further monthly sum of Rs. for the maintenance and education of each of the said children until he or she attains the age of------years and the wife shall out of such sum maintain and educate the said children and shall also keep the husband indemnified from and against all claims and demands in respect of the maintenance and education of such children. Provided that if any of the said children before attaining the said age of------ years dies or is settled in life and begins to earn his or her own livelihood or in the case of female child EF marries, the allowance herein stipulated to be paid for his or her maintenance shall cease to be payable.

6. The wife shall be at liberty forthwith to remove from the husband's house all her wearing apparel, jewellery and personal effects and also such of the further and other household goods and effects at the said house as belong to her as her separate property.

7. The wife shall pay and discharge all debts and liabilities incurred by her after the date hereof and keep the husband, his heirs, executors and administrators indemnified therefrom and if the husband has to pay any such debts or liabilities he will be at liberty to deduct the same from the maintenance allowance of the wife.

8. If the wife dies during the lifetime of the husband all her separate estate, movable as well as immovable, which remains undisposed of in her lifetime or by Will shall go to the person or persons who would become entitled to it if the husband died in her lifetime and the husband shall permit her Will to be proved or administration to her estate to be taken out by such person or persons.

9. If the parties shall be reconciled and return to cohabitation or if their marriage shall be dissolved or they shall be judicially separated by reason of any misconduct of the wife occurring after the date hereof then and in any such case all the covenants and provisions herein contained shall become void but without prejudice to the right of any party to take proceedings in respect of any antecedent breach of any such covenant or provision.

10. This deed shall be revoked by the death of the wife (*or*, by the death of either of the parties hereto).

IN WITNESS WHEREOF, etc.

2—Separation Deed between Husband and Wife with a Trustee

THIS DEED OF SEPARATION is made on the————day of————BETWEEN AB, etc., (hereinafter called "the husband") of the first part AND CD, etc., (hereinafter called "the wife") of the second part AND EF, etc., (hereinafter called "the trustee") of the third part.

WHEREAS (*as in Form* 1).

NOW THIS DEED WITNESSES and the husband and wife hereby covenant with each other and separately with the trustee, and the trustee so far as the agreements and provisions hereinafter contained are or ought to be performed or observed by the wife or the trustee or their respective executors or administrators or any of them hereby covenants with the husband as follows:

1-3 (*As in Form* 1).

4. The husband shall during the life of the wife and so long as she remains chaste pay to the trustee the annuity of Rs.————in trust for the wife as her separate estate. The said annuity shall be paid in advance by equal monthly instalments on the Ist day of each month and the wife shall have no power during her coverture to anticipate[1] the same.

Or

[4 (*i*) The husband will pay to the trustee on demand the sum of Rs. with interest thereon until payment at the rate of ——per cent per annum from the date of the deed and until such demand is made and is complied with will pay to the trustee interest at the said rate by monthly payment on the principal moneys for the time being remaining due on this covenant;

(*ii*) The trustee shall invest the principal money paid to him hereunder in or upon ——and may at his discretion withdraw the money and invest it in or upon any other investment of any nature hereby authorised;

(*iii*) The trustee shall pay the income of the investment and also the interest received by him from the husband to the wife during the joint life of the husband and wife and so long as the wife remains chaste without power of anticipation;

1 For meaning of "anticipate", see p. 914 *post* under TRUSTS, etc.

(*iv*) After the death of the husband or wife the trustee shall hold the said investments and the principal money and interest received by him hereunder in trust for the survivor of them PROVIDED THAT the wife shall not have power to dispose of such reversionary interest by way of anticipation;

(*v*) The trustee shall not require payment of the said principal sum or any part thereof if and so long as the husband shall pay the interest thereon or as the unpaid part thereof within 15 days after the same shall become payable.]

5. The wife shall out of the provision made for her by this deed maintain herself and defray all the expenses of all kinds.

6. (*As in Form* 1).

7. The wife shall pay and discharge all her debts and liabilities incurred by her after the date hereof and she and the trustee will at all times hereafter keep the husband indemnified, etc., (*as in Form* 1).

8-9 (*As in Form* 1).

IN WITNESS WHEREOF, etc.

SERVICE CONTRACT

Preliminary Note

Contents of a Service Contract

Service contracts are drafted in the same way as other agreements. The terms of employment should be definitely fixed and clearly expressed and nothing should be left to presumptions. They are required to be both affirmative (describing the acts and duties to be performed) as well as negative (putting restrictions on the acts of the employee during and/or after the term of employment). It is therefore necessary to make provision for (1) the time or period of employment; (2) the remuneration and other perquisites, if any, including pay, allowances, commission, rent free house, conveyance, etc.; (3) duties of employment; (4) powers of the employee; (5) leave and the terms on which it will be granted; (6) modes and grounds of determining the employment during the term; and (7) restrictive covenants.

As the employer and the employee may not be conversant with law, the terms of a service contract should be as explicit as possible and should be easily intelligible to a lay man. Unlike other agreements and legal documents which need not contain matters presumed or implied by law, it is better in such an agreement to specify even such matters and all other matters so as to make it a complete code, embodying the rights and duties of each party.

In respect of Government service, normally no formal contract is executed and only an appointment order is issued and the terms of service are thereafter governed by statutory rules and Government order. The same is the position of statutory corporations as employers. Service under government[1] or a statutory corporation[2] is primarily a matter of status, even though its origin be contractual, and the employer generally has the statutory power to alter the conditions of service unilaterally though subject to certain limitations. However, contractual employment on special terms is also permissible, vide Article 310 (2) of the Constitution. In such a contract, there is no objection to refer to any rules of service governing the particular class of service and referring to them as governing relations between the parties on any particular point, instead of repeating them in the form of covenants, because such rules are well known to all Government servants and are well understood by them, e.g., we may say that the employee will in all respects be bound by the Manual of Government Orders and rules relating to the conduct of Government servants; or the employee will be allowed travelling allowance at the rates admissible to a Government servant of the second class under Fundamental and Subsidiary Rules contained in volume II of the Financial Handbook.

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1 *Roshan Lal Tandon* v. *Union of India*, (1968) 1 SCR 125, A 1967 SC 1889.

2 *Sirsi Municipality* v. *Tellis*, A 1973 SC 855; *Sukhdeo Singh* v. *Bhagatram*, A 1975 SC 1331.

An interesting illustration of contractual appointment in Government service is furnished by a case[3] in which the State Government permitted the Ministers to appoint persons of their choice in their respective establishments. The order for appointment provided that it shall be temporary, co-terminous with the tenure of the concerned Minister. Following election new Government took over and their services were terminated. The Supreme Court upheld the contention of the State to the effect that the appointment was purely contractual co-terminous with the tenure of the Ministers establishment at whose choice and instance they were appointed. The employees could not be deemed to be temporary Government servants within the meaning of the Service Rule.

Period of Service—This may be definite or indefinite. If no period is fixed or an indefinite period is stated, e.g., "so long as the parties respectively please", the contract is terminable by a reasonable notice on either side. What is a reasonable notice varies in different cases, according to the character of the employment and the general custom, from 15 days to six months. When no term is fixed it is always proper to provide for determination by notice. In such a case, and also in case option of determination is reserved during the term, the period of notice should be settled and expressed in the agreement. It is not permissible, where the employer is Government or a statutory corporation or other instrumentality of the State, to provide for termination of services of a permanent employee by a mere notice without formal inquiry into the charges against him (see footnote below precedent No. 4).

Tenure means a term during which an office is held. It is a condition of holding the office. Once a person is appointed to a tenure post, his appointment commences when he joins and it ends on completion of the tenure unless curtailed on justifiable grounds. Such a person does not superannuate.[4]

Remuneration—This may be a fixed monthly salary, or fees or commission, or salary as well as fees or commission. Sometimes in business firms, employees are allowed a share in the profits in addition to a fixed salary. All these should be clearly provided.

Leave—Conditions and grounds on which, and the period for which leave may be granted as well as allowance payable during leave should be stated. In the case of Government servants engaged on contract, the leave rules applicable to permanent Government Servants in general may be applied but as there are different rules for different classes of Government Servants those applicable should be clearly referred to, or if they are not lengthy, they may be embodied in the agreement in the form of a covenant.

Determination of Employment

The grounds on which the employment may be determined during the

3 *State of Gujarat* v. *P.J. Kampavat*, (1992) 3 SCC 226, A 1992 SC 1685.
4 *Dr. L.P. Agarwal* v. *Union of India*, (1992) 3 SCC 526, A 1992 SC 1872.

term are generally misconduct, negligence, or want of medical fitness. Subject to what has been stated earlier, it may also be determined at pleasure by notice, without giving any ground. In the case of misconduct[5] or neglect, no notice is required, but, provision may be made for framing charges and taking defence as in the case of Government Servants. As an employee is entitled to damages for wrongful dismissal if the termination of the service is not properly made, provision in this respect should be carefully worded

Transfer from one Employer to Another

A contract for service is incapable of transfer unilaterally. Such a transfer of service from one employer to another can, in the absence of any statutory provision in that behalf, only be effected by a tripartite agreement between the employer, the employee and the third party.[6] Transfer cannot be made unilaterally from one cadre to another which alters, varies or modifies the terms and conditions of service. It would be necessary to accord opportunity to the government servant to exercise his option.[7]

Restrictive Covenants-Under this head are included covenants not to undertake any other work or service, not to divulge the master's secrets or to make improper use of his trade secrets or information about the master's affairs. Such latter covenants may be not only for the term of employment but also for subsequent reasonable periods.

Agreements in Restraint of Trade

In drafting restrictive covenants it is necessary to see that they are not illegal. Agreements in restraint of trade are void under Sec. 27, Contract Act, and should not be inserted in an agreement. However any covenant that the employee, during the course of employment, shall not directly or indirectly promote or help in any similar business will be lawful. It will be deemed to be in the interest of the employer and not a restraint on trade or business.[8] A covenant that the employee shall not join any firm of the employer's competitors or run a similar business of his own directly or indirectly for a period of two years at the place of his last posting after he leaves the company was interpreted to mean that it did not cover a case of termination of service by the employer as it was confined to the employee's voluntarily leaving the company.[9] In view of this construction the majority did not think it necessary to consider the validity

5 *State of Punjab* v. *Ram Singh*, (1992) 4 SCC 54, A 1992 SC 2188 (Misconduct discussed in detail).

6 *Pyarchand Kesarimal* v. *Omkar Laxman*, (1969) 2 SCR 272, A 1970 SC 823.

7 *Shankar Pandurang Jadhav* v. *Vice Admiral*, II 1991 (1) SC 301.

8 *Charlesworth* v. *Mac Donald*, 23 Bom 103.

9 *Superintendence Company of India* v. *Krishna Murgai*, (1981) 2 SCC 246, A 1980 SC 1717.

of this partial restraint of trade, but the concurring judgment of A.P. Sen, J discussed the law on the subject and held that as the agreement in question was not a "goodwill of business" type of contract it did not fall within Exception 1 to Sec. 27 and was therefore void.[10] Some other decisions on the subject are noted below.[11]

Effect of Labour Laws

Many Acts have been passed by the Central and State legislatures relating to the conditions of employment of teachers and other employees of aided schools and colleges and of universities (other than teachers and other employees of educational institutions established and maintained by religious or linguistic minorities),[12] and of workers in factories and commercial establishments, e.g. the Factories Act, the Industrial Employment (Standing Orders) Act, the Shops and Commercial Establishments Act, the Payment of Wages Act, the Workmen's Compensation Act, etc., and also of certain categories of employees of State-sponsored co-operative societies. In drawing up a service contract for such an employee the provisions of the relevant Acts must be kept in view. Any term of contract contrary to the statutory provisions will be null and void, as it is not open to an employee to contract out of the safeguards provided by the Legislature for his protection.

The tenure of service of a citizen who takes up employment with the state or a public sector corporation covered by Article 12 of the Constitution cannot be made to depend on the pleasure or whim of the competent authority unguided by principle or policy. The authorities cannot be invested with such uncontrolled and arbitrary powers. Accordingly, a rule to the effect that the services of a confirmed employee may be terminated by giving him 90 days notice or pay in lieu thereof is held to be void being hit by Articles 14 and 16 of the Constitution. A provision to this effect contained in a contract entered into by a public sector undertaking would as well be void under section 23

10 *Superintendence Company of India* v. *Krishna Murgai*, (1981) 2 SCC 246, A 1980 SC 1717; See also, *Niranjan Shanker Golikari* v. *Century Spinning and Manufacturing Company*, A 1967 SC 1098, and other cases cited in the judgment of A.P. Sen, J. in *Superintendence Co. supra*.

11 *Niranjan Shankar* v. *Century Spinning & Mfg. Co.*, A 1967 SC 1098; *A.B.C. Laminart Ltd.* v. *A.P. Agencies*, A 1989 SC 1239; *Gujarat Bottling Co.* v. *Coca Cola*, A 1995 SC 2372, (1995) 5 SCC 545.

12 See Article 30 of the Constitution. See also article by Justice K.N. Goyal (retd.), revising editor of the twelfth edition of this work, on "Rights of all Communities to Establish and Administer Educational Institutions" published in 1998 AIR Journal 67 *re* : rights of management of non-minority institutions. According to the author, the majority communities have the same rights as minorities. This view, however, has not yet been tested in courts.

Contract Act being in contravention of public policy and also violative of Article 14.[13] However, as regards the high level managerial cadre in public sector undertakings, keeping in consideration the national interest and high level of efficiency required the provision aforementioned may vary. In such a case the court may direct the employer to opt for not reinstating the employee and instead pay reasonable compensation. In regard to 'blue collar' workmen and 'white collar' employees other than those belonging to the managerial or high level cadre, covered under a provision as above mentioned, the rule observed ordinarily would be of reinstatement or compensation in lieu thereof.

Stamp Duty

Duty on an agreement for contract of service is the same as that for an ordinary agreement (*see* note on "agreements").

Registration

Not compulsory.

13 *Central Inland Water Transport Corporation* v. *Brojo Nath Ganguli*, (1986) 3 SCC 156; *O.P. Bhandari* v. *Indian Tourism Development Corporation Ltd.*, (1986) 4 SCC 337; see also *W.B. State Electricty Board* v. *Desh Bandhu Ghosh*, (1985) 3 SCC 116.

PRECEDENTS

1—Agreement of Service of Municipal Engineer

THIS AGREEMENT is made on the ——— day of ——— BETWEEN the Municipal Board of ——— (hereinafter called "the Board") of the one part AND AB, etc., (hereinafter called "the Engineer") of the other part.

WHEREAS the Board has engaged with effect from the ——— day of ——— the Engineer to serve the Board in the capacity of Municipal Engineer at the pay and upon the terms and conditions hereinafter appearing;

AND WHEREAS the said appointment, salary and conditions have been approved by the State Government.

NOW THIS AGREEMENT WITNESSES and the parties hereto hereby agree as follows :

1. That the Engineer will remain in the service of the Board for a period of five years from the ——— day of ———;

PROVIDED that the first year of such service shall be regarded as a period of probation and if at the end of that year the Board is not satisfied with his service, it may terminate this agreement without any notice.

2. That the Engineer will submit himself to the orders of the Board and of the officers and authorities under whom he may from time to time be placed by the Board and will at all times obey the rules lawfully prescribed for the time being by the Board regarding the duties to be performed by the Engineer.

3. That the Engineer will employ himself efficiently and diligently and to the best of his ability as a Municipal Engineer and will devote his whole time to the duties of the service and will not engage directly or indirectly in any trade, business or occupation on his own account and will not (except in case of accident or sickness certified by competent medical authority) absent himself from his said duties without having first obtained permission from the Board or its authorised officer.

4. That in the event of misconduct on the part of the Engineer or of a breach of any of the terms and conditions herein specified the Board may

at any time dispense with his services after due inquiry and observance of the conditions laid down in the ———— Municipalities Act or the rules made thereunder in this behalf, and the order of the Board dispensing with his services shall be subject to such appeal as may for the time being be provided by the said Act or rules.

5. That the Board will pay the Engineer so long as he shall remain in the service and actually perform his duties, salary at the rate of Rs.—— per mensem which may, at the option of the Board be increased after three years of approved service.

6. That subject to the condition that the Engineer maintains a motor car for the performance of his duties as Municipal Engineer the Board shall pay him a conveyance allowance of Rs.———— per mensem.

7. That in the matter of leave and other matters not provided for in this agreement the Engineer shall be governed by the rules, regulations and bye-laws lawfully made from time to time by the State Government or the Board in this behalf.

8. That either party to the agreement may terminate this agreement by giving to the other three months' notice in writing of its intention to do so and on the expiration of such notice this agreement shall be determined. Provided that the Board may pay to the Engineer three months' salary in lieu of such notice, and thereupon this agreement shall stand determined forthwith.

IN WITNESS WHEREOF, etc.

2—Deed of Appointment of an Engineer under Government

AN AGREEMENT made on the ———— day of ———— BETWEEN the Governor of Uttar Pradesh of the one part AND AB, etc., at present residing at ———— in the district of ———— (hereinafter called "the Engineer") of the other part.

WHEREBY it is hereby agreed as follows :

1. That the Engineer will remain in the service of the Government of Uttar Pradesh (hereinafter called "the Government") for a period of—— years from the day of ————;

2. That the Engineer will submit himself to the orders of the Government and of the officers and authorities under whom he may from time to time be placed by the Government and will at all times obey the rules prescribed for the time being for the regulation of the branch of the public service to which he may belong and will from time to time proceed to any part of India to which he may be required to proceed.

3. That he will employ himself efficiently and diligently and to the best of his ability as Executive Electrical Engineer and that he will devote his whole time to the duties of the service and will not engage directly or indirectly in any trade, business or occupation on his own account and that he will not (except in case of accident or sickness certified by competent medical authority) absent himself from his said duties without having first obtained permission from the Government or their authorised officer.

4. That in the event of misconduct on the part of the Engineer or of a breach of term of any of the conditions herein specified the Government may at any time dispense with his services after due enquiry.

5. That it shall be lawful for the Government, if satisfied on the medical evidence before them that he is unfit and is likely for a considerable period to continue unfit by reason of ill-health for the discharge of his duties, to determine the service under this agreement (the satisfaction of the Government in that behalf being conclusive) and thereupon his services shall be terminated and the Engineer shall be entitled to only three months' salary by way of compensation.

6. That the Government will pay the Engineer so long as he shall remain in the service and actually perform his duties, salary at the rate of Rs.——— per mensem during the first year, Rs.——per mensem during the second year, and Rs.———per mensem during the third and subsequent years.

(*or*, that the scale of the pay of the Engineer, so long as he shall remain in service and perform his duties shall be Rs. 24,000-1,000-30,000 and that the Engineer will start in this scale at the stage of Rs.— — per mensem and will get this pay rising to Rs. 24,000 per mensem by annual increments of Rs. 1,000).

7. That the Government will pay the Engineer so long as he actually performs his duties travelling allowance on the following scale, subject to

the condition that he maintains and uses a motor car for all journeys performed by him in the discharge of his duties when the journeys are within his jurisdiction and it is practicable to use a motor car—

(*a*) a conveyance allowance of Rs. 1,250 per mensem;

(*b*) a mileage allowance of Rs. 4 per km., for journeys of over 10 kms per diem performed by road in the discharge of his duties;

(*c*) a daily allowance at the rate allowed under the Rules for first class officers.

(*d*) mileage and daily allowance at the rate ordinarily admissible under the Rule to officers of the first class on duty by rail or road when the journeys are outside his jurisdiction or it is impracticable to use a car.

(*e*) for journeys partly by road and partly by rail within his jurisdiction a mileage allowance of Rs. 4 per km. for the road journey and railway fare at the rates admissible under the Rule to a first class officer.

8. That if the Engineer shall on the expiration of the term of this agreement leave the said service with approval of the Government and having satisfactorily at all times performed his duties and shall actually quit the said service or if his service is terminated within the term of this agreement otherwise than by himself, he shall be provided with a first class passage to any place in India provided that he claims such passage within three months from the determination of his service.

9. That the Engineer will be entitled during the said term of his engagement to leave on average pay upto 1/11th of period spent on duty (upto a maximum of four months at a time) to which may be added leave on medical certificate on average or half average pay up to the maximum of three months reckoned in terms of leave on average pay.

10. That he shall not be entitled to any pension, gratuity or bonus on retirement but that while this agreement is in force he shall subscribe to a Provident Fund at the rate of one-tenth of his pay each month the Government adding a half yearly contribution at the rate of one hundred per cent of his subscription for the half year. Interest at such rate as the Government may from time to time fix will be calculated monthly and added yearly to the account. The amount at his credit in the Fund will be paid to him on his quitting the service or to his legal representatives in the event of his death whilst in the service.

PROVIDED that the whole or any part of the Government contribution and interest and increment accrued thereon may be withheld to meet a liability incurred to the Government or in case he is dismissed from the service.

IN WITNESS WHEREOF, etc.

3—Contract of Employment of College Staff[1]

(With reference to rules of the College)

AN AGREEMENT made on the——————day of……
BETWEEN the Committee of Management of the——————college (hereinafter called "the Committee") of the one part AND AB, etc., of the other part.

WHEREBY IT IS AGREED as follows :

1. That the Committee hereby appoints the said AB to be in the said College upon the following scale of salary and increments namely the sum of Rs.——————per mensem upto the month of———inclusive and thereafter by annual increments of rupees——————per mensem upto Rs.———per mensem.

2. That the said AB shall assist the principal of the said College with zeal and efficiency in all matters pertaining to instruction and discipline and shall in addition perform when called upon to do so any other such services as may reasonably be required of him by the said Principal in the furtherance of the interest of the said——————College.

3. That the said AB shall not at any time during his employment under this agreement directly or indirectly engage in any other employment save of the said College.

4. That the period of employment of the said AB under this agreement shall be regulated by the rules for retirement passed by the Committee on the———day of———which shall be deemed to be incorporated herein PROVIDED NEVERTHELESS that in the event of the President of Committee being satisfied after a report from the Principal of the said College that the said AB is not performing his duties with zeal or efficiency or that he is a person unfit to be retained in employment in the said College

1 See Preliminary Note regarding teachers of Government-aided educational institution.

the said President may require the said AB to show cause why his services should not be dispensed with under this agreement and upon the said President deciding against the said AB this agreement shall terminate and the decision of the President in this respect shall be final.

5. That the said AB accepts the conditions of services, rights, and privileges which now obtain in the said college with reference to leave rules, Provident Fund regulations, retirement allowances and so forth and which are contained in the published Rules of the said College which shall be deemed to be incorporated herein and agrees to abide by all such conditions in so far as they may affect his services.

IN WITNESS WHEREOF, etc.

4—Contract of Employment of Manager of a Business Concern

AN AGREEMENT made on the ——— day of ——— BETWEEN AB, etc., (hereinafter called "the Principal") of the one part AND CD, etc., (hereinafter called "the Manager") of the other part.

WHEREBY it is hereby agreed as follows:

1. The Manager shall during the term of ——— years from the ———day of ——— next (now last past, *if the appointment is to take effect from a back date*) continue to serve the Principal as manager of business of ——— at ——— or any other place and shall give his whole time and attention to the said business and shall use his best endeavour to improve and extend the same and shall in all respects diligently and faithfully obey and observe all lawful orders and instructions of the Principal in relation to the conduct of the said business and shall not without his consent divulge any secrets or dealings relating thereto.

2. The Manager shall keep at the place of business at——— proper books of accounts showing all goods and moneys received and delivered and disbursed by him with necessary particulars of all such transactions and shall duly account for all moneys belonging to the Principal and coming into the hands or power of the manager and shall forthwith pay the same to the Principal or his bankers for the time being except only such moneys as the Manager shall be authorised by the Principal to retain for the immediate requirements of the said business.

3. The Principal shall pay to the Manager during the continuance of his engagement and provided he shall duly observe and perform the agreements herein on his part contained, the salary of Rs. per mensem on the first day of every calendar month commencing from the first day of without any deduction except such as he will be bound to make under the Income Tax law for the time being in force, AND shall also pay the Manager at the end of each year during the aforesaid period a further sum equal to per cent on the gross sales for the said year (*or*, on the net profits of the said business for the said year if any, after making such deductions as are properly made according to the usual custom of the said business in the estimation of net profits) PROVIDED ALWAYS that upon the death or termination of the engagement of the Manager before the expiration of the said period of years the Principal shall forthwith pay to him or his heirs, executors, administrators or other legal representatives as the case may be, in respect of the services of the Manager for the whole or any part of the current month a due proportion of the salary of Rs. per mensem together with such further sum in lieu of such percentage as aforesaid as shall bear the same proportion to the estimated gross sales (net profits) for the then current year as the part of the said year during which he has served shall bear to the whole year, the gross sales (net profits) being calculated on average of the past three years.

4. The Principal shall during the continuance of the Manager's engagement provide him with a suitable furnished house for residence free of rent, rates and taxes (except the charges for electricity consumed by him or of extra water used by him) and the Manager shall reside in the said house.

5. The Manager shall make such tours as may be necessary in the interest of the said business or as he may be directed by the Principal to make, and the Principal shall pay him all reasonable expenses actually incurred in undertaking such tours (*or*, a travelling allowance at Rs. 4 per km. for all journeys by road and one and one half first class fare for journeys performed by rail and a halting allowance of Rs. 400 per diem when a halt of not less than 8 hours is made at one place).

6. The Manager shall be entitled during his engagement to leave on full pay for a period equal to 1/11th of the period of service rendered and to a further leave on half pay in case of illness or incapacity to be proved to the satisfaction of the Principal for a period upto 15 days in one year.

7. Either party hereto may terminate the engagement of the Manager at any time before the expiration of the said term of ---------- years on giving or sending by registered post to the other party three calendar months' notice in writing, such notice to be given or sent in the case of the Principal to his house at and in case of the Manager to his place of business or residence provided by the Principal and on the expiration of the said three months from the date of giving or posting such notice the said engagement shall terminate provided that the Principal may terminate the said engagement at any time on payment of three months' pay in advance in lieu of such notice as aforesaid.[2]

8. If the Manager at any time wilfully neglects or refuses or from illness or other cause become or be unable to perform any of the duties under this engagement the Principal may suspend his salary (and sum by way of percentage) during such neglect, negligence or inability as aforesaid and may further immediately terminate the engagement of the Manager without giving any such notice or making such payment of salary in advance as hereinbefore provided.

9. The Manager will at his own expense find and provide two respectable sureties to the amount of Rs. each for his good conduct and for the due performance by him of this engagement and if he fails to do so for a period of three months from this date the Principal may terminate his services forthwith.

IN WITNESS, etc.

5—Renewal of Term of Service of an Employee (either on Old Terms or New Terms)

THIS AGREEMENT is made, etc.

WHEREAS the said CD has served the said AB as ---------- under an agreement between the parties hereto dated the ----------;

2 The validity of such a clause was not upheld in case of a State undertaking: *Central Inland Water Transport Corporation* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156. Although observations in the judgement are wide enough to cover even private employers the extension of its ratio to purely private employment would be contrary to the common law of master and servant and Sec. 14(i) (*b*) Specific Relief Act, 1963. See also, *S. Dutt* v. *Delhi University*, A 1958 SC 1050 and *Steel Industrials Kerala Ltd.* v. *Rebello*, (1985) 2 SCC 363 (para 19).

AND WHEREAS the term of the said CD's engagement under the said agreement having expired on the ——— , it has been agreed that the said AB shall re-engage, the said CD upon the terms and conditions hereinafter appearing (*or*, upon the terms and conditions contained in the said agreement dated the ———).

NOW THESE PRESENTS WITNESS and the parties hereto hereby agree as follows :

(1) The said CD shall serve the said AB as ——— for one year from the—

(2)

(3)

etc.

(*or*, 2. Terms and conditions of the said agreement shall be the same as are contained in the aforesaid agreement of the parties dated ——— in so far as they may be applicable to the employment under this agreement and all the terms and conditions contained in the said agreement shall be deemed to have been incorporated in this agreement).

IN WITNESS WHEREOF, etc.

6—Agreement Cancelling Employment (Endorsed on Service Agreement)

AN AGREEMENT made on the ——— day of ——— BETWEEN the within-named parties.

WHEREBY it is agreed as follows :

1. The employment of the Engineer by the Board under the within-named agreement shall cease as from the date hereof and from the same date all the provisions of the within-named agreement shall cease to have effect;

2. In consideration of the sum of Rs. ——— paid by the Board to the Engineer (the receipt of which the Engineer hereby acknowledges) the Engineer releases the Board from all claims and demands under the within written agreement whether in respect of salary, allowance, compensation, damages or otherwise;

3. The Engineer shall on or before the ——— day of ——— deliver up possession of the quarters occupied by him under the within written agreement and in default shall pay to the Board as liquidated

damages the sum of Rs. for every day after that date during which he shall retain possession thereof.

IN WITNESS WHEREOF, etc.

7—Service Agreement with Confidentiality Clause

AN AGREEMENT made on this ———day of ——— BETWEEN the a company incorporated under Companies Act, 1956 and having its registered office at (hereinafter called "the Company") of the one part AND AB, etc., (hereinafter called "the Employee") of the other part.

WHEREAS the Company manufactures ALP and ZNP by using white/yellow phosphorous through a process not known to others;

AND WHEREAS the Company wants to employ a Chemical Engineer to supervise the same while ensuring that such Employee should maintain secrecy and confidentiality to which the employee has agreed.

NOW THESE PRESENTS WITNESS AS follows :

1. The Employee shall serve the Company as ———for a period of years from the

2.

3.

4. The Employee shall not during the tenure of his employment or for a period of one year thereafter either join any business of the Company's competitors or run any business of his own using any confidential or secret information including any secret process or formula acquired in the course of his employment with the Company.[3]

5. The Employee shall return all papers and documents of the Company and not retain any copies or extracts therefrom upon termination of his services.

6.

7.

etc.

IN WITNESS WHEREOF, etc.

3 Care should be taken in drafting this clause in view of the provisions of sec. 27 of Contract Act. Such restraint during the period of employment is perfectly valid and can be enforced by injunction, vide Sec. 42 of Specific Relief Act, 1963. However as regards negative covenants operative after the cessation of employment, they must be reasonable (*Superintendence Company of India* v. *Krishan Murgai*, A 1980 SC 1717 : (1981) 2 SCC 246; *Sandhya Organic Chemicals P. Ltd.* v. *United Phosphorous Ltd.*, A 1997 Guj. 177).

TRUSTS INCLUDING SETTLEMENTS, ENDOWMENTS AND WAQFS

Preliminary Note

A trust is defined in Indian Trusts Act 1882[1] as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner. Thus, there are three essential ingredients: a declaration of trust, existence of property, which is the subject of trust, and the beneficiary (also called "*cestui que trust*"). The purpose of the trust should also be lawful, whether for the benefit of the public or an individual. The person creating the trust must be legally competent to contract and a trust may be created on behalf a minor with the permission of the Principal Civil Court of original jurisdiction (Sec. 7 Indian Trusts Act). Every person capable of holding property may be a trustee, but if the trust involves the exercise of discretion he cannot execute it unless he is competent to contract (Sec. 10). The Government cannot be a trustee[2] nor can a Government servant act as trustee of a mosque, temple or religious institution (Sec. 22, Religious Endowments Act, 1863). A corporation can both create trust and be a trustee. An insolvent can also be a trustee and the trust property is not affected by his insolvency. It is not advisable to appoint *cestui que trust* as trustees. Every trust of which the purpose is unlawful will be void, and, if the trust is created for both lawful and unlawful purposes and the two purposes cannot be separated, the whole trust would be void (Sec. 4). Any property which is transferable can be the subject of trust, whether it is movable or immovable, but a mere beneficial interest under a subsisting trust cannot be made subject of a trust. The beneficiary of the trust may be any person capable of holding property. Such person may be a sentient being or a juristic person or even a deity. A trust may also be created for a religious or charitable object and the beneficiaries in such cases are the public or class of the public interested in it.

Whether Public or Private

A trust may be either public or private. The criterion for deciding whether a particular trust is or is not of a private nature is whether the said trust is or is not for the benefit of individuals. It is the extensiveness of the object which may indicate the public nature of a trust. If a trust is intended to benefit a large and extensive section of the community it cannot be treated as a family trust.[3]

1 This Act governs only private trusts.

2 *Viziaramarju* v. *The Secretary of State*, 8 Mad 525 PC.

3 *Prakash Chandra Nag* v. *Subodh Chandra Nag*, A 1937 Cal 67; *Sate of Bihar* v. *Charusila Dasi*, A 1959 SC 1002 (case of temple); *Narain Bhagwantrao* v.

A private trust is trust for the private convenience and support of individuals or families while a public trust is for the benefit of the public at large or some class of it answering a particular description, the object being to benefit an uncertain and fluctuating body and the trust being of a permanent and definite character.[4]

A clear picture in mind of distinction between private and public trust should help in drawing the trust. The crucial point to be seen is whether it is intended by the founder that specified individuals are to have the right of worship at the shrine, or the general public or any specified portion thereof. In *Deoki Nandan* v. Murlidhar,[5] the Supreme Court indicated these principles in this behalf

"The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute, a body which is incapable of ascertainment".

If the endowment is in favour of the idol itself "proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public", though "the mere fact that the public is allowed to visit a Temple Thakurdwara cannot necessarily indicate that the trust is public as opposed to private."[6]

When property is dedicated for the worship of a family idol, it is a private and not a public endowment as the persons entitled to worship the deity can only be the members of the family. A consideration may also be whether the idol is installed not in the precincts of the residential quarter but in a separate building raised for that very purpose on vacant site.[7]

Following are some of the features taken in consideration in this connection[8]—

(a) location of the temple with reference to the residence of the person claiming rights of private ownership;

(b) the size of the construction and its proportion to the entire extent of the property;

Gopal Vinayak, A 1960 SC 100; *Dhaneshwarbua* v. *Charity Commissioner*, (1976) 2 SCC 417; *Shivprasad* v. *Leelabai*, A 1998 Bom 131; *Bala Shankar* v. *Charity Commissioner*, 1995 (Supp.) 1 SCC 485.

4 *Farman Ali* v. *Md. Raza Khan*, 1949 AI J 453 at 457

5 A 1957 SC 133;

6 *Babu Bhagwan Din* v. *Gir Har Saroop*, A 1940 PC 7.

7 *Jammi Raja Rao* v. *Sri Anjaneya Swami Temple*, (1992) 3 SCC 14, A 1992 SC 1110.

8 *Hari Bhanu Maharaj of Baroda* v. *Charity Commissioner, Ahmedabad*, (1986) 4 SCC 162.

(c) the nature of the grants made to the endowment;

(d) the identity of the individuals for whom the *Samadhi* in question has been raised;

(e) The ownership of the property in question.

The character is to be ascertained of the time of its origin. The private charactar of the institution is not affected subsequently in the absence of clear and definite evidence that later the dedication came to be for the use of the public. Property belonging to public religious or charitable endowment, it should be remembered, cannot ordinarily be disposed of by negotiation; this has preferably to be by public auction with reserve price fixed having regard to the market value. That is one of the noteworthy incidents of such endowment.[9] How did the founder treat the property and how did the descendants treat it are relevant, as also, has the income of the endowed lands been continuously applied to the objects of the dedication.

A trust may also be partly private and partly public. Apart from the instance of *Wakf Alal Alad* (discussed below), even a non-Muslim is not barred, for instance, from making a trust private up to his life time, and after his death, public.

How Trust is Created

Under the Indian Trusts Act, 1882, which applies to whole of India except the State of Jammu & Kashmir and the Andaman and Nicobar islands a trust in relation to immovable property may be declared by a non-testamentary instrument in writing, signed by the author of the trust and the trustee and registered, or by a will of the author of the trust. No particular form or language is required to create a trust. What is essential is a clear intention of the author. A trust in relation to movable property can be created either in the same way as that of immovable property or by transfer of the ownership of the property to the trustee (Sec. 5). In places where the Trusts Act does not apply, a trust of immovable property may be created orally if the author of the trust is himself the trustee and consequently no transfer of the property is involved, and all that is required is only a declaration of trust.[10] If a stranger is appointed as trustee, a transfer of property is necessary and the conveyance must be made according to the law of Transfer of Property, e.g., if it amounts to gift, it must be made as a gift in favour of the trustee.

Instrument of Trust

An instrument of trust is drafted either as a deed poll or as a regular deed between the author of trust and the trustees. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed

9 *Chenchu Rami Reddy* v. *Govt. of A.P.*, (1986) 3 SCC 391.

10 *Madonji* v. *Tribhowan*, 36 B 396.

between the author of trust and the trustees. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll. No specific words are necessary, but, whatever the words used, the deed should contain with reasonable certainty (a) an intention to create a trust, *(b)* the purpose of the trust, *(c)* the beneficiary *(d)* the names of the trustees, and *(e)* the trust property, and *(f)* transfer of the legal ownership of the property to the trustee unless the author is himself the trustee. [Secs. 6 to 9 of the Indian Trusts Act]

Declaration of Trust

The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in unequivocal language and with reasonable certainty. No particular or technical words are necessary but the words used must be definite and unequivocal. This intention is expressed clearly in the recitals of the deed and in the operative part also. If the trustee is a stranger the property is transferred to him "upon trust". If the author is himself the trustee, he declares in the operative part that he "dedicates" or "sets apart" the property in trust for such and such purpose and constitutes himself as the trustee.

Acceptance of Trust

Acceptance of trust by a trustee may be either express, e.g: by executing the deed of trust or by verbal assent, or be inferred from conduct, e.g., by entering into possession of the property and on the duties as trustee. But it is always safer to have the deed of trust executed by the trustee also.

Directions in Respect of Trust

Different directions are given to the trustees by the author as to the manner in which the trust is to be worked. These are the conditions and provisions of the trust and vary in different kinds of trusts according to the circumstances. Provision is also usually made for appointment of new trustees.

Revocation of Trust

A trust cannot be revoked unless (a) all the beneficiaries consent, (b) a power of revocation has been reserved in the deed, and (c) in case of a trust for payment of debts, it has not been communicated to the creditors (Sec. 78). If the trust property is to be applied for author's own benefit, the trust can be revoked. A power of revocation may with advantage always be reserved in the deed. A public charitable trust cannot however be revoked, nor be otherwise adversely affected by a subsequent deed.[11] After having settled the property

11 *Sri Agasthyar Trust* v. *C I T*, (1998) 5 SCC 588 (paras 14 to 16).

by a settlement deed the settlor has no title left in it and is therefore not competent to bequeath it, for such bequest will amount to implied revocation of the settlement.[12]

Both testamentary and non-testamentary gifts for public charitable purposes must be saved by wider interpretation of court applying the doctrine of *Cy-pres* (as near as), *i.e.*, giving effect to the general intention *via* another method that closely approximates the one specified. Because public interest is served that way.[13] Where only a conditional gift was made, if the condition fails, the gift will not take effect.

Hindu Endowments

While a trust can be created for charitable and religious purposes by transferring property to the trustees and defining the objects of the trust as laid down above, yet religious and charitable endowments under the Hindu and Mohammedan law can be created in accordance with the law and usage relating thereto. This is a fundamental difference between the juridical conception on which the English law relating to trust is based and that which forms the foundation of the Hindu and Mohammedan systems, and for this reason the rules applicable to *waqfs* and Hindu religious endowments have been deliberately exempted from the scope of the Indian Trusts Act, (Sec. 1). Under the Hindu law a gift can be made to a deity installed or to be installed in a temple, and deity or idol is recognized by courts as a juristic person capable of holding property, and property dedicated to an idol belongs to the idol and not to the *shebait* who is in the position of a manager only and not that of a trustee.[14] Similarly a *muth* is also a juristic person and gift of property can be made to it instead of a trust. It is not necessary that the idol be in existence at the time of creating the trust.[15] Sometimes a dedication is made and also trustees are appointed with definite directions for expending the income of the dedicated property for the purposes of the deity in a particular way. Sometimes the donor appoints himself as the first trustee. There is nothing illegal in this. There is also nothing illegal in the donor as *shebait* of a temple continuing to reside in the house, in a portion of which the idol is installed, for the convenient management of the trust[16] and in appointing his heirs as *shebaits* to succeed him one after another and allow them also to reside in the house likewise. In spite of such provisions the dedication may be held to be absolute. But if the deed as a whole shows that only a charge is created on the property or there is a mere trust to receive and apply a portion of the income for the specified

12 *Dagani Ramadas* v. *P. Daveed*, (1998) 8 SCC 465.

13 *State of U.P.* v. *Bansidhar*, A 1974 SC 1084.

14 *Angurbala* v. *Debabrata*, A 1951 SC 293.

15 *Ratan Sen* v. *Suraj Bhan*, A 1944 All 1; *Jagdish* v *Mt. Kausilla*, A 1947 All 317.

16 *Nirupama Ghosh* v. *Purnima Ghosh*, (1973) 3 SCC 411, A 1972 SC 1412.

religious or charitable purpose and there is no divesting of property then the dedication may be held to be partial.[17] Though as regards the property of the temple he is in the position of a trustee.[18]

A *shebait* is different from a trustee in that *(a)* the property does not vest in him but in the idol or the institution, while in case of a trust the property vests in the trustee for the benefit of *cestui que trust*, (the beneficiaries) *(b)* the *shebait* is a manager and not a trustee, *(c)* the *shebait* has not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property and almost invariably has a share in its usufruct which depends upon the terms of the grant or upon custom or usage. His rights and interest have the character of proprietary rights, and except as otherwise provided by the founder or by usage or custom, *shebaitship*, like any other species of heritable property, follows the line of inheritance from the founder.[19]

In this connection the Supreme Court's observations in *Nirupama Ghoshe* v. *Purnima Ghoshe*,[20] are interesting and instructive. Their lordships have observed that where a pious settlor with a large family but few properties is torn between his desire to make a dedication in the name of his titulary deity, on the one hand, and his natural inclination to make a provision for the members of his family, on the other, and bearing both considerations in mind executes a deed of settlement, a favourite device with such settlor is to constitute his heirs as *shebaits* of the deity and give them a right of residence permanently though in the capacity of *shebaits*. In all such cases courts must decide principally on the wording of the Settlement Deed whether the settlor intended to create an absolute dedication in favour of the deity or only a partial dedication. It was further pointed out that *shebaits* are merely managers of the deity and are not expected to spend out of their pocket for the upkeep of the deity. They might spend out of devotion to the deity, but there is no legal obligation on them in that behalf. In these circumstances, a settlor intending an absolute dedication in favour of a deity or charity would not be more concerned that his heirs live in the house from generation to generation along with their families, but would be more concerned for the welfare of the deity and the permanent maintenance of the building in which the deity is housed.

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17 See discussion of case law in *Sappani Mohd. Mohideen* v. *R.V. Sethusubramania Pillai*, (1974) 1 SCC 615, A 1974 SC 740; See also *Menakuru Dasaratharami Reddi* v. *D. Subba Rao*, A 1957 SC 797, 1957 SCR 1122.

18 Mulla's Hindu Law 18th Edn. Sec. 414.

19 *Angurbala* v. *Debabrata*, A 1951 SC 293; *Shambhu Charan Shukla* v. *Sri Thakur Ladli Radha Chandar Madan Gopal*, (1985) 1 SCC 524 (Shebait right may as well be bequeathed by will.)

20 A 1972 SC 1412 : (1973) 3 SCC 411

In *Radhakanta Deb* v. *Commissioner of Hindu Religious Endowments*[1], the following tests have been laid down to determine whether an endowment is of a private or of a public nature :—

1. Where the origin of the endowment cannot be ascertained, the question is whether the user of the temple by members of the public is as of right;

2. The fact that the control and management vests either in a large body of persons or in the members of the public, and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large.

3. Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple are retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of the maintenance of the temple belonging to the founder himself. This will be a conclusive proof to show that the endowment was of a private nature.

4. Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment.

Similar views have been expressed in *State of Bihar* v. *Bisheshwar Das*, A 1973 SC 2057; *Deelip Kumar & Co.* v. *Mulla Gulamali Trust*, 1998 AIHC 1073 (Mad.); *Marua Dei* v. *Muralidhar Nanda*, A 1999 SC 329, (1999) 1 SCC 377.

How Made

Property can be dedicated to a temple either by giving it to the trustees and executing a deed of trust in the usual way, or by dedicating it to the idol itself. In the latter case, a deed of dedication, though not absolutely necessary, is expedient to have one executed instead of leaving the dedication to be inferred from the use of the property and conduct of the donor and the *Shebaits*. No particular words are required for dedication, and either it may take the form of a gift to the idol or the property should be expressly set apart for, or dedicated to, the religious and charitable purposes, which should be clearly specified. The undernoted cases[2] contain an exhaustive discussion on ascertainment of the intention of the author as to whether an absolute *debutter* of the properties was created with directions to *shebaits* regarding application of moneys or a trust was created vesting the properties in the trustees. Debutter means literally 'belonging to a deity' (Mulla : Hindu Law, 18th Edn. Sec. 913).

It is not necessary that the image of the deity should have been installed in a temple, but the deity should be named,[3] nor is an endowment affected by

1 A 1981 SC 798 (para 14 at pages 801-2)

2 *C I.T.* v. *Jagannath jee*, (1977) 2 SCC 519; *Ramkishorelal* v. *Kamalnarayan*, A 1963 SC 890.

3 *Sarab Sukh Das* v. *Ram Prasad*, 46 A 130, 78 IC 118.

the destruction or mutilation of the idol, and a new idol may be installed in its place.[4]

Charitable gifts, e.g., those for *sadabarat*, *dharamshala*, *pathshala* may be joined with religious gifts[5] but if they are separately made they should be made in the form of trusts.

Waqfs

Waqf is the tying up of the property in the ownership of God the almighty and the devotion of the property for the benefit of human beings. The right of ownership passes from the donor to God immediately when a proper *waqf* is made and the manager of the *waqf*, who is called *mutwalli*, is only the manager or governor and not a trustee in the strict sense in which that word is used in English law.[6] There are two kinds of *waqfs* (1) *public waqf* which is a dedication of property for public purposes, e.g., the maintenance of a mosque, orphanage, *imambara*, etc., and (2) *Private waqf*, which is for the benefit of the settlor's family and descendants. The latter kind of *waqf* is valid if the ultimate benefit in case of there remaining no descendant however distant is reserved for the public and for any other religious purposes or charitable purpose of a permanent character. Such a waqf is called *waqf alal aulad* and is recognized by the Mussalman Waqf Validating Act, 1913. A *waqf* exclusively for the benefit of the family or descendants of the settlor is not valid, therefore, the device of reserving an ultimate dedication to charity is adopted so to bring the *waqf* under the Act and make it valid.[7] The maintenance and support of the family, children or descendants of the *waqif* are not pious purpose.[8] The whole of the property must be given to charity as ultimate bequest.[9] It should also be noted that the reservation may be for the maintenance and support of the *waqif* and descendants and not for the absolute use of the settlor for his life. In the latter case, the gift would be void. If there was no intention to dedicate and the *waqfnama* was never acted upon and the deed was meant to be a shield against possible claims there would be no valid *Waqf*,[10] but once a valid *Waqf* is created it is not open to the *Waqif* to subsequently revoke it and deal with the property as its owner.[11]

4 *Puran Chandra* v. *Gopal Lal*, 8 CLJ 369.

5 *C.I.T.* v. *Jagannathjee*, (1977) 2 SCC 519.

6 *Vidya Vaauthi T. Swamgal* v. *B. Ayyar*, A 1922 PC 123; *Aliah Rakhi* v. *Shah Mohd.*, A 1934 PC 77; *Nawab Zan Yar Jung* v. *Director of Endowments*, A 1963 SC 985.

7 *Mohammad Ali* v. *Dinesh*, A 1940 Cal 417; *Trustees of Sahebzadi Oalia Kulsum Trust* v. *C.E.O.*, (1998) 6 SCC 267, A 1998 SC 2986 (Such a trust is not violative of Secs. 13 and 14, Transfer of Property Act which apply only to transfers *inter vivos* and not to such trusts).

8 *Mohuddin* v. *Sofia*, A 1940 Cal 501.

9 *Abdul Karim* v. *Rahimabai*, A 1946 Bom 342.

10 *Mohd. Ali Mohd Khan* v. *Mst. Bismillah Begam*, A 1930 PC 255.

11 *Beli Ram & Bros* v. *Md. Afzal*, A 1948 PC 168.

No form is prescribed by the Mohammedan law for making a valid *waqf*. It may be made orally or by a deed *inter vivos* or by will. If a deed or *waqfnama* is written, all that is necessary is that the object of the *waqf* should be clearly specified and the property should be clearly defined. No particular words are necessary to indicate the grant but it is advisable to use the word *waqf* which has a well known and recognized meaning though it is not necessary.[12] The *Waqif* should actually divest himself of the property and a mere declaration of intention by itself will not constitute a *waqf*, though the dedication need not be express and may be inferred from long use[13] and other facts and circumstances.[14]

A *waqf* made while the *waqif* is suffering from death illness (*marzul maut*) is valid only to the extent of 1/3rd of the assets, unless assented to by the heirs.

Any Musalman who has attained puberty, though not majority, can make a *waqf*. A woman can also make a *waqf*.

Requirements of Valid Waqf

A *waqf* should be certain as to the property endowed, unconditional, and not subject to an option. It must have a final object which cannot fail and the object must be expressly stated. The dedication must be absolute and present, and not contingent or conditional. The *waqf* can be of any kind of property but the dedication must be permanent. A decree is property of too precarious a nature to admit of a permanent dedication.[15] *Waqf* must according to Shia law, be accompanied by delivery of possession, though this is not necessary under the Sunni law. The office of a *mutwalli* is not necessarily heritable. The deed of *waqf* should provide for the appointment or nomination of a *mutwalli*. Sometimes it is provided that a *mutwalli* should nominate his successor. If there is no provision in the deed of *waqf*, or if the directions given therein fail, court will appoint a *mutwalli*.

Dedication for a mosque

With regard to a mosque in order to create a valid dedication of a public nature the following conditions are to be satisfied[16] :-

(i) the founder declares his intention to dedicate a property for the purpose of a mosque.

(ii) the founder divests himself completely from the ownership of the property;

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12 *Mt. Khurshed Jahan* v. *Qamqam Ali*, A 1947 Oudh 17.
13 *Mohammad Shah* v. *Fasihuddin*, A 1956 SC 713.
14 *Muhammad Imdad* v. *Mt. Bismillah*, A 1946 All 468.
15 *Ghulam* v. *Hafiz Abdul Rashid*, A 1947 All 127.
16 *Syed Mohd. Salie Labbai* v. *Mohd. Hanifa*, (1976) 4 SCC 780.

(iii) the founder provides for a separate entrance to enable the public to enter the mosque.

Founder's permission or the bare act of allowing the members of Muslim community to offer prayers amounts to a complete delivery of possession. Mosque becomes consecrated for public worship either by delivery of possession or the dedication to *waqf*. Subsequent to the complete dedication to the mosque as a place of public worship, any reservation or condition imposed by the owner would be deemed to be void.

For the test to determine when a graveyard is to be deemed public, see *Syed Mohd. Salie Labbai v. Mohd. Hanifa*, supra.

In the case of *waqf*, the usufruct only can be spent; in case of gift,the corpus of the property itself may be consumed. Without delivery of possession, gift is incomplete.

Treasurer of Charitable Endowments

In case of trusts established for charitable, or partly charitable and partly religious purposes (but not exclusively for religious teaching or worship), the trust property may, by an application to the State Government under Sec. 4, Charitable Endowments Act 1890, be vested in the officer called the Treasurer of Charitable Endowments to be held by him in trust for the objects of the trust (Sec. 3). He is a corporation sole (*ibid*). A scheme is prepared by the Government with the concurrence of the founder, for the administration of the said property and application of the income to the objects of the trust, but the Treasurer is not required to administer the property (Sec. 5). In such cases no deed of trust is necessary.

Marriage and Family Settlements

Marriage and family settlement are species of settlements by way of trust. When an annuity is settled on a wife, it is not necessary to have any trustees and the annuity may be settled by agreement to which the husband and wife are parties. Certain antenupital and post-nuptial arrangements are however made in England by way of settlement and in these, as well as in cases of family settlements for the benefit of children trustees are usually introduced. Property is transferred to them in trust for the wife and children. Such settlements are not common in India. In all such settlements, provision is usually made for a resulting trust in favour of the settlor or his legal heirs in case of death of the beneficiaries. In case of children, the children are usually made the beneficiaries on attaining majority or in case of females on marriage, and, until then the trustees spend the income of trust property on their maintenance and education. Whatever provisions is intended to be made should be clearly expressed.

Other Settlements

Settlement of property in lieu of right to maintenance does not amount to transfer by way of sale or gift.[17] A settlement deed providing that the property will be held and enjoyed by the settlor's wife and "after her by her son and his descendants from generation to generation, for all time" was held to create only a life estate and not an absolute estate in her favour; the absolute estate was given to their son subject to the life estate in her favour.[18]

It was provided that after the death of the daughter-in-law "the members of her family" shall be the owners of the property given to her by the settlement deed, it was held that the property would devolve not on her collaterals but on her daughter's son as the nearest member of her family.[19]

Stamp Duty

Settlement is defined in the Stamp Act as meaning "any non-testamentary disposition in respect of movable or immovable property, made (*a*) in consideration of marriage, (*b*) for the purpose of distributing property of the settlor among his family or those for whom he wishes to provide, or for the purpose of providing for some person dependent on him, or (*c*) for any religious or charitable purpose." For a deed of settlement, or endowment which falls within the definition, the duty is that payable on a bond for a sum equal to the amount or value of the property settled as set forth in the deed (Article 58).

For declaration of trust not amounting to settlement, see Article 64.

Registration

Registration of a deed of trust involving immovable property is compulsory under the Indian Trusts Act, (Sec. 5). In territories where the Act does not apply, or in cases of trusts not covered by the Act (e.g., *waqfs*, or religious or charitable trusts), registration would be compulsory under the Registration Act if the value of the property involved is Rs. 100 or more.

If a trust is created by a will, the above rules about registration do not apply.

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17 *State of U.P.* v. *Rajkumar R.R. Brahma*, (1969) 2 SCC 818.

18 *A. Sreenivasa Pai* v. *Saraswathi Ammal*, A 1985 SC 1359.

19 *L. Babu Ram* v. *Raghunathji*, A 1976 SC 1734 : (1976) 3 SCC 492.

GENERAL FORMS

Various Forms of Recitals in Deeds of Trust

1. Intended Marriage

WHEREAS a marriage is intended shortly to be solemnized between the said AB and the said CD.

2. Marriage and Agreement for Settlement

WHEREAS the husband and wife were married on the———— of———and previous to such marriage they agreed to make a settlement as is hereinafter contained.

3. Transfer of Securities Passing by Delivery

AND WHEREAS pursuant to an agreement made for the intended marriage the bonds mentioned in the schedule hereto belonging to the husband have been delivered by him to the trustees to the intent that the same shall be held in trust for the husband until the intended marriage and after the solemnization thereof upon the trusts hereinafter expressed.

Or,

AND WHEREAS the said AB has endorsed and made over to the trustees, the securities particulars of which are set forth in the schedule hereto to be held by the trustees upon trust and in the manner hereinafter expressed.

4. Agreement to Assign Property by Husband and Wife

AND WHEREAS for the intended marriage it was agreed that the properties of the husband and wife hereinafter mentioned shall be assigned to the Trustees upon the trusts hereinafter declared concerning the same (respectively).

5. Agreement to Pay Annual Sum

AND WHEREAS for the intended marriage it was further agreed that the said AB shall enter into such covenant as is hereinafter contained for the payment to the trustees of the annual sum hereinafter mentioned to be held and applied by them upon the trusts and in the manner hereinafter expressed.

6. Statement about Children

AND WHEREAS there has been issue of the said marriage, five children only viz., AB, CD and EF, sons and GH and JK daughters of whom AB and GH are major and the others are still minor and unmarried.

7. Agreement for Settlement on Wife

AND WHEREAS for the intended marriage it was agreed that all the said premises shall be settled by the husband in the manner hereinafter appearing.

8. Debutter Settlement

AND WHEREAS the said AB has erected a temple at———— and has established a deity by the name of————in the said temple and is desirous of dedicating the properties mentioned in the schedule hereto to the said deity for the expenses of the said temple and to secure the worship of the said deity in the said temple and to make a settlement of the said property in the manner hereinafter appearing;

9. Trust for Erecting a Temple

AND WHEREAS the said AB is desirous of erecting a temple at————and of installing the idol of————therein and has decided to dedicate the property mentioned in the schedule hereto for the cost of the construction of the temple and of the maintenance thereof and for the expenses of the worship and other necessary expenses in the manner hereinafter appearing.

10. Making a Further Provision

AND WHEREAS the founder is desirous of making such further provision as is hereinafter contained for the maintenance of the said temple and *dharamshala* and for performance of such acts of devotion and charity and celebration of such festivals connected with the said worship to be conducted and on such scale as specified in the————schedule hereto;

11. Payment of Money for Founding Scholarships

AND WHEREAS the founder has paid the sum of Rs.———— to the trustees to the intent that the same shall be dedicated in perpetuity for the promotion and encouragement of education at the College at———by founding scholarships in the manner hereinafter appearing.

12. Founding Beds in Hospital

AND WHEREAS the donor is desirous of establishing an endowment fund for the endowment of beds in the————hospital (hereinafter called "the Hospital") and the maintenance of the same for patients who may be unable to pay fees and rent charged by the hospital;

AND WHEREAS the donor has for this purpose paid Rs.——— (*or*, endowed and delivered the securities mentioned in the———schedule hereto) to the trustees upon the trust and subject to the powers and provisions hereinafter declared and expressed, concerning the same;

13. Waqf Alal Aulad

WHEREAS with the object of attaining *Kurbat* or nearness to God and reward in the next world, I desire to make a *waqf* of the properties mentioned in the schedule hereto for the maintenance and support of my descendants with the ultimate reservation for the public charitable purposes hereinafter mentioned;

14. Waqf of Mosque

AND WHEREAS the *Waqif* of the property hereinafter described to be used as a mosque for the benefit of the Muslim community and for the use of the said community in the manner hereinafter appearing;

15. General Waqf

AND WHEREAS the *Waqif* is desirous of making a *waqf* of the properties described in the schedule hereto for the public religious and charitable purposes hereinafter mentioned;

16. Statement of Value of the property[1]

AND WHEREAS the value of the said property (*or*, the property described in the schedule) is Rs.

Miscellaneous Clauses and Conditions of Trust

1. Trust of Separate Funds of the Wife and Husband for Life of each

During the joint lives of the husband and wife the trustees shall pay

1 This is necessary for calculation of stamp duty and is required by Sec. 27, Stamp Act. The statement may be made either as a recital or as a declaration, or the value may be mentioned along with the description of the property.

the income of the property described in the first schedule hereto and the property for the time being representing the same (hereinafter called "the husband's fortune") to the husband and his assigns and shall pay the income of the property described in the second schedule hereto and the property for the time being representing the same (hereinafter called "the wife's fortune") to the wife and after the death of such one of them the husband or wife as shall first die shall pay the income of his or her fortune to the survivor of them and his or her assigns during his or her life but so that during marriage this interest hereby given to the wife shall be without power of anticipation.[2]

2. Annuity to Wife

During the joint lives of the husband and wife the trustees shall out of the income of the said property for the time being representing the same pay an annuity of Rs.————to the wife without power of anticipation from the date of marriage such annuity to be payable in equal monthly instalments on the————day of each month and shall during such joint lives pay the residue of such income to the husband and his assigns.

3. Trust in Favour of Children

The trustees shall hold the property hereby settled IN TRUST for all or any of the children or child of the intended marriage who being male attain the age of eighteen years or being female attain that age or marry, and if more than one, in equal shares.

4. Maintenance and Accumulation

The trustees shall after the death of husband and wife apply the whole or such part as they think fit of the income of the share in the trust property to which any child of the intended marriage shall for the time being be entitled in expectancy under the trust hereinbefore declared for and towards his or her maintenance, education or benefit and may either themselves apply the same or may pay the same to the guardian or guardians of such child for the purpose aforesaid without seeing to the application thereof (and shall invest the surplus income (if any) thereof in any investment hereby authorised in augmentation of the capital or share).

2 In conveyancing "anticipation" means "the act of assigning, charging or otherwise dealing with income before it becomes due" (Black's Law Dictionary, VI ed., p. 93)

5. Investment of Trust Fund

The trustees shall forthwith invest the trust fund in any of the forms of investment allowed by law (*or*, in one of the investments mentioned in ———schedule hereto) and may from time to time vary such investment for others of a like nature as often as they shall deem expedient.

Or

All moneys received by the trustees and not required for immediate expenditure for the purposes of the trust may at the discretion of the trustees be invested in any of the forms, etc., (*as in para* 5).

6. To Sell Securities

The trustees shall be at liberty at their discretion to call in and sell any securities hereby transferred and re-invest the sale proceeds in any other securities or deposit the same in any nationalised bank.

7. Not to Sell

The turstees shall have no power to sell, mortgage or otherwise transfer the immovable property hereby settled or any part thereof but they shall be at liberty to grant leases for terms not exceeding seven years.

8. To Sell

The trustees shall have power if they think fit to sell the immovable and movable property subject to the trust hereby created and all money received by such sale shall form part of the trust fund and shall be applicable accordingly.

9. To Purchase

The trustees may at any time or when they think expedient apply any part of the trust fund in acquiring by purchase or on lease or otherwise any land as a site or as part of the said————of the————and in———and all land so acquired shall be transferred or demised to or otherwise vested in the trustees or such other persons as they shall from time to time direct.

10. Appointment of New Trustees

If and whenever the number of the trustees shall be reduced below——, the continuing trustees shall appoint such number of new

trustees as shall be required to make up the total number for the time being to——.

Or,

In case of any vacancy in the board of trustees caused by death, resignation or otherwise, the same shall be filled up by nomination by the remaining trustees.

11. Trustees to Act by Majority of Votes[3]

All or any of the trusts and powers vested in or exercisable by the trustees hereunder shall be capable of being performed or exercised by a majority of the trustees hereof for the time being and any action or decision of such majority shall be as valid and effective as it would have been if done by all the trustees.

12. Power to make Rules

Subject as aforesaid the trustees shall from time to time make and alter rules and regulations with regard to the conduct of the business and all matters in respect of which any power or duty is hereby vested in them as they may think proper.

13. Cy-pres

If the object for which this trust has been created shall fail and cannot be fulfilled the trustees shall be at liberty to apply the trust fund and the property which is the subject of this trust to any other object of alike nature which the trustees shall consider proper.

14. Power of Revocation

The settlor may at any time or times hereafter by any deed or deeds revocable or irrevocable or by will or conduct expressly referring to this power or the property subject thereto appoint such new or other trustees and concerning the trust fund (*or*, the property hereby settled or any part thereof) as he may think fit.

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3 Sec. 48 Trust Act provides that all trustees must act jointly except where the instrument of trust otherwise provides. Hence this clause.

PRECEDENTS

[*In these Precedents only trusts created inter vivos are dealt with; Precedents of those created by Will will be found in the next part relating to Wills*]

1—Marriage Settlement under which prospective Husband's Father Agrees to Pay an Annuity to the prospective Wife

THIS SETTLEMENT is made on the————day of———— BETWEEN AB, etc., (hereinafter called "the settlor") of the first part AND CD, etc., of the second part AND EF, etc., of the third part.

WHEREAS a marriage has been fixed up between CD and EF and during the negotiations for the marriage it was agreed (between the settlor and the father of the EF) that the settlor will enter into an agreement to pay an annuity of Rs.————to EF during the continuance of her marriage with CD;

NOW THIS DEED WITNESSES that in pursuance of the agreement and in consideration of the intended marriage the settlor covenants with CD and EF and as a separate covenant with each of them as follows :

1. The settlor will during his life (*or*, the settlor his heirs, executors, administrators will) from and after the solemnization of the marriage and during the subsistence of that marriage pay to EF without power of anticipation an annuity of Rs.————.

2. The annuity shall be deemed to accrue from day to day and shall be payable monthly by equal instalments on the first day of every month, the first payment (if necessary of an apportioned part of the said annuity) to be made on the first day of the month next following the month in which the marriage is solemnized.

3. If EF becomes insolvent or does or attempts to do or suffer anything or any event happens whereby the annuity, or its part becomes vested in or payable to some other person or cease to become payable to EF then the annuity shall forthwith cease to be payable.

4. The settlor as owner of the property mentioned in the schedule hereto, hereby charges the same with the payment of the annuity.

5. If marriage between CD and EF is not solemnized within months this settlement shall become void and of no effect.

The schedule herein referred to.

IN WITNESS WHEREOF, etc.

2—Post-Nuptial Settlement by Husband on himself, his Wife and Children

THIS SETTLEMENT made on the———day of——— BETWEEN AB, etc., (hereinafter called "the Settlor") of the first part AND CD, etc., (hereinafter called "the wife") of the second part AND EF, etc., HI, etc., LM, etc., and OP, etc., (hereinafter called "the trustees," which expression shall include the trustee or trustees for the time being) of the third part.

WITNESSES that in consideration of natural love and affection of the settlor for his wife and children and for other good considerations the settlor as owner hereby transfers to the Trustees ALL that property described in the schedule hereto valued at Rs.———TO HOLD the same to the Trustees upon trust and subject to the powers and provisions hereinafter expressed, viz. :

(1) The Trustees shall first discharge out of the income or capital of the property hereby settled after paying land revenue, cesses and taxes and other outgoings and expenses of realisation all the debts of the settlor due on the date hereof.

(2) The trustees may in their absolute and unfettered discretion either allow the said property or any part or parts thereof to remain as actually invested or may sell, call in or convert into money the same and invest the net sale proceeds thereof in the names of the trustees in or upon any investments they think proper.

(3) Subject to the provisions contained in clause (1) the trustees shall hold the income of the property settled and the property for the time being representing the same for the benefit of the settlor and the wife during their lives and after the death of either of them for the benefit of the survivor.

(4) After the death of the settlor and the wife the trustees shall hold the said property and the capital and income of the trust fund in trust for all the children of the settlor who shall attain the age of eighteen years in equal shares, and in the meantime shall apply the income of the said property or the property representing the same towards the maintenance and education of the said children during their minority and invest the surplus income, if any, in such investments as they think fit.

(5) If there shall be no child of the settlor then subject to the trusts and provisions herein contained the trustees shall hold the said property and all trust funds and income for the legal heirs of the settlor surviving the settlor and the wife (*or*, the legal heirs of the settlor or the wife whoever shall die last).

(6) The trustees may, after the death of the settlor and the wife, from time to time by mortgage or sale of the said property hereby settled raise any moneys necessary for the maintenance and education of the settlor's children during their minority.

(7) The power of appointing a new trustee or new trustees hereof shall vest in the settlor and after his death in the wife if she survives him and after the death of both in the person or persons for the time being entitled to the trust funds if of full age, and if there shall be no such person then in the court or any other officer having jurisdiction in this behalf under the law for the time being in force PROVIDED THAT whenever a vacancy shall happen amongst the trustees by death or any other means a new trustee shall forthwith be appointed to fill such vacancy.

(8) The settlor may at any time in his lifetime or by will revoke all or any of the trusts powers or provisions hereinbefore declared and by the same or any other deed or will declare such new or other trust powers or provisions concerning the property hereinbefore settled as he shall think fit.

The schedule herein referred to.

IN WITNESS WHEREOF, etc.

3—Settlement of Property for the Benefit of Minor Children

THIS SETTLEMENT made on the ——— day of ——— BETWEEN AB, etc., (hereinafter called "the settlor") of the one part

AND CD, etc., EF, etc., GH, etc., (hereinafter called "the Trustees" which expression shall include the trustee or trustees for the time being) of the other part.

WITNESSES as follows :

1. In consideration of the natural love and affection for his children named X, Y and Z who are all minors and were born on the————, the————and the———respectively, the settlor hereby transfers and assigns the property described in the schedule hereto which belongs to the settlor to the trustees upon trust and subject to the powers and provisions hereinafter expressed and declared.

2. The Trustees shall not transfer the immovable property hereby transferred except in case of absolute and unavoidable necessity and with the permission of the settlor or in case of his death his wife and in case of the death of both with the permission of the District Judge having jurisdiction in the matter.

3. The Trustees may sell the movable properties mentioned in the schedule hereto as necessity may arise and may in their absolute discretion either allow the money and securities to remain deposited and invested as they at present are or may withdraw the said money or any part thereof and deposit it elsewhere or invest it in any safe security and may sell or convert into money and security or part thereof and invest the net sale proceeds thereof in the name of the Trustees in or upon such investments as they think proper.

4. The Trustees shall hold the said property mentioned in the schedule hereto or any property representing the same in trust for such of the settlor's children viz., X, Y and Z who shall attain the age of 18 years in equal shares.

5. The Trustees shall apply the income of the property hereby transferred to them or the property representing the same towards the maintenance and education of the settlor's said children during their minority and invest the surplus income, if any, in such investments as they think fit.

6. The settlement hereby made shall be irrevocable.

7. The power of appointing new trustee or trustees shall be vested in the settlor or after his death in his wife if she survives him.

8. It is hereby declared that the value of the

Rs.——.

THIS DEED OF TRUST etc. (as in Form 3).

WHEREAS the said AB owns and possesses all that property detailed and specified in the schedule hereto which is his self acquired property and over which he has full disposing power under the Hindu law;

AND WHEREAS the said AB has for some time past been keeping very indifferent health and is unable to look after his affairs and has lost all hopes of a complete recovery;

AND WHEREAS his only son CD has long been subject to epileptic fits is now a man of weak intellect and of almost unsound mind totally incapable of managing the household and estate affairs;

AND WHEREAS for the aforesaid reasons and with the object of making proper and adequate provision for the due management, protection, preservation and disposition of his estate the said AB is desirous of creating a trust in respect of his aforesaid property in manner hereinafter appearing;

AND WHEREAS the total value of the aforesaid property is Rs. —— as detailed in the schedule hereto.

NOW THIS DEED WITNESSES as follows :

1. The said AB hereby transfers ALL that property described in the schedule hereto (hereinafter referred to as "the trust property") to the trustees TO HOLD the same in trust for the said AB and after his death upon the trust hereinafter declared concerning the same with and subject to such powers and limitations as are hereinafter specified.

2. The Trustees shall by themselves or through an agent or agents employed by them manage and deal with the trust property in such manner as might be most beneficial to the interest of the trust and shall realise the rent, dividend, interest and other income accruing from the trust property

and the said AB shall make such formal endorsements and execute such documents and do every such thing as may be legally necessary to enable the trustees to realize such income.

PROVIDED that so long as the said AB or his wife shall be alive and in full possession of his senses, the trustees shall not be competent to sell, mortgage or otherwise transfer any portion of the residential house except with his express consent if he is alive and able to give consent or with the consent of his wife in case he is dead or is unable to give his consent.

3. During the said AB's life time the trustees shall spend the income of the trust property in such manner as the said AB may direct and in case he is not able to give any directions the said income shall be spent on the maintenance of the said AB, his wife, his son, his son's wife and such other members of his family as may for the time being be in existence and dependent on him and on all religious, social and customary needs of the family such as *mundan* and marriage of members of the family, *bhat* and *chhuchak* of the children of his daughters, etc.,

4. After the death of the said AB the income of the trust property shall be spent on the maintenance of his wife, his son the said CD, the said CD's wife and such other members of his family as may be in existence and on all such religious, social and customary needs of the family as aforesaid.

5. If at any time the trustees find that the income of the trust property is not sufficient for the objects of the trust as hereinbefore recited, they shall be at liberty to draw upon the cash mentioned in the schedule hereto or to raise money by disposing of such stocks, shares or securities mentioned in the said schedule as they may think proper, provided that except in cases of sudden, urgent and unavoidable necessity they shall not be entitled to raise more than rupees ten thousand in any one year by drawing upon such cash or disposing of such stocks, shares or securities.

6. Whenever on account of death or other cause, the office of trustee becomes vacant, the said AB if he is alive and in proper senses and after his death or if he is not in his proper senses the remaining trustees shall appoint a new trustee and if they cannot agree about the appointment of a new trustee or fail to appoint one within a reasonable time, the court may

appoint a new trustee in accordance with the law for the time being in force in this behalf and in making such appointment the trustees or the court shall give due weight to the wishes, if any, of the said AB's wife and wife of the said CD expressed in this behalf.

Pending the appointment of a new trustee the remaining trustees shall continue to administer the trust.

7. On the death of both the said AB and his son the said CD this trust shall cease and the trust property or such portion of it as may be in existence shall immediately vest as follows :

* * * * *

8. The said AB hereby expressly reserves to himself the power to revoke or modify at any time and at his pleasure the trust hereby created but such revocation or modification will not affect any acts already done by the trustees in execution of the trust.

The schedule herein referred to.

IN WITNESS WHEREOF parties have signed this deed on the ——day of——.

5—Assignment of Property by a Debtor for the Benefit of his Creditors[1]

THIS DEED is made on the——day of—— BETWEEN AB, etc., (hereinafter called "the Debtor") of the first part AND CD, etc., and GH, etc., (hereinafter called "the Trustees") of the second part AND the several persons, firms, and companies mentioned in the First schedule hereto (hereinafter called "the Creditors") of the third part.

WHEREAS the Debtor being unable to pay to the Creditors their debts in full has proposed to them to make an assignment of his property for their benefit in the manner hereinafter contained and the proposal has been accepted by the Creditors.

NOW THIS DEED WITNESSES as follows :

1 See also precedent No. 1 under "COMPROMISE, COMPOSITION AND FAMILY SETTLEMENT", *ante*.

1. The Debtor hereby transfers all that property described in the second schedule hereto to the Trustees upon the trust hereinafter declared with and subject to such powers and limitations as are hereinafter specified.

2. The Trustees shall collect, call in, sell and convert into money the property hereby transferred and after defraying the necessary expenses shall distribute the net assets proportionately amongst the creditors according to such rules as are applicable to the administration of estates in insolvency proceedings and shall stand possessed of the balance thereof (if any) upon trust for the Debtor.

3. The Trustees may postpone the sale of all or any of the property so long as they think fit and may at their discretion lease, manage or otherwise deal with the trust property in such manner as they think fit. They shall also have the power to raise money by mortgage of all or any of the trust property for the purpose of discharging the liabilities of the Debtor and for repairs and other expenses incidental to the management of the property.

4. The Trustees may carry on and manage the business of the Debtor and may employ the Debtor or any other person in the management and may pay to him such remuneration as they determine.

5. For the purpose of collection of debts owing to the Debtor, the Trustees may bring any suit or other proceedings in court or may refer any dispute with any person in relation to any such debt to arbitration or may enter into any compromise or arrangement in relation to any such debt.

6. The Debtor hereby appoints the Trustees jointly and any two or more and each of them severally his attorneys and attorney in his name and on his behalf to execute any deed or document or instrument which the trustees may deem necessary for the due performance of the trusts hereof.

7. The Creditors hereby do and each of them does hereby release and discharge the Debtor from all the said debts and from all actions, claims, demands or any other proceeding whatever by the Creditors or any of them against the Debtor in respect thereof; Provided that this release shall in no respect prejudice the rights of the Creditors or any of them against parties other than the Debtor and the Creditors hereby expressly reserve all their rights and remedies against any such party or parties.

8. The Trustees shall, in the administration of the trust hereby created, act according to their unanimous judgment and in case of difference of opinion, according to the opinion of the majority of them.

The schedule herein referred to

The First Schedule

(Names of Creditors)

The Second Schedule

(Details of Property assigned)

IN WITNESS, etc.

6—Deed of Trust about Government Grant-in-Aid to a Roman Catholic Church[2]

THIS DEED OF TRUST is made on the———day of———— BETWEEN AB Roman Catholic Bishop of Allahabad (hereinafter called "the Bishop") of the one part AND the Governor of Uttar Pradesh (hereinafter called "the Government" which expression includes its successors and assigns) of the other part.

WHEREAS the Bishop applied to the Government for the grant of money for building a Roman Catholic Church in Allahabad Cantonment;

AND WHEREAS the said Government by G.O.No.———— dated———sanctioned the grant-in-aid of Rs.———— towards the construction and electric installation of the said Roman Catholic Church on condition of the execution of this deed of trust.

NOW THESE PRESENTS WITNESS and the parties hereto hereby agree as follows :

1. That the Bishop will apply the whole of the aforesaid grant on the construction and electrification of the building of the said Church.

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2 Normally in a secular State such a grant-in-aid would not now be permissible (*see* Preamble and Article 27 of the Constitution). But if places of worship are destroyed in a communal riot, etc., Government may be justified in spending public funds on restoration of those temples, mosques, churches or gurudwaras (*K. Raghunath* v. *State of Kerala*, A 1974 Ker 48, 1972 Ker LT 442). Suitable recitals should be made according to the facts of the case.

2. That the Bishop shall hold the said building upon trust to permit the same to be used in perpetuity as a Roman Catholic Church for the benefit and use of Roman Catholics residing or being in the neighbourhood of the said hereditament.

3. That on the death of the Bishop or on his ceasing to hold the office of the Roman Catholic Bishop of Allahabad, the said building shall vest in the person appointed for the time being to the office of Roman Catholic Bishop of Allahabad upon the same trust as aforesaid.

4. That the said Church shall be maintained by the Bishop or any other person for the time holding the office of the Roman Catholic Bishop of Allahabad from collections, donations or any other fund at his disposal for the purpose.

5. That if at any time the said building ceases to be used as a Roman Catholic Church the Government will be at liberty to claim a refund of the aforesaid grant and the said building shall remain charged with the repayment of the aforesaid amount of grant to the Government and the Government shall for the purpose of realising the amount of the aforesaid grant be entitled to enforce against the said building all the remedies of a charge holder.

IN WITNESS WHEREOF, etc.

7—Deed of Endowment of Property for a Hospital to be Built by the Founder and to be Managed by Zila Panchayat

THIS DEED OF TRUST is made on the——day of—— BETWEEN AB, etc., (hereinafter called "the founder") of the one part AND the Zila Panchayat of (hereinafter called "the Panchayat") of the other part.

WHEREAS the founder had always had a keen and earnest desire to serve the people of the locality round about the village of—————— within an approximate radius of twenty kilometres;

AND WHEREAS the best method of service in the opinion of the founder is the rendering of better medical aid which, at present, is practically denied to the aforesaid locality;

AND WHEREAS this can best be done by the opening of a well-equipped hospital on modern lines;

AND WHEREAS on the founder providing a building for the said hospital and making a gift of the properties hereinafter specified and valued at Rs. ———— for the purposes of the hospital the Panchayat has agreed to make a contribution for the recurring expenses of the hospital and the Government of Uttar Pradesh (hereinafter called "the Government") has also promised to make a non-recurring grant for equipment of the hospital and also to make a recurring grant for the upkeep and maintenance of the same.

NOW THIS DEED WITNESSES as follows :

1. The founder hereby transfers to the Panchayat ALL those properties detailed in the schedule hereto TO HOLD the same to the Panchayat upon trust that the proceeds and income of the said properties after deducting bad debts, expenses of realisation and litigation, etc., (if any) shall be used exclusively for the maintenance and upkeep of the hospital hereinafter mentioned.

2. The founder hereby undertakes to construct suitable buildings for the said hospital at village————according to plan sanctioned and approved by the———, on or about the————at a cost of not less than Rs.———and on its completion to transfer the same to the Panchayat upon trust that the same shall be used for the purposes of the said hospital.

3. The Panchayat hereby agrees that on the said building being completed and transferred to the Panchayat as hereinbefore agreed, the Panchayat shall open a hospital in the said building to be called———— Hospital, and that the name of the said hospital shall never be changed notwithstanding any change in its management or constitution.

4. The Panchayat hereby agrees that it will manage the said properties properly and with due diligence through its agents and will spend the entire net proceeds accruing therefrom on the upkeep of the said hospital. The Panchayat further agrees to keep the buildings of the said hospital at all times in proper repair and will also meet all recurring or non-recurring charges that may be necessary for this purpose.

5. It is further declared that in case the Government thinks that it would be to the interest and benefit of the said hospital the Panchayat may, with the previous approval of the Government, dispose of the properties hereby transferred in any manner advised by the Government,

and in such contingency the total sale proceeds shall be deposited in a Bank approved by the Government or invested in some secure and profitable manner approved by Government.

6. If at any time the Government is of opinion that the said hospital is not being managed efficiently and properly and in consequence withdraws its grant the Government will have the full authority to take charge of all the properties hereby conveyed or of the money into which the same may have been converted under the preceding clause and either to run the hospital itself or to have it run by any other body constituted by the order of the Government.

7. That for the better and more efficient management of the hospital for all time to come it is also declared that there shall be a Board of Visitors consisting of the District Magistrate————as the President and CD, EF, and GH and the founder as members. After the death of the founder one of the descendants of the founder nominated by the District Magistrate for the time being of ——— district will take the place of the deceased and similarly after the death of any such descendants one of his descendants, and so on, nominated as aforesaid, shall take the place of the deceased as a member of the Board of Visitors, and in case of the non-existence of any such descendant, or on the occurrence of vacancy in the office of any other member, the remaining members shall appoint any suitable man to fill up the vacancy.

8. The main function of the Board of Visitors shall be to inspect the hospital to see that the Panchayat is properly and efficiently managing the hospital and spending on it the amount contributed for the purpose and to give such advice and direction to the Panchayat for the efficient, proper and economical administration of the hospital as it thinks proper and the Panchayat shall accept such advice and obey such directions as far as possible and as far as the funds will permit.

9. That it would be within the competence of the Panchayat to appoint, remove and dismiss, medical and other staff for the said hospital.

The schedule herein referred to

IN WITNESS WHEREOF, etc.

8—Deed of Settlement for Establishing a Girls' School

THIS DEED is made on the ——————day of——————— BETWEEN AB, etc., (hereinafter called "the settlor") of the one part AND CD, etc., and EF, etc., and GH, etc., (hereinafter called "the Trustees" which expression shall include the survivor or survivors of them and the administrators and executors of the last survivor or the trustee or trustees for the time being of the trust hereby created) of the other part.

WHEREAS the settlor is owner of the immovable property described in the first schedule hereto and of the land described in the second schedule hereto and of the securities mentioned in the third schedule hereto;

AND WHEREAS the settlor being desirous of establishing a Girls' High School at————has decided to settle irrevocably the said property, land and securities for this purpose in the manner hereinafter following;

AND WHEREAS the settlor has endorsed in favour of and delivered to the trustees the said securities mentioned in the third schedule hereto;

AND WHEREAS the total value of the properties mentioned in the first, second and third schedules hereto is Rs.——————as detailed in the said schedules.

NOW THIS DEED WITNESSES as follows :

1. In pursuance of the said desire of the settlor, the settlor hereby transfers and assigns to the trustees ALL that property described in the first schedule hereto AND ALL that land described in the second schedule hereto AND ALL the securities described in the third schedule hereto TO HOLD the same to the Trustees upon the trust and with and subject to the powers, provisions and agreements hereinafter declared and expressed concerning the same.

2. The Trustees shall within one year from this date construct on the land described in the second schedule hereto a suitable building for a Girls' School at a cost of not more than Rs.————to be raised by sale of such of the securities mentioned in the third schedule hereto as the Trustees may think proper.

3. The Trustees shall establish a Girls' High School in the said building and any initital cost of establishing such school shall be met from the income of the property described in the first schedule and the securities described

in the third schedule hereto and if such income is not sufficient, from the sale proceeds of such securities as the trustees may consider it necessary to sell for the purpose.

4. The Trustees shall manage the said property mentioned in the first schedule hereto and after paying Government revenue, cesses, taxes and all expenses of collection and management shall use the balance of the income as well as the income from such of the securities mentioned in the third schedule hereto as may remain unsold or of any other securities into which the same may hereafter be converted by them shall be used for the expenses of the said Girls' School and any balance remaining after making such expense, shall be deposited in such bank and invested in such manner as the Trustees may consider proper.

5. The Trustees shall have power to convert such securities mentioned in the third schedule hereto as they think necessary into other securities or into money but they shall not have power to sell, mortgage or otherwise transfer the property described in the first schedule hereto except with the permission of the District Judge having jurisdiction.

6. In case of any vacancy amongst the trustees occasioned by death, resignation or incapacity of any trustee or otherwise the settlor shall appoint another trustee to fill up the vacancy and after his death the remaining trustees shall make the appointment.

(*Any other conditions suitable and necessary*).

The schedule herein referred to

IN WITNESS WHEREOF, etc.

9—Trust Deed Establishing a Scholarship

THIS DEED OF TRUST is made etc. (*as in Form 3*)

WITNESSES as follows :

1. The trustees shall hold the sum of Rs. ———— this day paid to them by the founder upon trust to apply the income thereof in perpetuity for the promotion and encouragement of education in the University in the manner hereinafter appearing.

2. The Trustees shall invest the said sum of Rs.———— in their names in any investment permitted by law and may at any time and from time to time vary any of such investments for others of a like nature.

3. The said sum of Rs. ———— and the investment representing the same as aforesaid shall be called the———— Trust Fund and are hereinafter referred to as the Trust Fund.

4. The trustees shall out of the income of the trust fund first pay all costs and expenses of or incidental to the management of the trust fund and the income thereof and shall apply the balance in establishing a scholarship (hereinafter called the ———scholarship) of the monthly value of Rs.———— to be from time to time awarded in the manner hereinafter mentioned to a student entering the said University as an undergraduate and to be held and enjoyed as hereinafter provided.

5. The scholarship shall be awarded at such intervals and as the result of such examination and in such manner and shall be held and enjoyed for such period and upon and subject to such terms and conditions as shall from time to time be prescribed by regulations to be made by the said University and in default of such regulations as the trustees shall determine.

6. The trustees may at any time and from time to time set apart as sinking fund the whole or any part of the surplus income produced by the trust fund in any year not required to meet the cost of the said scholarship and may invest any sums so set apart and the resulting income thereof in the names of the trustees in the manner aforesaid with power at any time to vary such investments.

7. The trustees may at any time sell any investment representing the capital or income of the sinking fund and apply the proceeds thereof or the capital or income of the sinking fund as though the same were income produced by the trust fund during the then current year.

8. So much of the income of the trust fund in any year as is not required for the aforesaid scholarship or sinking fund shall from time to time be applied for the grant of any such other scholarship and in such manner as the University may from time to time direct.

9. The trustees may with the concurrence of the Chancellor of the said University at any time wholly or partially vary any of the purposes for which the income of the trust fund is to be applied and such income or part thereof shall then be applied to such other purpose provided that the same shall not be applied to any purpose unless the same is conducive to the promotion or encouragement of education at the said University.

10. In case of the occurrence of any vacancy amongst trustees by reason of death or resignation of any trustee or for any other cause, the founder will have the right to appoint a new trustee and after the death of the founder the remaining trustees shall by a majority of votes appoint a new trustee and in case of equality of votes, the appointment shall be made by the Chancellor of the said University (*or*, by the Court having jurisdiction in this behalf).

IN WITNESS WHEREOF, etc.

10—Trust Deed Establishing a Scholarship, when no Trustees are Appointed but Money is given to the University

(Para 6 as in Form B)

NOW THIS DEED WITNESSES and I hereby declare that the University shall hold the said promissory note upon the trust and with and subject to the powers and provisions hereinafter contained, (*Rest mutatis mutandis-as in the last precedent*).

11—Endowment to a Deity in a Temple

THIS DEED OF ENDOWMENT is made on the ---- day of ---- by AB, etc.

WHEREAS I have created (*or*, am desirous of creating) a temple at---- and have established (*or*, and am establishing) a deity by the name of Shri Kishori Ramanji Maharaj in the said temple.

AND WHEREAS I am desirous of dedicating the properties mentioned in the first and second schedules hereto to the said deity (and for the cost of construction of the said temple) and to secure the worship of the said deity in the said temple and of making a religious endowment of the said properties in the manner hereinafter appearing.

AND WHEREAS the value of the said properties is Rs. ----.

NOW THIS DEED WITNESSES and hereby declares as follows:

1. In pursuance of my said desire I hereby grant, set apart, dedicate and appoint ALL that land and house property described in the first schedule and all those securities and movable property described in the second schedule hereto to and for the worship of the said deity absolutely forever in the manner hereinafter contained.

2. I hereby constitute and appoint myself the first *shebait* for the purpose aforesaid and direct that after my death my eldest son and after his death his eldest male descendant in the male line shall succeed successively as *shebait* and that if any *shebait* dies without leaving any male descendant then his widow and after her death the eldest of the male heirs of the last male *shebait* shall succeed and failing such male heirs, any officer of Government appointed by the Government or court will be the *shebait* who will have the power to appoint *sub-shebaits* under him, removable at his pleasure. If any person entitled to succeed is a minor, then the guardian for the time being of the property of such minor shall be the *shebait* during the term of such persons's minority.

3. The *shebait* shall not have power to sell or mortgage or otherwise transfer the properties hereinbefore dedicated except in case of urgent necessity and with the permission of the District Judge for the time being of _____.

4. If any person entitled to be a *shebait* shall renounce the Hindu religion or transfer any portion of the dedicated property in violation of the condition hereinbefore recited then he shall for the purposes of this deed be considered to be dead and the person next entitled to succeed as *shebait* shall succeed.

5. The *shebait* for the time being shall hold the said properties hereinbefore dedicated in trust to manage the same to the best advantage with full power to let out the same and in the event of an involuntary transfer of any portion of the immovable property, to invest the value or price thereof or any compensation received therefor in landed property or in securities of the Government of India and will have power to vary such investments from time to time.

6. The income of the said properties hereinbefore dedicated shall be applied first in the maintenance and repair of the said property and the

payment of land revenue, cesses, taxes and other outgoings in respect of the same and the *shebait* after deducting a remuneration for himself of————percent of the gross income and collections shall lay out and spend the remainder of the said income in the daily worship of the said deity and in defraying the expenses of the usual festivals in the manner and according to the customs of the family with full liberty to apply a portion of such income to the improvement of the said property hereinbefore dedicated or to purchase other property to be included in the said dedication.

The schedule herein referred to

IN WITNESS WHEREOF, etc.

12—Declaration of Public Trust in Property Already used as a Charitable Institution

THIS DEED is made on the————day of————by me, AB, etc.

WHEREAS three years ago my deceased father CD constructed a building for a *dharamshala* at ———— with shops attached thereto;

AND WHEREAS since the said building has been used as a *dharamshala* for the free accommodation of all Hindu travellers and visitors and the income from the rent of the said shops is spent on the upkeep of the said building and the pay of the *chaukidar*;

AND WHEREAS it is considered expedient to make a formal dedication of the said building and shops to the purpose for which they were constructed and to make a more definite provision for the upkeep of the said *dharamshala*;

NOW THIS DEED WITNESSES that I grant, dedicate and set apart the building and shops fully described in the schedule herto to and for the purposes hereinafter mentioned in the manner hereinafter contained and declare as follows :

1. The said building shall for ever be used as a *dharamshala* for the free accommodation of Hindu visitors and travellers in accordance with such rules as may from time to time be made by the trustee for the time being.

2. I shall be the Manager or trustee of the said *dharamshala* and shops during my life and after my death my eldest male descendant in the male line and failing him any other person in my family who may be fit to act as such trustee will be the trustee.

3. The trustee for the time being shall keep the said *dharamshala* building in good state of repairs and in clean and sanitary condition and will employ a *chaukidar* and such other servants as may be necessary to look after the said building and the comfort of the lodgers as he may consider necessary.

4. The income of the said shops shall after defraying the necessary expenses of collection be applied to the upkeep and necessary expenses of the said *dharamshala* and any surplus remaining after defraying all such expenses shall be used either in improvement of the said building and shops or in providing additional comforts to the visitors and travellers and no part of the said income shall in any case be appropriated by the trustee to his own use.

The schedule herein referred to

IN WITNESS WHEREOF, etc.

13—Waqf Alal Aulad

THIS DEED OF WAQF is made on the ---day of------ by AB, etc., (hereinafter called "the *Waqif*").

WHEREAS the *waqif* is the absolute owner of the immovable property mentioned in the first schedule hereto and of the shares, securities and other movable property mentioned in the second schedule hereto.

AND WHEREAS the *waqif* has no debts and the dower debt of his wife also has been partly paid to her and partly relinquished by her by the deed dated ---.

AND WHEREAS the *waqif* is desirous of making a *Waqf* of the said properties for the maintenance and support of himself and his descendants and in the event of extinction of the line of his descendants for the benefit of the poor Muslims of --- in manner hereinafter appearing.

AND WHEREAS the total value of the said properties as per details given in the schedules hereto is Rs. ----------.

NOW THIS DEED WITNESSES that the *waqif* hereby makes a settlement by way of *waqf* of ALL immovable properties, shares, securities and movables mentioned in the first and the second schedules hereto and extinguishes all his rights of ownership therein and declares as follows:

1. That the aforesaid property shall no longer be the private property of any one but shall be *waqf* for the maintenance and support of the *waqif*, his family, children and descendants and in case of extinction of his line of descendants for the benefit of the poor of the————belonging to Muslim faith.

2. That the *waqif* hereby appoints and constitutes himself the sole *mutwalli* of the said *waqf* during his life with absolute power of management thereof and shall appropriate the income of the said property to his own use.

3. That after the death of the *waqif*, any person nominated by the *waqif* in his lifetime or failing such nomination his eldest son or failing him the eldest male descendant and failing a male descendant a female descendant of the *waqif* in the male line of descendants or failing her the eldest male descendant in the female line of descendants and failing him the eldest female shall be the *mutwalli*.

4. The second and subsequent *mutwallis* shall have power to nominate their successors and failing such nomination the descendants in the order given in Clause 3 shall be the *mutwalli*.

5. The *mutwalli* for the time being shall manage the *waqf* property to the best of his ability and in case he is a minor or person of unsound mind his guardian appointed by the Court shall manage the property on his behalf.

6. That after payment of revenue, cesses, rates, taxes and necessary expenses of management the profits, and income of the said property shall be divided by the *mutwalli* amongst the *waqif's* descendants according to their shares under the Muslim Law.

7. That the *mutwalli* shall have no power to sell, mortgage or in any other way transfer or charge the immovable property mentioned in the

first schedule hereto or any part thereof except by lease for a period not exceeding seven years at a time but he may call in and convert into cash the property mentioned in the second schedule hereto and deposit the money in any nationalised bank or invest it in such securities as he may deem fit or may purchase immovable property and all such money, securities and immovable property into which the property mentioned in the said schedule may be so converted shall be deemed to be part of the *waqf* hereby made as if the same were included in the first schedule hereto.

8. That the descendants of the *waqif* will have no right to transfer or charge in any manner their shares of the income and profits of the *waqf* property.

9. That on the extinction of the line of descendants of the *waqif*, the *mutwalli* for the time being shall use the income and profits of the aforesaid property for the sole use and benefit of the Muslims of the city of———— in such manner as he shall think fit.

The schedule herein referred to

IN WITNESS WHEREOF the *Waqif* has signed this deed on the date first above written.

14—Waqf for Public Purposes

THIS DEED OF WAQF, etc., (*as in Form* 13).

WHEREAS, etc., (*as in Form* 13).

AND WHEREAS the *waqif* having no wife or children is desirous of making *waqf* of his said properties for the sake of God for the charitable purposes hereinafter mentioned;

AND WHEREAS the total value, etc., (*as in Form* 13).

NOW THIS DEED WITNESSES that the *waqif* purely for the sake of God and in order to get religious benefit in the next world hereby makes a *waqf* of the properties mentioned in the first and second schedule hereto and extinguishes all his rights of ownership therein and declares as follows :

1. That out of the money specified in the second schedule and the proceeds of sale of such of the securities mentioned in the second schedule

as the *mutwalli* may think proper to sell, Rs. shall be spent on the construction of a mosque on the land near , mentioned in the first schedule, and the mosque so constructed shall be used as a public mosque for saying prayers by all Muslims without any distinction of sect or school of thought.

2. That the income of the aforesaid property shall be applied in perpetuity to the following purposes :

(*a*) Rs.——per annum for the upkeep of the *Imambara* at ;

(*b*) Rs.——per annum for the expenses of *majlis* and other celebrations in connection with the Muharram;

(*c*) Rs. per annum to be paid to the Shia Orphanage at so long as it exists and if it ceases to exist to any other Muslim Orphanage in India according to the discretion of the *mutwalli* for the time being;

(*d*) Rs. per annum to be paid to the Islamia High School at or if the said school ceases to exist to any other Islamia school at the discretion of the *mutwalli* for the time being;

(*e*) Rs. per annum on feeding the poor Muslims;

(*f*) Rs. per annum on the expenses of poor pilgrims proceeding to *Kaaba Sharif*;

(*g*) Rs. per annum on the upkeep and maintenance of the mosque to be constructed as provided in clause 1.

(3) The *waqif* hereby appoints AB, etc., as the *mutwalli* of the said *waqf* and has delivered possession of the aforesaid *waqf* property to him as such *mutwalli*.

4. The said *mutwalli* and each *mutwalli* after him will have power to nominate his successor and the successor so nominated will be the *mutwalli*. Failing a nomination in any case or if the person so nominated becomes unfit or incapable to act as *mutwalli* the Court may appoint a *mutwalli*.

5. The *mutwalli* for the time being shall manage the *waqf* property to the best of his ability and shall after payment of revenue, cesses, rates, taxes and necessary expenses of management first pay out of the surplus an allowance of Rs. per annum to himself for his services as such *mutwalli* and shall apply the residue to the several expenses mentioned

in clause 2 hereof and any surplus remaining over after meeting all the said expenses shall form part of the *waqf* fund.

6. If the profits and income of the *waqf* property in any year proves insufficient for meeting all the aforesaid expenses, the *mutwalli* shall be at liberty to draw upon the *waqf* fund and if that also is not sufficient the expenditure referred to in sub-clause (*f*) of clause 2 shall be reduced, and if a further reduction becomes necessary the expenses referred to in sub-clauses (*b*), (*c*) and (*d*) will also be proportionately reduced;

7 and 8. (*as in Form* 13).

The Schedule herein referred to

IN WITNESS WHEREOF, etc.

15. Appointment of a New Trustee

THIS DEED OF APPOINTMENT is made on the day of ——— BETWEEN AB, etc., CD, etc., and EF, etc., (hereinafter called "the continuing trustees") of the one part AND GH, etc., (hereinafter called "the new trustee") of the other part.

WHEREAS by a deed of trust dated ——— made by XY, the continuing trustees and one LM were appointed trustees;

AND WHEREAS by the said deed it was provided that in case of a vacancy amongst the said trustees, the surviving trustees shall have power to appoint a new trustee to fill up the same.

AND WHEREAS the said LM has died on the (*or*, has on the ——— resigned the office of trustee), (*or*, has become insane) (*or*, has been sentenced to imprisonment for life).

NOW THIS DEED WITNESSES that the continuing trustees in exercise of the powers conferred on them by the aforesaid deed of trust, hereby appoint the new trustee as a trustee of the said trust for all the purposes for which the said LM was trustee thereof jointly with the continuing trustees AND declare that henceforth the continuing trustees and new trustee shall hold the trust property as trustees under the aforesaid deed of trust and exercise all the powers and perform all the duties of trustees specified in the aforesaid deed of trust.

IN WITNESS WHEREOF, etc.

16— Revocation of Trust, by Endorsement[3]

I, the within named AB, etc., acting with the consent hereby testified of the within named beneficiaries X, Y and Z (*or*, acting under the power of revocation reserved in the within-written deed of trust) hereby revoke the trust created by the within-written deed of trust.

17—Revocation of Trust by a Separate Deed

THIS DEED is made on the ——— day of ——— BETWEEN AB, etc., (hereinafter called "the Settlor") of the one part AND CD, etc., (hereinafter called "the trustee") of the other part.

WHEREAS by a deed of trust dated ——— the Settlor transferred his property specified therein to the Trustee upon trust to sell the same and with the proceeds of the sale to pay the debts due from the Settlor to the several creditors named in the said deed;

AND WHEREAS the trust created as aforesaid has not yet been communicated to any of the aforesaid creditors;

AND WHEREAS the Settlor now desires to revoke the said trust and to make other arrangements for the discharge of his aforesaid debts.

NOW THIS DEED WITNESSES that the Settlor hereby revokes the trust created by the aforesaid deed of trust.

IN WITNESS WHEREOF, etc.

18—Trust Deed for Charitable Objects

THIS DEED made on the ——— day of ——— BETWEEN ——— AB, etc., (hereinafter called "the Settlor") of the one part AND (1) CD etc., (2) EF etc., (3) GH etc., (hereinafter called "the Trustees") of the other part;

WHEREAS the Settlor is absolutely entitled to the Fixed Deposits described in the Schedule hereto and is desirous of declaring the trust of the said sum of Rs. ——— together with other sums which the Settlor

3 Sec. 78, Trusts Act permits revocation of a non-testamentary trust, where all the beneficiaries are competent to contract, with their consent, or if a power of revocation has been expressly reserved, or in the case of trust for payment to creditors, until it has been communicated to them.

may from time to time deliver to the Trustees for such purpose and the income from such sums;

AND WHEREAS the Trustees have agreed to be the trustees and the Settlor has agreed to transfer and deliver the property described in the Schedule hereto to the Trustees to the intent that the same shall be held by them upon trust and subject to the powers, provisions and stipulations hereinafter declared and contained of and concerning the same;

NOW THIS DEED WITNESSES as follows:

1. The said Trust shall be known as

2. Only the income by and out of and not the corpus of the Trust Fund shall be spent on the objects of the Trust.

3. The Trustees shall apply the net income of the corpus for the purposes of giving financial assistance to poor and needy people, to ailing persons having no means or little means to get their treatment, to poor students who cannot prosecute their further studies for want of money, to widows who do not earn and who have no male members to support them, to persons in distress affected by floods or earthquakes or other acts of God, and also to religious institutions for erection of rooms or cottages in their premises and to educational institutions for purposes of establishing scholarships and generally to help hospitals and other charitable institutions financially.

4. (1) For so long as the Settlor shall live and shall not himself resign or become incapacitated he shall be the Trustee Chairman of the said Trust and shall alone exercise the powers of applying or expending the trust fund for the purposes hereinbefore mentioned. During his life time for so long as he shall be the Trustee Chairman, the other trustees shall not be entitled to question his act or omission in applying or expending the trust fund for the purposes aforesaid or to question whether or not the moneys applied or expended or to be applied on any person, institution or body was or is a deserving case to be benefited by the trust fund.

(2) After the death of the Settlor or of his resignation or incapacitation, the said trustee or trustees for the time being shall elect one from amongst themselves to be the Trustee

Chairman but such Trustee Chairman shall be a relative of the Settlor and shall be entitled to exercise only such powers as the majority of the trustees for the time being may in a duly constituted meeting decide.

(3) During his life time the Settlor shall have power at any time and from time to time to remove any trustee without assigning any reason and to appoint a substitute.

5. The trustees may at any time make such arrangements, draw up such schemes and make and frame such rules as they shall in their uncontrolled discretion think fit for the administration of the charity hereby constituted and the management of the Trust Fund and may at any time amend alter or repeal any of the said arrangements, schemes or rules as they shall think fit.

6. All receipts to the Trust Fund, other than the income from the corpus, shall be signed by at least two trustees.

7. Proper accounts showing all receipts received and disbursements made on account of the charity hereby constituted shall be kept by the trustees and shall be duly audited with all necessary vouchers every year by such auditor or auditors as the trustees shall appoint from amongst themselves or other persons or themselves jointly with other persons or if the trustees shall consider it necessary or expedient by a professional accountant whom they may employ and pay for the purpose.

8. Subject to the provisions of clause 4 (3), if the trustees or any of them or any trustees or trustee of this deed shall die or desire to be discharged from trusteeship or refuse or neglect or become incapable or unfit to act as trustee under this deed the surviving or continuing trustees or trustee for the time being under this deed (and for this purpose any retiring or refusing trustee shall if willing to act in the execution of this power be considered a continuing trustee) shall appoint new trustees or a new trustee in the place of the trustees or trustee so dying or desiring to be discharged or refusing or neglecting or becoming incapable or unfit to act as aforesaid and upon every such appointment the number of trustees may be increased or diminished but not to less than five in number and upon every such appointment the trust property shall as soon as circumstances shall conveniently admit be transferred to or vested in the trustees or trustee for the time being. This present power shall be additional

to and shall not prevent the execution or exercise of any statutory power to appoint new trustees for the time being in force. PROVIDED ALWAYS that for so long as the Settlor shall continue to be the Trustee Chairman, he shall have the absolute discretion of appointing any person to be a trustee in place of any trustee ceasing to act as aforesaid or of increasing the number of trustees and appointing persons thereto.

9. (1) The Trustees may from time to time appoint any one of their member to be their Secretary without remuneration.

(2) The Trustees shall keep a minute book of their proceedings.

(3) Subject to the provisions of clause 4, three trustees excluding the Trustee Chairman shall form the quorum and for decisions the opinion of the majority shall prevail.

10. The Trustees may convert the corpus of the Trust Fund by investing in such securities as are mentioned in Sec. 20 of The Indian Trusts Act, 1882.

11. Whenever any charity out of this trust is given to any religious institution for erecting rooms or cottage in their premises the Trustees shall obtain a promise from such donee to allow the relatives of the Settlor the use of such room or cottage free of charge for any period in a year not exceeding thirty days.

The schedule herein referred to

IN WITNESS WHEREOF etc.

[*For other forms of trusts see under MORTGAGE, and under WILLS*].

WILLS

Preliminary Note

What is Will

Will is a disposition of property made by a person during his life but intended to take effect after his death. It is defined in Sec. 2 (h) of the Indian Succession Act 1925 as meaning "the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death". A will is a secret and confidential document which the executant is never ordered to produce.[1] A will takes effect on the death of the executant and during his life-time is an ambulatory[2] document, revocable at any moment, having no legal effect whatsoever. Where, however, a document though entitled a will also nominated the *shebait* of a temple it was held[3] that such nomination was immediately effective and was not postponed till after the executant's death and that unless the power to cancel the nomination was expressly reserved it could not be cancelled.

The Law Applicable

In order to be a valid disposition of immovable property, a will must be made in conformity with the law of the country in which the property is situate, and in order to be a valid disposition of movable property, it must be made in conformity with the law of the testator's domicile. Therefore, when considering the question of the validity of a will with regard to (*i*) testamentary capacity of the testator, (*ii*) the heritable quality of the property, and (*iii*) the formalities and constitution of a deed of will, it is necessary to consider it with reference to the law applicable as laid down above. The country of domicile is the country of domicile at the time of making the will and subsequent change of domicile does not affect the validity of a will previously made.

When a man has got immovable property in one country and has a domicile in another, it is more convenient and advisable for him to make two wills, one relating to immovable property and one to movable property. The law of the country which is to govern a will should be carefully studied before drafting it.

How Will is made in India

Wills by all persons except Hindus, Buddhists, Sikhs, Jains and Muslims

1 *Hubert P. James* v. *Ghulam Hussein Pakseema*, 1949 ALJ 148 (PC), A 1949 PC 151.

2 'Ambulatory' means revocable, subject to change, capable of alteration (Black's Law Dictionary 1990 Edn., p. 80)

3 *Rambir Das* v. *Kalyan Das*, (1997) 4 SCC 102.

are governed by the Indian Succession Act, 1925. The more important provisions of that Act relating to wills, including that which relates to the form of a will, have, however, been applied to wills made by Hindus, Buddhists, Sikhs and Jains as well (Sec. 57). (On the need, if any, of probate or letters of administration, however, see below).

The following formalities are prescribed by the Indian Succession Act for a will:

(1) The will should be made in writing except that a soldier or airman in active service or a mariner at sea, not being a Hindu, Buddhist, Jain or Sikh, can make an oral will (Sec. 63, 65).

(2) It should be signed or marked by the testator or by some other person in his presence and by his direction [Sec. 63(a)]. The signature should be so placed that it should appear that it was intended thereby to give effect to the writing as a will [Sec. 63(*b*)]. The best place is at the foot or end of the writing.

(3) It should be attested by two or more persons, each of whom has seen the testator making his signature or mark, or has seen some other person signing the will in the presence and direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark or the signature of such other person. Each of the attesting witnesses should sign the will in the presence of the testator, but it is not necessary that more than one witness should be present at the same time [Sec. 63(*c*)]. In a case where the attesting witnesses' signatures appeared above the thumb mark of the testator it was held that the attestation was invalid as the witnesses appeared to have signed it even before the executant.[4]

How Will is Drafted

No particular form of will is prescribed by law, but the ordinary form in vogue in England which has been followed for centuries may be usefully adopted. The language employed should be as simple as possible and free from technical words and be easily intelligible to a lay man. As in many cases will is made by persons at death bed, if it is full of technical expressions and not easily intelligible to a lay man, it can be challenged on the ground that the testator did not clearly understand it and its effect.

Parts of a will

A will is drafted as a deed poll in the first person and generally consists of the following parts:

1. Commencement

A will is commenced thus:

4 *Mangal Singh* v. *Nathu Singh*, (1998) 8 SCC 598.

"This is the last will of me, AB, etc., made this the ------- day of ------"
and the first clause to follow is that revoking previous disposition thus:

"I hereby revoke all former wills and codicils made by me."

There is also an alternative form thus:

"I, AB, etc., hereby revoke all former wills and codicils made by me and declare that this is my last will" (*or*, and by this last will bequeath all my property, etc.).[5]

In this case the date is placed at the end.

The revocation of previous wills and codicils must be expressly and definitely made and it is not sufficient to say that this will is the last will as that statement does not amount to a revocation of a former will. The intention to revoke a will should be expressly declared (Sec. 70, Succession Act).

2. Clause about appointment of executor and trustees and guardians---

If the will contains a trust, trustees should be appointed, and if executors of the Will are appointed the same persons may be appointed trustees. It is not necessary that an executor should be appointed, but the great advantage of appointing an executor is that the executor is entitled to get a probate of the will to enable him to administer the estate of the deceased without giving any security, while if no executor is appointed, no probate can be granted (Sec. 222), and letters of administration will be necessary (Sec. 232 and 234), which will not be granted without an administration bond (Sec. 291).

Probate cannot be granted to a minor or a person of unsound mind nor to any association of individuals unless it is a company satisfying notified criteria. (Sec. 223). No such person should, therefore, be appointed executor, but there is no objection to the appointment of a minor "if and when he shall attain the age of majority". Any number of persons may be appointed executors. The previous consent of an executor should be obtained as no one is bound to accept the duties of an executor or trustee. There is no objection to the appointment of one of the beneficiaries as an executor. The appointment may be in the alternative to provide for the contingency of the executor dying during the lifetime of the testator or refusing to act.

It may be pointed out here that Sec. 213 provides that no right as executor or legatee can be established in any court unless a probate or letters of administration have been obtained. This section, however, does not apply to Muslim wills or to those wills of Hindus, Sikhs, Jains and Buddhists which are made outside the Presidency towns of Chennai and Mumbai or the territories which on 1.9.1870 were included in Bengal except in so far as they relate to

5 This form is traditionally used even where the testator never made any will or codicil earlier.

immovable property situate within the said limits.[6] (In the case of Parsis, this has to be read as Calcutta, Chennai and Mumbai). Thus in the rest of India this restriction applies only to Christians and Jews.

If a testator wants to appoint a guardian for his minor children, he can do so by his will; such guardian can get a certificate of guardianship.

3. Legacies and Devises

In English law, a bequest of movables is called a "legacy" and a bequest of land and other immovable property is called a "devise". Legacies and devises are either "specific" or "general". The Indian Succession Act 1925 however uses the term "legacy" to cover both movable and immovable property : (See illustrations to Sec. 142). A specific legacy is the bequest of a definite thing or property out of the testator's estate. It consists of a specified part of the testator's property (Sec.142). The other bequests are general. In English wills the order of bequest is generally as follows :

Specific legacies, general legacies, annuities, specific devises and general devices; but there is no objection to providing for specific legacies and devises before the annuities and the general legacies and devises after the annuities. "Annuities" means a fixed payment of money periodically.

A clause of bequest is generally commenced thus :

"I give, etc." or "I bequeath, etc."

The bequest may be made either absolutely or for life, or on trust. It is more convenient to set out the *bequests on trust* after all the other bequests and annuities.

4. General Provisions

After bequests, annuities and trust clauses, general clauses should be added as necessary, e.g., those relating to the appointment of trustees, powers of trustees. Investment clauses, power of sale, etc.

5. Testimonium

Testimonium is the last part of a will. Date is sometimes mentioned in the testimonium, sometimes in the beginning as in deeds.

6. Signature and attestation

Signature and attestation are placed at the end of a will, signature immediately after the testimonium and attestation after the signatures. No particular form of attestation is prescribed by law, but the best and safest thing

6 *Ram Chand* v. *Sardara Singh*, A 1962 Punj 382; *Namberumal* v. *Veeraperumal*, A 1930 Mad 956 (DB).

would be to state correctly and fully how the witnesses have attested the will, *i.e.*, whether the will was signed by the testator in their presence or the testator acknowledged his signature e.g.:

"Signed by the above named testator in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as witness." (*See* INTRODUCTION Part I-Preliminary, *ante*, on 'signature' and 'attestation'; alternative forms of attestation under "*General forms*").

Recitals

Recitals will rarely be required in a will and are not inserted in an ordinary English will. If, however, any recitals are considered necessary, they should be added to the relevant clause. For instance, if a power of appointment given to a widow by her husband's will is exercised, the husband's will may be recited in the beginning of the clause in which the power is exercised, thus :

"WHEREAS by his will dated————my deceased husband, AB, had given me power to appoint guardian of my minor son XY. Now in exercise of that power I appoint etc."

or, "WHEREAS my late husband XY had begun to construct a building for a *dharamshala* which he could not complete and had directed me by his will dated ———— to finish it and dedicate it to a *dharamshala* and to make suitable provision for its upkeep.

AND WHEREAS the building is now complete but I have not been able to make suitable provision for the current expenses of the *dharamshala*. Now I hereby bequeath the following securities to the aforesaid trustees upon trust etc."

If, however, the recitals are general and not applicable to any clause in particular, e.g., recital about title to property they may if absolutely necessary, be added immediately after commencement, thus "Whereas I am owner, etc., I hereby make the following bequests and trust in respect of the said property."

A recital in a will about the legatee being her adopted son is certainly a piece of admissible evidence but is not conclusive evidence of the adoption. However, the bequest in his favour may nevertheless be given effect to if the Court finds that the motive for the execution of the will was not merely the recognition by the testator of his relationship, through adoption, with the devisee but mainly the existence of feelings of love and affection for him.[7]

Corrections

All obliterations, interlineations and other alterations made in the will must be executed in the same way as will, *i.e.*, must be signed by the testator

7 *Banwarilal* v. *Tirlok Chand*, (1980) 1 SCC 349.

and attested by witnesses (Sec. 71). This can be done, if there are one or two alterations; by the testator and witnesses signing on the margin opposite the alteration but if there are several alterations it would be more convenient to make a memorandum at the end, showing by reference to the serial number of the lines and the alterations made, and to have this memorandum signed by the testator and attested by witnesses (Proviso to Sec. 71).

Points to be Considered before Drafting

Before drafting a will it is necessary to consider (1) whether the testator is competent to make a will, (2) whether the property which he wishes to bequeath is that which is legally bequeathable and which the testator is competent to bequeath, (3) whether the devisees are legally competent to take the devises, (4) whether the interests which the testator wishes to create can legally be created, (5) Whether the conditions which the testator wishes to impose can legally be imposed[8] and (6) whether the machinery desired to be employed for carrying out his wishes is sufficient and legally sound.

If the description as a whole or any part of a deed or document fails to ascertain the object of the writer or the parties, no meaning can be extracted and the document or the clause must be rejected for uncertainty. Although a document which is vague or meaningless must be rejected, the courts often strive hard to construe them generously in order to make sense of them and give effect to them (*See* Odgers, Construction of Deeds and Statutes, 5th Edn., pp. 87-88).[9]

Who can make a Will

Every person who is not a minor or a man of unsound mind can make a will (Sec. 59, Indian Succession Act, 1925, which applies to all except Muslims; for Muslim Law see, sub-heading, 'Muslim Law' *infra*; for Hindu coparcener see 'Bequeathable Property' *infra*). A person may, however, be disqualified by any local law from disposing of his property, or may be entitled to do so only with some permission or under certain restrictions.

By a man of "unsound mind" is meant not necessary a lunatic, idiot or insane person but also a man who, though otherwise quite sane, is not at the moment of executing the deed, by reason of illness, in his proper senses and competent to understand what he is doing. It is necessary that he should be in a sound disposing condition which means that he must also be conscious of the various claims persons have upon his property and must be capable of realising the extent of the property disposed of under the will.[10] Mere old age

8 See Sections 126 to 140, Indian Succession Act.

9 See also, *Pramod Kumar Bhatia* v. *Om Prakash*, (1980) 1 SCC 412 (missing words supplied in a will where intention clear).

10 *Pt. Parshotam Ram* v. *L. Keshodas*, A 1945 Lah 3; *Krishna Kumari Sinha* v. *Kayastha Pathshala*, A 1966 All 570.

is no evidence of incapacity to make a will.[11] When a will is made by a sick person it is advisable to provide satisfactory evidence that the man is in his proper senses and able to understand what he declares. For this purpose it would be best, if practicable, to have the will attested by the medical attendant, who may also append a certificate at the foot of the will that he has satisfied himself that the testator is in his proper senses. A will or any part of a will, the making of which is caused by fraud or coercion or by such importunity as to take away the free agency of the testator, will be void (Sec. 61). A practice has therefore grown in India to say that the testator makes the will without any persuasion, fraud or coercion, but such a statement is not strictly necessary.

Joint, Mutual, Reciprocal Wills

There may be a joint will executed by two or more persons. It may relate either to jointly owned property or to their separate property treated as a common fund, in favour of a third person or persons.

A joint will may also be a mutual or reciprocal will. Such a will is really two separate wills of different persons, more or less reciprocal in their provisions. Word 'joint', in the case of such a will, goes to form, and word 'mutual' goes to its substance, vide Black's Law Dictionary, 6th (1990) Edn., p. 1599.

Bequeathable Property[12]

All property, movable and immovable of which a man is owner can be disposed of by him by will except such as is legally non-transferable, such as an occupancy tenancy.[13] If a man has only a life interest in a property, he cannot make a will of it. According to *Mitakshara* Law, a Hindu coparcener, earlier, could not dispose of his undivided coparcenary interest even if the other coparceners consented. The position has now been changed. Sec. 30 (Explanation) of the Hindu Succession Act, 1956, says that any Hindu may dispose of by will or other testamentary disposition, any property which is capable of being so disposed of by him in accordance with law. The explanation to the section makes it clear that the interest of a male Hindu in a *Mitakshara* co-parcenary property shall be deemed to be property capable of being disposed of by him. A sole surviving coparcener may bequeath the joint family property, and a subsequent adoption will not amount to revocation of the will. To the extent the testator oversteps his right in devising certain property the will

11 *Ram Nath Das* v. *Ram Nagina Chaubey*, A 1962 Pat 481.

12 Sec. 90 Succession Act provides for increase, diminution or other change in the description of the property between the execution of the will and the death of the testator : See *Lachhman Singh* v. *Raja Ram Singh*, A 1999 SC 1756, (1999) 3 SCC 517 (para 5).

13 *Sangappa* v. *Land Tribunal*, A 1998 SC 3229.

would be inoperative but would operate in respect of the rest.[14] A property which has already been settled earlier under a settlement deed is no longer bequeathable.[15]

Who can be Devisee

Any person can be a devisee, including a minor, or a mentally ill person. A corporation, a Hindu deity and any other juristic person can take a bequest. So far as Hindus are concerned the Hindu Disposition of Property Act, 1916 permits disposition of property by will even in favour of a person not in existence at the time of such disposition provided it is not in breach of the provisions of Sec. 113, 114, 115 and 116 of the Succession Act. Sec. 113 provides that where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void unless it comprises the whole of the remaining interest of the testator in the thing bequeathed. Sec. 114 lays down the *rule against perpetuity*, namely, that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong. Sec. 115 and 116 make consequential provisions.

Joint devisees

Unless expressly mentioned otherwise in the will, the joint devisees will take the property as tenants in common and not as joint tenants.[16]

Person to Whom Probate or Letters of Administration cannot be granted

Probate or letters of administration cannot be granted to any person who is a minor or of unsound mind, nor to an association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by the State Government in this behalf (Sec. 223 and 236, Indian Succession Act). A statutory corporation is however, not an association of individuals but is a "person", and probate or letters of administration can be granted to it.[17]

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14 *Banwari Lal* v. *Trilok Chand*, (1980) 1 SCC 349.

15 *Dagani Ramadas* v. *P. Daveed*, (1998) 8 SCC 465.

16 *Amal Krishna* v. *Ganesh Chandra*, A 1998 Cal. at 228, relying on *Boddu Venkatakrishna Rao* v. *Boddu*, A 1968 SC 751 and *Syed Shah Ghulam Ghouse* v. *Syed Shah Ahmad*, A 1971 SC 2184 (para 12); Sec. 19 Hindu Succession Act also relied on.

17 *Benaras Hindu University* v. *Gouri Datt Joshi*, 1949 ALJ 523, A 1950 All 196.

It may be added that taking of a probate or letters administration is not obligatory except when the will is made or the property is situated in Bombay or Chennai presidency towns or within the territories which were under the Lt. Governor of Bengal at the time the Succession Act was passed.[18]

Legality of Interest Created

In this connection it is necessary to bear in mind the provision in Sec. 112-117 (which apply to Hindus, Buddhists, Sikhs and Jains also), and to see that the bequests do not conflict with them. Sec. 118 (which does not apply to Hindus, Buddhists, Sikhs and Jains) provides that a man having a nephew or niece or any nearer relative shall not have power to bequeath any property to religious or charitable uses except by a will executed not less than twelve months before his death and deposited within six months from its execution in some place provided by law for the safe custody of wills of living persons. However, the provision has been held to be violative of the constitution and as such void.[19]

Sufficiency of Provisions

The provisions relating to bequests made and trusts created by the will should be complete. For example, when trustees are appointed, the will should provide for the appointment of new trustees and for the conduct of business by the trustees by the opinion of a majority. It should give sufficient power to them, according to the nature of the property, to manage it properly and carry out the testator's directions regarding the disposal or uses of the property or its income. Powers of sale, of reinvestment, employing agents, etc., may also be necessary in certain cases.

The interest conveyed should be clearly defined. This is particularly necessary in the case of wills by Hindus in favour of their wives. If the intention is that the wife should take an absolute interest it should be clearly so expressed. Saying that the wife shall be "full and absolute owner" is sufficient to convey absolute title,[20] but even the words "*malik*" and "*Waris*" may be held to be consistent with conferment of a life estate only if the other terms of the will so indicate.[21] Where a will provides that after the testator's death his widow shall be "exclusive owner" and "full owner" and after her death "whatever property remains shall be owned" by the testator's nephews and

18 *Jagdish Chandra* v. *Punjab National Bank*, A 1998 Delhi 266 (para 24).

19 *John Vallamattom* v. *Union of India*, A 2003 SC 2902

20 *Bai Kevli* v. *Dalsukh Ram*, A 1945 Bom. 178.

21 *Arun Kumar* v. *Shrinivas*, A 2003 SC 2528 *(approved the principles for construction of Wills Summarised in Navneet Lal* v. *Gokul*, (1976) 1 SCC 630; *Ramkishorelal* v. *Kamalnarayan*, A 1963 SC 891 (case Law on when "*Malik*" may not imply proprietary rights).

also that she and they shall not be entitled to sell it, the widow was held to be full owner and not merely life owner and the prohibition against selling was disregarded as repugnant to the absolute gift to her.[1] In construing the true intention of testator it is permissible to deduce the fair import of the document by reading it as a whole.[2] Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied (by the court) in order to effectuate the intention, as collected from the context.[3] It is one of the cardinal principles of construction of wills[4] that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. It is for this reason that where there is a bequest to "A" even though it be in terms apparently absolute followed by a gift of the same to "B" absolutely "on" or "after" or "at" A's death, "A" is prima facie held to take a life interest and "B" an interest in remainder, the apparently absolute interest of "A" being cut down to accommodate the interest created in favour of "B".[5] It is however always safe to express the intention clearly and in unmistakable terms.

On distinction between creation of vested interests and contingent interests, see p. 264, *ante*.

Proof of Will

The law settled with regard to proof of a will is that the mode to prove a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed under Sec. 68 of the Evidence Act. The onus to prove the will is on the propounder.[6] In the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law are sufficient to

1 *Jagat Singh* v. *Sangat Singh*, A 1940 PC 70.

2 *Bishun Singh* v. *Mangla Nain*, A 1945 PC 30; *Usha Subbarao* v. *B.E. Vishveswariah*, A 1996 SC 2260.

3 Jarman on Will, 8th Ed., 592, relying on *Pramod Kumar Bhatia* v. *Om Prakash*, (1980) 1 SCC 412.

4 Sections 74 to 111 Succession Act lay down statutory rules of construction of wills. Excepting sections 91 to 94, 97, 99 and 100 all these sections apply to construction of Hindu wills as well (See schedule III to the Act read with Sec. 57).

5 *Ramachandra Shenoy* v. *Hilda Brite*, A 1964 SC 1323; folld. in *A. Sreenivasa Pai* v. *Saraswathi Ammal*, A 1985 SC 1359.

6 *Gurdial Singh* v. *Smt. Rattan Kaur*, A 1996 P & H 265.

discharge the onus. The onus is on the propounder to clear the mist arising due to suspicious circumstances by explaining the same to the courts' satisfaction. If attestation has preceded the execution of the will it is not valid. Attestation can only follow the execution.[7]

Muslim Law

Under the Muslim Law, the power to make bequests is limited to one third of the net assets. Where, however, there are no heirs (or among, Sunnis, if the only heir is the spouse) upon whom two-thirds share is to devolve in the oridnary course, or when there are heirs but all of them agree and give their consent, the limit of one third may be exceeded. The consent in such a case is to be given in the case of Sunnis, after the testator's death, but in the case of Shias, such consent may be given during the lifetime of the testator also. If the heirs are minors at the time of testator's death, consent must be given only after attaining majority. A guardian is not competent to give consent on behalf of a minor. Muslim law does not recognise a conditional will. For detailed rules regarding rateable abatement in case one or more wills exceed the "bequeathable third" works on Muslim Law may be consulted.

Codicil

Codicil is a supplement to a will. When a testator wishes to make some slight alteration in his will, e.g., change in the number of trustees or absolute or partial revocation of a gift or a bequest of an additional item of property, he should do so by executing a codicil to his will, making the additions or alterations and expressly confirming the original will. When the alterations are considerable, it is best to write a fresh will revoking the former one. Codicil requires the same formalities (signature and attestation) as a will and is usually commenced thus: "I, AB, etc., hereby declare that this is my *first (second or third* as the case may be) codicil to the will dated——".

Stamp Duty

No Stamp duty is required on a will.

Registration

The registration of a will is optional (Sec. 18).[8] There are special provisions in Part IX of the Registration Act under which a testator may deposit his will in a sealed cover with the Registrar. On the death of the testator any person can apply to have the will opened and copied in the Register. The Court can also require the production of such a will from the Registrar who will open it and send it to the Court after copying it out in his Register.

7 *Virendra Singh* v. *Kashibai*, A 1998 MP 324 (DB); *Mangal Singh* v. *Nathu Singh*, (1998) 8 SCC 598.

8 *Rani Purnima Devi* v. *Kumar Khagendra Naryan Deb*, A 1962 SC 567; *Shakuntala Devi* v. *Ladly Mohan Mathur*, (1986) All CJ 189.

General Forms of Different Parts and Clauses of Will

1. Introductory Clauses

a) *Commencement*

I AB, etc., declare this to be my last will which I make this ——— day of ——————— hereby revoking all other wills and codicils heretofore made by me.

Or,

I AB, etc., hereby revoke all former wills and codicils made by me and declare that this is my last will.

Or,

This is the last will of me AB, etc., made this the ——————— day of ———————.

Or,

I hereby revoke all former wills and codicils made by me.

Or,

I AB, etc., hereby revoke all former wills and codicils made by me and by this last will bequeath all my property, etc.

Or,

I declare this to be the first (*or*, second) codicil to my will made the (and which is modified by a codicil dated ———————).

2. Appointment of Executors and Trustees

a) Executor

I appoint CD, etc., sole executor of this my will (*or*, CD, etc., EF, and GH, etc., executors[1] of this my will).

b) Executor and Trustee

I appoint CD, etc., EF, etc., GH, etc., to be the executors and trustees of this will.

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1 Where more executors than one are appointed any transfer of property by them can be made only jointly : *K. Leelavathy Bai* v. *P.V. Gangadharan*, (1999) 3 SCC 548, A 1999 SC 1267.

c) On Attaining Majority

I appoint CD, etc., and EF, etc., and also my son XY, etc., if and when he shall attain majority to be the executors and trustees of this my will.

d) Guardian

I appoint my trustees hereinbefore named to be the guardian of my minor children to act jointly with my wife.

3. Specific Legacies

a) Absolute

I give to CD, etc., absolutely ————.

b) For life

I bequeath the use and enjoyment of all my furniture, etc., to my wife ———— during her life (*or* widowhood) and declare that after her death (*or*, remarriage) the same shall fall into my residuary estate.

c) Release of Debt

I release and forgive to ———— or to his representatives if he should die in my lifetime whatever amount may remain owing to me at my death on the bond executed by him for Rs. ———— on the ———— and I direct my trustees to cancel and deliver up the said bond to him or them.

4. Specific Devises

a) Devise of Property

I bequeath to CD, etc., all that property described in the first schedule hereto.

b) Subject to legacies, etc.

I bequeath to CD, etc., all that property described in the first schedule hereto subject to and charged with the payment to XY of legacy of Rs.———— (*or*, subject to the payment of several annuities and legacies hereby charged and made payable out of the said property).

c) Bequest of Leasehold

I give my leasehold land described in the first schedule hereto for all the residue which shall be unexpired at my death of the term for which the said land is held subject to the rent reserved by and the covenants and conditions contained in the lease under which the same is held.

d) Of Trade and Business

I bequeath to —— the goodwill of my trade and business of —— and the stock in trade, machinery, plant and effects therein or belonging thereto together with the lease of the shop and building situate at —— in which the said business is carried on or which is used for the purpose thereof and the benefit of all contracts subsisting in respect of the said business and all book debts and moneys due to me in respect thereof or standing to the credit of my business account at my death, the said —— discharging and indemnifying my general estate from debts and liabilities due or subsisting in respect of the said business at my death.

5. General Legacies

a) Pecuniary legacies

I give to CD, etc., the sum of Rs. ——————.

b) Several Legacies

I give the following legacies namely;

(*i*) to CD, etc., the sum of Rs. ——————;

(*ii*) to EF, etc., the sum of Rs. ——————.

c) On Trust

I give to the trustees the sum of Rs. —————— upon the trust hereinafter declared concerning the same.

d) Alternative Bequest

I give to CD, etc., the sum of Rs. —————— but if the said CD shall die before me then I give his legacy to his children or child, if any, living at the time of my death.

e) On Majority

I give the sum of Rs. ———— to CD, etc., if and when he shall attain the age of eighteen.

f) In Trust to Invest

I give to my trustees the sum of Rs. ———— upon trust to invest the same in or upon any of the investments hereby authorised with power to vary any such investment AND I declare that my trustees shall hold the said sum of Rs. ———— and investments and income thereof in trust for CD, etc., if and when he attains the age of eighteen, but if the said CD shall die under the age of eighteen then I declare that the said sum of Rs. ———— and the investment and income thereof shall sink into and form part of my residuary fund.

g) Priority of Legacies

The several pecuniary legacies hereinbefore given to the said —— shall have priority in the order in which the same are hereinbefore given but so that legacies given to a class shall have no priority as between the members of such class.

h) Direction in case of Deficiency

If the moneys to arise from the sale and conversion hereby directed or otherwise forming part of my estate shall not be sufficient to pay all the legacies hereby given then the said legacies shall be proportionately reduced (*or*, the said legacies given to CD, etc., and EF, etc., and GH, etc., shall abate proportionately in exoneration of the remaining legacies).

6. Legacies to Charity

a) To Orphanage

I give to the ———— orphanage the sum of Rs. ————.

b) Several Legacies

I give the following charitable legacies, namely:

(*i*) To the ———— the sum of Rs. ————;

(*ii*) To the ———— the sum of Rs. ————.

c) Legacy Invested for the Poor

I give to my trustees the sum of Rs. ———— upon trust to invest the same and apply the yearly income thereof for the benefit of the poor and deserving widows.

d) Legacy on Several Trusts

I give to my trustees the sum of Rs. ———— to be expended by them at their absolute discretion for all or any of the following purposes, namely etc.

e) Dedication to Deity

I direct that the property described in the second schedule hereto shall be dedicated to the deity of Shri Radha Krishanji Maharaj in the temple at ———— and shall be set apart and income thereof applied for the upkeep of the said temple and the expenses of worship of the said deity and the expenses of the annual festivals of the said temple.

7. Annuities

a) Bequest of Annuity

I give to CD, etc., during his life an annuity of Rs. ———— to begin from my death (and to be payable in equal monthly instalments thereof).

b) To wife

I give to my wife CD during her life and so long as she does not re-marry an annuity of Rs. ———— without power of anticipation[2] to begin from my death.

c) To wife, Reducible on Remarriage

I give to my wife CD an annuity of Rs. ———— during her widowhood beginning from my death and in the event of her marrying again then during the remainder of her life a reduced annuity of Rs. ———— in either case without power of anticipation.

---

2 For meaning of 'anticipation' see TRUSTS (Forms of Miscellaneous Clauses).

d) To Two Persons or Survivors

I give to CD, etc., and EF, etc., and the survivor of them an annuity of Rs. ———— during their joint lives and the life of the survivor to begin from my death.

c) Charge on Property

I give to CD, etc., during his life an annuity of Rs. ———— to begin from my death to be charged against and payable out of my property described in the third schedule hereto.

8. Bequest of Residue

a) To an Individual

I bequeath and devise all my movable and immovable property whatsoever and wheresoever not otherwise disposed of by this my Will or any Codicil hereto to CD, etc., absolutely (*or*, to CD for his life and after his death to EF, etc., absolutely).

b) On Trust

I bequeath etc., (*as in a above*) to my trustees upon the trust hereinafter declared concerning the same, that is to say————.

9. General Clauses relating to Trust or Trustees' Powers

a) Introductory Clause

My trustees shall hold the residue of the said money and investments for the time being representing the same and of such part of my estate as shall for the time being remain unsold and uninvested upon the trust hereinafter declared that is to say ————.

b) Life Interest

My trustees shall pay the income of the said sum of Rs. ———— (*or*, the said shares and securities and the property representing the same) to my wife the said CD during her life and so long as she remains my widow without power of anticipation.

Or,

My trustees shall out of the income of the trust fund accruing during the lifetime of CD, etc., pay an annuity of Rs. to XY during his life such annuity to commence from the death of my said wife and to be payable by monthly payments.

c) Trust for Sale and Conversion of Property

Upon trust my trustees shall sell, call in, collect, and convert into money, the said movable and immovable property at such time or times and in such manner as they shall think fit and I direct that the income of such of the said property as for the time being shall remain unsold shall be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof.

d) Payment of Debts, and to make Investments

The trustees shall out of the moneys to arise from the sale, calling in and conversion of or forming part of my said property pay my funeral and testamentary expenses and debts and the legacies given by this my will or codicil hereto and other moneys which under or by virtue of any direction or bequest are payable out of my general estate, and to invest the residue in or upon any of the investments hereby authorised with power to vary such investments of a nature hereby authorised.

e) Trust for Children

After the death of my wife the trustees shall stand possessed of the capital and future income of the trust fund in TRUST for all or any of my children who being male attain the age of 18 years or being female attain that age or marry if more than one in equal shares (*or*, for all or any of my children or child if more than one in equal shares).

Or,

After the death of my wife the trustees shall stand possessed of the capital and future income of the trust fund in TRUST for my issue in such shares and in such manner as my wife shall by deed or will appoint

---

3 In case of a bequest to a plurality of persons, the presumption is that they take the property as joint tenants, with a right of survivorship (and not as tenants in common), unless there are words showing the contrary : Sec 106 Succession Act; the rule has been recognised in the cases of Christians, (*Arakal* v. *Domingo*, 34 M 80), Parsees (*Navroji* v. *Perozbai*, 23 B 80) and Muslims (*Jusab* v. *Fatima Bai*, A 1948 B 53), but not so in case of Hindus (*Amal Krishna* v. *Ganesh Chandra*, A 1998 Cal. at 221 DB).

AND in default of any such appointment for all or any of my children or child if more than one in equal shares.

f) Giving Predeceased Child's Share to his Representative

If any child of mine shall have died in my lifetime leaving issue living at my death, the share which such child would have taken shall be held in TRUST for his or her legal representatives as part of his or her present estate.

g) Trust for Spendthrift Son

I give the sum of Rs. to my trustees upon TRUST that they shall invest the same at their discretion in any investment hereby authorised with power from time to time to vary such investment AND shall from time to time during the life of my son CD or during such shorter period or periods either continuous or discontinuous as they shall think fit pay all or any part of the income of the said sum of Rs. and the investments thereof upon protective trusts for the said CD with power from time to time to pay or apply any part of the capital thereof for the benefit of the said CD as if they were the beneficial owners of such income and capital.

After the death of the said CD my trustees shall pay the income of the said sum of Rs. and the investments thereof or such part thereof as shall remain undisposed of to his widow during her life without power of anticipation and after her death to the children of A who being male, etc.

In the event of the failure or determination of the trust hereinbefore declared and contained the said money or investment or such part thereof as shall remain undisposed of shall sink into my residuary estate.

h) Maintenance and Accumulation during Minority

My trustees may apply all or any part of the income of the share to which any minor shall be entitled in expectancy or would if of full age be entitled to possession under the trust hereinbefore contained for his or her maintenance, education or benefit in such manner as they think fit and shall invest the surplus in any investments hereby authorised in anticipation of the capital of such share.

i) Investment Clause

Trust moneys may be invested in or upon the following securities:

j) Power to Purchase Furniture

Trust money may at the request of my wife be laid out to an amount not exceeding Rs. in the purchase of .

k) Power to Lend

Trust money may at any time be lent to the said for the purposes of his business of to an amount not exceeding Rs. from such fund and at such rate of interest and upon such terms as the trustees may think fit.

l) To Act by Majority[4]

Any of the powers and authorities hereby given to or vested in my trustees may at any time be exercised by a majority of my trustees.

m) Power to Appoint new Trustees

The power of appointing a new trustee of this my will shall be vested in my wife during her life.

Or,

The power, etc., shall be exercised by the remaining trustees with the concurrence of my said wife if she is alive.

10. Testimonium and Attestation

a) Will

IN WITNESS WHEREOF I, the said ———, have put my signatures to this my will (to each sheet of this my will contained in this and in the preceding ——— sheets of paper) the day the year first above written (*or*, on the ———).

b) Codicil

IN WITNESS WHEREOF I, the said ——— have signed this codicil on the ———.

4 Sec. 48 Trust Act provides that all trustees must act jointly unless the instrument of trust otherwise provides.

c) Attestation of Signature

Signed by the above named AB in our presence at the same time[5] and each of us has in the presence of the testator signed his name hereunder as attesting witnesses.

d) Attestation on Acknowledgment

The said AB has personally acknowledged to us separately having made the above signature to this will and each of us has on such acknowledgment and in the presence of the said AB signed this will hereunder as an attesting witness.

e) Where Another Person Signs for the Testator

Signed by CD, etc., with the name of the above named testator as his last will in the presence of and by the direction of the testator and in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as attesting witnesses.

f) When the Testator is Illiterate or Blind

Signed by the above named testator with his mark as his last will after the same had first been read over and explained to him in our presence and had appeared to be perfectly understood and approved by him in our presence at the same time and each of us (*as in para* c).

g) Attestation of Alterations

The interlineations between the and lines of page and the alteration in the line of page and the erasure in the line of page having been previously made has been signed by the above named, etc. (*as in para c*).

---

5 The words "at the same time" are not strictly necessary, vide Sec. 63, Indian Succession Act. It is possible for the testator to acknowledge his signature to an attesting witness who may not have actually seen the testator sign the will. In that case however each attesting witness will make a separate attestation, and the one who has not seen the testator signing it but has only received the testator's personal acknowledgement will state so.

PRECEDENTS

1—Simple Will giving All Property to One Person

I, AB, etc., hereby revoke all former wills and codicils made by me and by this my last will bequeath and devise all my movable and immovable property whatsoever and wheresoever to my wife[1] (*or*, to CD, etc.,) absolutely and appoint her (him) sole executrix (executor) of this my will.

IN WITNESS WHEREOF I have signed this will hereunder on the ——— day of ———.

Sd. ———

Signed by the above named testator in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as an attesting witness.

1.

2.

2—Will Bequeathing All Property to Wife for Life and thereafter to Others, with Annuities to Several Persons

This is the last will of me AB, etc., made this the ——— day of ———.

1. I hereby revoke all former wills and codicils made by me.[1]

2. I bequeath all my money and other movable property whatsoever and wheresoever to my wife XY absolutely.

3. I devise all my lands and other immovable property to my wife XY for her life and after her death to my daughter CD absolutely and if the said CD shall die before my said wife then to my nephew GH.

4. I bequeath the following annuities to commence from the date of my death and to be paid in equal monthly payments :

(*a*) To my daughter CD, etc., an annuity of Rs. ——— to be paid during her life;

---

1 These words are traditionally used even where no former will or codicil was made at all.

(*b*) To my sister EF, etc., an annuity of Rs. ---------- during her life and after her death to be continued to her son, if any, or sons, if more than one, in equal shares;

(*c*) To my nephew GH, etc., an annuity of Rs. ---------- during his life;

(*d*) To my old servant JK, etc., an annuity of Rs. ---------- during his life;

IN WITNESS WHEREOF, I the said AB have signed this will hereunder the day and year first above written.

(*Attestation as in Form* 1).

3—Will with Pecuniary Legacies, Annuities and Trust for Wife and Children

THIS is the last will etc. (*as in Form* 2).

1. *As in Form* 2.

2. I appoint AB, etc., CD, etc., and EF, etc., to be my executors and trustees.

3. I bequeath all my household goods and cattle to my wife absolutely.

4. I bequeath my books, clothes, watch and personal jewellery to my eldest son KL.

5. I bequeath

(*a*) Rs. ---------- to my wife absolutely to be paid as soon as possible;

(*b*) Rs. ---------- to each of my executors who shall prove my will.

(*c*) To each of my servants who at my death shall have been in my employment for not less than three years immediately preceding my death, three months' salary in addition to the wages then due or accruing.

6. I bequeath to my said wife a life annuity of Rs. ---------- and to my sister MN a life annuity of Rs. ---------- both of which shall commence from my death, such annuities to be secured by the appropriation of investments sufficient to ensure the same out of income but in the event of a subsequent deficiency of income the capital of this appropriated fund to be liable. After such appropriation any residuary estate shall be free of the said annuities.

7. All the residue of my property, movable and immovable is to be converted into money by my executors and after payment of my debts, funeral and testamentary expenses is to be invested and settled on the following trusts:

(*a*) To pay the income to my said wife during her life (*or* widowhood).

(*b*) Subject hereto in trust to pay or divide the corpus to or between all my children or who being male shall attain majority or being female shall attain majority or previously marry, the share which would have belonged to any child already dead or who may die before me leaving issue to go to such issue by substitution *per stirpes*[2].

(*c*) The shares of each daughter to be retained upon the usual trust for life for her separate and unalienable use with power by will to give her husband a life or lesser interest with remainder to her issue as she may by deed or will appoint and so far as such power shall not be exercised, to her children at majority with remainder, in default of such child becoming absolutely entitled, to such persons as such daughter may by will appoint, with remainder, in default of appointment, to her legal heirs as if she had died unmarried and intestate and her share had belonged to her absolutely.

8. During her life my said wife is to have the power of appointing a new trustee in case of any vacancy.

IN WITNESS WHEREOF, etc.

Attestation as usual.

4—Will by a Sonless Hindu Leaving Several Legacies and also making Religious and Charitable Bequests

This is the last will, etc., (*as in Form* 2).

1. *As in Form* 2.

2. I appoint AB, etc., and CD, etc., and EF, etc., to be the executors and trustees of this my will.

3. I appoint the said trustees as guardian of my children jointly with my wife.

---

2 "*per stirpes*", as distinguished from 'per capita', means, in a representative capacity. In other words, members of each branch get one share. *Cf.* Sec. 10 Rule 3 and Sec. 19 (a), Hindu Succession Act.

4. I bequeath

(*a*) to my friend X, all my books,

(*b*) to my son-in law Y, my motorcar, pony, watch with chain, drawing room furniture, silver and china dinner and tea sets and my bungalow situate at ——— ;

(*c*) to my daughter P wife of the said Y, the agricultural land described in the first schedule hereto.

5. I bequeath the following pecuniary legacies :

(*a*) to each of my trustees who shall prove my will and act in the trust thereof, the sum of Rs. ——— ;

(*b*) to each of my servants HJ and KL, the sum of Rs. ——— ; and

(*c*) to my sister Q for the marriage of her daughter, if the daughter is in existence and un-married at the date of my death, Rs.

6. I bequeath the following charitable legacies:

(*a*) to the ——— hospital Rs. ;

(*b*) to the ——— Orphanage Rs. ;

(*c*) to the ——— Girls' School at ——— Rs. ;

(*d*) to the ——— Temple at ——— Rs.

7. I bequeath the following annuities (*as clause* 4 *in Form* 2).

8. I bequeath all my money in deposit in the various banks and all shares and securities to the trustees upon trust to utilise the same for the expenses of ceremonies in connection with my funeral and *shradh* and payment of all my debts and the pecuniary legacies hereby bequeathed and the balance in founding a charitable hospital to be called the ——— hospital. For this purpose the trustees will have power to sell the said securities.

9. I release and forgive to GH or to his representatives if he dies before me the amount that may at the time of my death be due to me from him on his bond for Rs. ——— dated ——— and direct my trustees to cancel and deliver up the bond to him.

10. I bequeath all my agricultural land described in the second schedule hereto to the trustees upon trust to apply the net income thereof after payment of the land revenue, cesses, taxes and necessary charges of

collection to the current expenses of the said hospital, and to invest the savings left after meeting such expenses in a sinking fund for the benefit of the said hospital.

11. Whereas my deceased father PQ had built a *dharamshala* which has since been maintained by me but no permanent provision for its maintenance has yet been made either by deceased father or by me, I hereby bequeath the property described in the fourth schedule hereto to the trustees upon trust to apply the net income thereof to the maintenance and upkeep of the said *dharamshala* and the comfort of the public using the same, according to their best judgment and discretion.

12. I bequeath my property movable and immovable whatsoever and wheresoever existing at the time of my death and not otherwise disposed of by this will to my wife absolutely (*or*, for her life without any power of alienation and after her death to my grandson MN, being the son of my daughter AB).

13. I hereby give power to my wife the said ST to appoint a new trustee or new trustees on the occurrence of any vacancy in the office of trustees.

14. I direct that if there is any difference of opinion between any trustees in any matter concerning this will or the management of property hereby bequeathed or the execution of any trust hereby created, the opinion of the majority shall prevail.[3]

IN WITNESS etc.

Attestation as usual.

5—Codicil Substituting a Trustee for one Appointed by the will

I, AB, etc., declare this to be a first codicil to my will dated the ——— day of ———.

WHEREAS by my will I have appointed CD as one of the executors and trustees and have given him a legacy of Rs.——— if he acts.

AND WHEREAS the said CD has died.

1. Now I hereby revoke the appointment of the said CD as one of

3 See Preliminary Note, *ante*, sub-heading "To act by majority".

the executors and trustees of my will and appoint KL, etc., to be the executor and trustee thereof in place of the CD and I bequeath to the said KL a legacy of Rs.———— if he acts as such executor and trustee.

2. I hereby revoke the legacy of Rs. ———— given to the said CD by the said will.

3. I hereby declare that my said will and all the provisions contained therein shall be construed and take effect as if the name of the said KL were substituted therein as an executor and trustee thereof for the name of CD.

4. In all other respects I confirm my said will.

IN WITNESS, etc.

Attestation as usual.

6—Codicil Altering certain Bequests

I, AB, etc., declare this to be a second codicil to my will dated the ———— which was modified by the first codicil dated the ————

WHEREAS by the said will I bequeathed-

(*a*) a specific legacy of Rs. ———— to my daughter CD;

(*b*) a share in my residuary estate to my son KL.

AND WHEREAS the said CD has died and since the execution of my will I have had cause to be displeased with the conduct of my son KL and do not therefore desire to leave any share of my estate to him.

NOW I direct that

(1) I hereby revoke the legacy of Rs. ———— to the said CD and bequeath the said legacy to the said CD's daughter EF;

(2) I revoke the devise of a share in my residuary estate in favour of my son KL;

(3) In all other respects I confirm my said will and the first codicil aforesaid.

IN WITNESS, etc.

Attestation as usual.

7—Codicil Correcting Clerical Errors

1. I declare this to be a first codicil to my will dated ——————;

2. I declare that my said will shall be read and construed and take effect in all respects as if .

(*a*) the word " " had been inserted after the word "——" in line of page thereof;

(*b*) the words " " had been substituted for the words " — " in the line of the page thereof.

3. In all other respects I confirm my said will.

IN WITNESS WHEREOF, etc.

Attestation as usual.

8 Revocation of Will

I, AB, etc., hereby revoke a will made by me bearing date——— and modified by a codicil dated —— and all other testamentary dispostions whatsoever hereinbefore made by me and declare it to be my intention to die intestate.

IN WITNESS, etc.

Attestation as in will.

9—Will Reviving a Will and Codicil previously Revoked

1. I, AB, etc., declare this to be my last will.

2. I hereby revive and confirm the will dated and the codicils thereto dated respectively —— and ——formerly made by me, which said will and codicils I had revoked by a deed dated ———.

IN WITNESS, etc.

Attestation as usual.

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