

LAW COMMISSION OF INDIA

SIXTEENTH REPORT

(OFFICIAL TRUSTEES ACT, 1913)

November, 1960

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GOVERNMENT OF INDIA : MINISTRY OF LAW

CHAIRMAN

T. L. VENKATARAMA AIYAR.

LAW COMMISSION.

5, Jor Bagh, New Delhi-3,

November 25, 1960.

Shri Asoke Kumar Sen,
Minister of Law, Government of India,
New Delhi.

MY DEAR MINISTER,

I have great pleasure in forwarding herewith the Sixteenth Report of the Law Commission on the Official Trustees Act.

2. The revision of the Law relating to Official Trustees was referred by the Law Ministry to the previous Commission and had been just taken up by it. After the constitution of the present Commission, the subject was entrusted to Shri P. Satyanarayana Rao. The draft Report prepared by him was considered by the Commission at its meeting held on the 18th March, 1960, and was revised in accordance with the decisions taken therein. The revised draft Report was circulated to the State Governments and other persons interested for opinion. The opinions received from them were considered by the Commission at its meeting held on the 15th October, 1960. It was left to the Chairman and Shri P. Satyanarayana Rao to finalise the Report in the light of the decisions taken at the meeting.

3. The Commission wishes to acknowledge the services rendered by Shri P. M. Bakshi, Deputy Draftsman, in connection with the preparation of the Report.

Yours sincerely,

T. L. VENKATARAMA AIYAR.

REPORT ON THE OFFICIAL TRUSTEES ACT, 1913

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REPORT ON THE OFFICIAL TRUSTEES ACT, 1913

PART I

GENERAL

1. The office of Official Trustee was constituted in India during the days of the East India Company by Act 17 of 1843. As the preamble to that Act indicates clearly, the office was created to save "the property of infants, feme coverts and others vested in trustees, from the peculiar risks to which they were exposed not only from the insolvency of the trustees, but from the frequent difficulties occasioned by their death, or absence or incapacity to act". The history of the legislation relating to the office till the passing of the present Official Trustees Act in 1913 has been traced succinctly by Kinney¹ in his introduction to the Official Trustees Act, and it is needless to repeat it here. Historical background.

2. The Official Trustees Act has been in force for more than forty-five years. It is on the whole a comprehensive and well-drafted piece of legislation and no difficulties have been felt in the interpretation of the various sections of the Act. We are of the opinion that the Act does not require any substantial changes. Scope of revision.

We have examined the provisions of the (English) Public Trustee Act, 1906 and the case-law thereunder to find out whether any useful changes can be made in our Act in the light of the same and we are satisfied that no such changes are necessary.

In England, the Lord Chancellor appointed, in 1954, a Committee "to consider the work of the Public Trustee and to advise whether any changes should be made in his functions or methods of business or in the financial conditions under which he operates". In keeping with its terms of reference the Committee dealt with the organisational and financial aspects of the office and made recommendations with a view to placing the Public Trustee in a sound financial position. We are not concerned with these aspects of the office of Official Trustee, and the recommendations of the Committee² are therefore of little use for our purpose.

3. In 1952, at the instance of the Government of West Bengal, the then Administrator-General and Official Trustee of West Bengal made a study of the Official Trustees Act and submitted a list of suggestions to be considered in Suggestions of Governments of West Bengal and Madras.

¹Kinney : Law relating to Administrators-General and Official Trustees, pages 95—99.

²Report of the Committee of Enquiry into the Public Trustee Office, Cmd. 9755.

the course of the revision of the Act. These suggestions were sent to the Central Government, which circulated the same among the various State Governments for their comments. The Government of Madras in its reply made certain additional suggestions and these were also communicated to the various States for their comments. These suggestions and the comments are considered below.

Insertion of
a provision
similar to
s. 22 of the
Administrator-General's
Act.

4. The first suggestion made by the Government of West Bengal is that a provision on the lines of section 22 of the Administrator-General's Act should be incorporated in the Official Trustees Act.

Under section 22 of the Administrator-General's Act, 1913, whenever an Administrator-General applies for letters of administration under the Act, it is sufficient if the petition states certain matters mentioned in the section¹. This provision, in effect, dispenses with the necessity of mentioning all the particulars under sections 277 and 278 (1) of the Indian Succession Act, 1925 as also the submission of any separate affidavit² which may be required under the rules made by the High Court or under s. 19-I of the Court Fees Act, 1870. While under the Administrator-General's Act, the occasions for filing such petitions may be³ numerous, we find that in the case of Official Trustee, such occasions would be rare.

¹Section 22 of the Administrator-General's Act runs as follows :—

"22. Whenever any Administrator-General applies for letters of administration in accordance with the provisions of this Act, it shall be sufficient if the petition required to be presented for the grant of such letters states,

(i) the time and place of the death of the deceased to the best of the knowledge and belief of the petitioner ;

(ii) the names and addresses of the surviving next-of-kin of the deceased, if known ;

(iii) the particulars and value of the assets likely to come into the hands of the petitioner ;

(iv) particulars of the liabilities of the estate, if known."

²See *in the goods of Mc. Comisky*, 20 Cal. 879. This case, though decided under Act II of 1874 is a good authority as the relevant provisions of the 1874 Act have been reproduced in the present Act.

³Petitions for letters of administration under the Administrator-General's Act can be presented in the following cases :—

(a) Compulsory petitions in the case of non-exempted persons having assets exceeding two thousand rupees, where no other person has applied for administration—section 9;

(b) Petitions under orders of the High Court in respect of assets left within the Presidency Towns, where there is apprehension of misappropriation, deterioration, etc.—section 10;

(c) Petitions under orders passed by the High Court in respect of assets in the Presidency Towns pending determination of rights of succession, section 11 (1) read with section 11(2)(b);

(d) Petitions limited to military estates—section 17;

(e) Petitions under the general provisions of sections 6, 7, 8, 11 and 31, etc.

Under the Official Trustees Act, the only possibility in which the Official Trustee may become an executor is under section 7(6) which states that the Official Trustee shall not administer the estate of a deceased person unless he is expressly appointed as sole executor and sole trustee under the will of such person. He cannot be appointed under this provision as an executor, *simpliciter*, but he can be appointed only if there is a trust created by will in which he will be appointed as the sole executor and sole trustee under the will. In such a case, he will have to apply for a probate in case the probate is obligatory. There is no possibility of his applying for letters of administration in the other cases in which the Administrator-General can apply. The Government of Madhya Bharat was against the proposal made by the Government of West Bengal. Cases where a trustee is appointed as the sole executor and sole trustee under will would be rare and in such cases there is no harm if he files an affidavit as required by section 19-I of the Court-fees Act or under rules made by the High Court. For a remote contingency of that type we think it unnecessary to engraft a provision similar to section 22 of the Administrator-General's Act in the Official Trustees Act. Besides, it would seem to be in keeping with the pattern of the Act to treat the Official Trustee as standing, generally speaking, in the same position as a private executor and a private trustee.

5. The second suggestion made by the Government of West Bengal is that a provision similar to section 26 of the Administrator-General's Act may be incorporated in the Official Trustees Act. Section 26 of the Administrator-General's Act empowers the Administrator-General to decide the claims of the creditors and others against the estate of deceased in the course of the administration of the assets of the deceased.

Insertion of a provision similar to s. 26 of the Administrator-General's Act.

Section 26 of the Administrator-General's Act reads thus :

"26. (1) When the Administrator-General has given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims be at liberty to distribute the assets or any part thereof in discharge of such lawful claims as he has notice of.

(2) He shall not be liable for the assets so distributed to any person of whose claim he had not notice at the time of such distribution.

(3) No notice of any claim which has been sent in and has been rejected or disallowed in part by the Administrator-General shall affect him unless proceedings to enforce such claims are commenced within one month after notice of the rejection or disallowance of such claim has been given in the prescribed manner and unless such proceedings are prosecuted without unreasonable delay.

(4) Nothing in this section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

(5) In computing the period of limitation for any suit, appeal or application under the provisions of any law for the time being in force, the period between the date of submission of the claims of a creditor to the Administrator-General and the date of the final decision of the Administrator-General on such claim shall be excluded."

We cannot agree with the suggestion. Leaving aside for a moment the exceptional case under section 7(6) of the Official Trustees Act, the functions of the Official Trustee are entirely different from those of the Administrator-General. The Official Trustee has merely to carry out the execution of the trust for which he is the trustee and the question of deciding the claims of creditors against the trust seldom arises. All that he has to do is to pay the beneficiaries what is due to them under the trust and, if any difficulty arises, to apply to the High Court for directions. He stands, generally speaking, in the same position as a private trustee under the Indian Trusts Act. If a private trustee has no power to decide and adjudicate upon any claims under the Trusts Act, there is no reason to vest such a power in the Official Trustee. Where the Official Trustee happens to be the sole executor and trustee under section 7(6) of the Official Trustees Act, he stands, so far as the executorial functions are concerned, in the same position as an ordinary executor and holds the estate as trustee after the administration is completed and the residue ascertained¹.

By way of contrast it may be noted that the functions of the Administrator-General are different in nature. The proceedings before him are to a certain extent really a substitute for a suit for the administration of the estate, and it is on this that his powers and duties are based². We, therefore, arrive at the conclusion that there is no justification for incorporating the provisions of section 26 of the Administrator-General's Act in the Official Trustees Act.

Insertion of provisions similar to ss. 30 and 51 of the Administrator-General's Act.

6. We pass on to consider the suggestions made by the Government of Madras. The first suggestion is to the effect that provisions similar to sections 30 and 51 of the Administrator-General's Act may be inserted in the Official Trustees Act. Whilst section 30 of that Act empowers an Administrator-General to take evidence on oath, section 51 provides the penalty for giving false evidence on oath. As already pointed out³, the Administrator-General has certain judicial or quasi-judicial functions to perform and, therefore, there is full justification for clothing him with the power to take evidence on oath. On the other hand, the Official Trustee has no such functions to discharge. Indeed, it will be contrary to the basic approach of the Official Trustees Act, which envisages the Official Trustee as standing on practically the same footing as a private trustee or private

¹The question—"When an executor becomes the trustee where he is appointed as executor and trustee under the will" has been considered in a number of cases—See in this connection *Raghavalu Naidu and Sons v. Commissioner of Income-Tax*, A.I.R., 1950, Mad. 790.

²He has, for example, to administer the estate and decide claims of creditors and legatees when he obtains letters of administration under the various provisions already noted—See para. 4, foot-note.

³See para. 4, *supra*, and also ss. 31-32 of the Administrator-General's Act.

executor, to clothe the Official Trustee with judicial powers. We cannot, therefore, accept the suggestion, notwithstanding the fact that the provisions in question have been inserted in the Official Trustees Act in its application to West Bengal, by an amending Act¹.

7. The second suggestion made by the Government of Madras is that the provisions of section 28(2) of the Administrator-General's Act may be incorporated in the Official Trustees Act. This sub-section lays down that applications for directions of the High Court under the Act may be made by the Administrator-General or any person interested in the assets or in the due administration thereof. With regard to persons who may apply for directions to the High Court under the Official Trustees Act, provision has been made in section 26 of the Act². That section provides that the Official Trustee or any person beneficially interested may apply. In the case of a trust the only persons entitled to due administration are the beneficiaries and none else. There is, therefore, no necessity to provide separately for persons "interested in the due administration" as in section 28(2) of the Administrator-General's Act. In those cases where the Official Trustee is acting under section 7(6), the wide provisions of section 302 of the Indian Succession Act can be availed of. We do not, therefore, recommend any change in section 26 of the Official Trustees Act.

8. The third suggestion made by the Government of Madras is that the Official Trustee may be empowered to accept the guardianship of the property of minors and lunatics. In *Omar Tyab v. Ismail Tyab*³, Rangnekar J. observed:

"In my opinion the Official Trustee would be a suitable person to be appointed the guardian of property of a minor in such cases. He has got a well set-up establishment.....for the purpose."

In this connection, it may be mentioned that in New Zealand the Public Trustee may be appointed a guardian of any infant by any deed or will or by the Court⁴. We were, at one time, inclined to adopt the suggestion of the Government of Madras. But, from the comments received from some State Governments and Official Trustees it would appear that the Official Trustee would not have time to take over such work, particularly because in some States he is only a part-time officer or is a person who, while holding some substantive post, acts as Official Trustee in addition. If that be the case, the provision, even if inserted, would remain a dead letter. Accordingly, we have considered it unnecessary to incorporate any such provision.

¹See the Official Trustees (Bengal Amendment)—Act, 1941.

²i.e., the Official Trustees Act.

³A.J.R. 1928, Bom. 69.

⁴Report of the Committee of Inquiry into the Public Trustee Office Cmd. 9755, page 30. (App. IV, item 15).

PART II

PROPOSALS RELATING TO SECTIONS

Preamble.

9. The preamble merely repeats what is stated in the long title, and should be omitted.

Sections 1 and 2.

10. Section 1 does not require any change. In section 2 the definition of High Court should be omitted, leaving the matter to be governed by the definition in the General Clauses Act.

Section 3.

11. This section has been omitted by the Adaptation of Laws (No. 2) Order, 1956. We think, however, that this section should be restored. Besides the power to invoke the jurisdiction of High Court under section 25 of the Act, the Official Trustee may have also to approach the District Court, as section 7 of the Act confers upon him the same powers and enjoins the same duties and liabilities and so makes him subject to the control and orders of the Court in the same manner as any other trustee acting in the same capacity. Further, in the discharge of his duties as Official Trustee, he stands in the same position as a private trustee, and he may have to invoke the jurisdiction of the district court under the Trusts Act also. It will be very inconvenient for him to move the several district courts in respect of different properties situated in their respective jurisdictions. It will be more convenient, from the point of view of the Official Trustee, to enable him to approach the High Court even in respect of those matters, without the necessity of going to the district courts. For this purpose, we think that the section should be restored¹, conferring upon the High Court jurisdiction not only under this Act, but also the jurisdiction which the district courts will have under the Trusts Act. It has been suggested that the section should be expressed in a different way, to make the intention clear. Accepting this suggestion, we have re-drafted the section². The concurrent jurisdiction of the district court need not of course be affected, and this may be made clear.

¹The section as it stood before the Adaptation of Laws (No. 2) Order, 1956, was as follows :—

“For the purposes of this Act the High Court shall have jurisdiction throughout the State.”

²See the Appendix.

12. The qualifications for the appointment of the Official Trustee require to be changed. The mention of Barristers as a separate class has become out of date. Section 4(2)(a) may, therefore, be deleted. Section 4

Under section 4(2)(b) no qualification is imposed under the Act as to the standing of the Advocates, Attorneys, etc. This may have been due to the paucity at the time of passing the Act of persons of any standing willing to take up the post. Conditions have changed now. In keeping with the nature of functions of the Official Trustee, we recommend that a minimum of seven years' standing should be prescribed. The reference to vakils may be deleted. Under the legislation now in hand relating to legal practitioners, Advocates will be enrolled by the Bar Councils and hence the expression "of High Court" will be unnecessary as regards Advocates.

Section 4(2) (c) has become obsolete, as it refers only to persons holding the office of Deputy at the commencement of the Act¹. It should be omitted.

We are of the opinion that it is unfair to exclude Deputies altogether from the category of persons eligible for appointment as Official Trustee. As the Deputy can and does sometimes perform the functions of the Official Trustee, we consider it reasonable to provide that a person who has worked for a specified period as a Deputy should be eligible for appointment as Official Trustee. We need hardly add that in case of persons appointed as Deputies in accordance with the qualifications recommended by us, the case is much stronger. We recommend that sub-clause (c) of section 4(2) may be deleted and in its place a provision may be introduced to the effect that a person who has worked as a Deputy for a period of five years is eligible for appointment as Official Trustee. (This will apply to present incumbents also).

Under section 4(2) (d), a person already in the service of the Government may be appointed as Official Trustee in a State other than West Bengal, Madras or Bombay. This provision was made on the ground that it would be difficult to get persons with legal qualifications in those States. Whatever may have been the position in 1913, the reason cannot hold good now. We, therefore, recommend that the clause may be deleted.

A fruitful source of recruitment for filling up the post of Official Trustee is the State Judiciary. We recommend that a person who has for at least ten years been a member of the Judicial Service of a State may also be made eligible for appointment as Official Trustee.

¹Viz., 1913. .

- Section 5. 13. No qualifications have been prescribed for appointment as Deputy. Since the Deputy can, under the Act discharge any of the duties and exercise any of the powers of the Official Trustee, it is only proper that some qualifications should be prescribed. We recommend that no person shall be appointed as a Deputy unless he has for at least three years been an advocate or an attorney of a High Court or has for a like period been a member of the Judicial Service of a State.
- Sections 6—12. 14. No change, except that in section 10(3), the reference to the Trustees etc. Act (now repealed) may be omitted, and in section 12, "infant" may be replaced by "minor".
- Sections 13—18. 15. Small drafting changes have been proposed in sections 13, 15 and 17, as can be seen from the proposed amendments.¹ The remaining sections need no change.
- Section 19. 16. Sub-section (2) of this section has been slightly altered by the Official Trustee (Bengal Amendment) Act, 1940, and the amendment seems to be reasonable. The same may be adopted.
- Sections 20—24. 17. No change.
- Section 25. 18. In section 25, it has been suggested that the word "interest" should be replaced by "income". We agree. "Interest" is limited to income from money, while "income" is much wider and will include all classes of income, particularly income from property. We accept the suggestion.
- Sections 26 to end. 19. No change.
- Appendix. 20. With a view to presenting a clear picture of the proposals made by us in this Report, we have, in the Appendix, shown our proposals in the form of draft amendments to the existing Act.

1. T. L. VENKATARAMA AIYAR

(Chairman)

2. P. SATYANARAYANA RAO

3. L. S. MISRA

4. G. R. RAJAGOPAL

5. S. CHAUDHURI

6. N. A. PALKHIVALA

} Members.

D. BASU

Joint Secretary.

NEW DELHI;

The 18th November, 1960.

¹See the Appendix.

APPENDIX

*Proposals as shown in the
form of draft amendments.*

(This is a tentative draft only)

2 of 1913

The preamble to the Official Trustees Act, 1913, (herein- Preamble.
after referred to as the principal Act), shall be omitted.

In section 2 of the principal Act, clause (2) shall be Section 2.
omitted.

After section 2 of the principal Act, the following Section 3
section shall be inserted, namely:— (New).

2 of 1882.

"3. The High Court shall, in respect of proceedings Extent of
under this Act and the Indian Trusts Act, 1882, taken jurisdiction
by or against the Official Trustee, be a competent of High
Court for the whole area subject to its civil appellate
jurisdiction: Court.

Provided that nothing in this section shall be
construed as affecting the jurisdiction of any district
court."

In section 4 of the principal Act, for sub-section (2), Section 4
the following sub-section shall be substituted¹, namely:—

"(2) No person shall be appointed to the office of
the Official Trustee unless he—

(a) has for at least seven years been an
advocate; or

(b) has for at least seven years been an
attorney of a High Court; or

(c) has for at least ten years been a member of
the judicial service of a State; or

(d) has for at least five years held the office
of Deputy Official Trustee."

Section 5 of the principal Act shall be re-numbered as Section 5.
sub-section (1) of that section, and after sub-section

¹Compare article 217 of the Constitution. Contrast section 4, Bombay
Public Trusts Act, 1950.

An Explanation on the lines of the Explanation to article 217 (2) of the
Constitution is considered unnecessary.

(1) as so re-numbered, the following sub-section shall be inserted, namely:—

“(2) No person shall be appointed as a Deputy under this section unless he—

(a) has for at least three years been an advocate; or

(b) has for at least three years been an attorney of a High Court; or

(c) has for at least three years been a member of the judicial service of a State.”.

Section 10. In section 10 of the principal Act, in sub-section (3), the words and figures “the Trustees’ and Mortgagees’ Powers Act, 1866, or” shall be omitted.

Section 12. In section 12 of the principal Act, in sub-section (1) for the word “infant”, the word “minor” shall be substituted.

Section 13. In sub-section (2) of section 13 of the principal Act.—

(a) the words “or Deputy Official Trustee” shall be omitted;

(b) for the words “the Official Trustee’s personal knowledge”, the words “his personal knowledge” shall be substituted.

Section 15. In section 15 of the principal Act, the words “revenues of the”, wherever they occur, shall be omitted.

Section 17. In section 17 of the principal Act,—

(a) the proviso to sub-section (1) shall be omitted;

(b) in sub-section (2), the words “the revenues of” shall be omitted.

Section 19. In section 19 of the principal Act, in sub-section (2), for clause (a), the following clause shall be substituted, namely²:—

“(a) whether the accounts have been audited in the prescribed manner, and whether, so far as can be ascertained by such audit, the accounts contain a full and true account of everything which ought to be contained therein.”.

Section 25. In section 25 of the principal Act, for the word “interest”, the word “income” shall be substituted.

²Necessary change in the marginal note can be made without formal amendment.

³Cf. the amendment made by section 3, of the Official Trustees (Bengal Amendment) Act, 1940 (Bengal Act 12 of 1940).