

BORROWINGS UNDER THE INDIAN TRUSTS ACT, 1882

1. Under Section 3 of the Indian Trusts Act, 1882 (“**Trusts Act**”), a “trust” is an obligation annexed to the ownership of property. The “beneficial interest” or “interest” of the beneficiary is his right against the trustee as owner of the trust-property. Hence, under the Trusts Act, the trustee is recognized as the legal owner of the trust property and holds the trust property in its own right for the benefit of the beneficiaries.
2. In terms of the Trusts Act, a trust has four ingredients – i.e. trust property or trust monies, the author of the trust, the trustee of the trust and the beneficiaries of the trust. Given that a trust is not a juristic person and can neither own property nor sue or be sued in its own name¹, all the obligations of the trust are carried out by the trustee which may sue and be sued in respect of the obligations of the trust. The trustee is the legal owner of the trust and the trust property vests in him².
3. The scope of activities to be carried out by a trustee are governed by, *firstly*, the Trusts Act, and *secondly*, the terms and conditions of the instrument which creates the trust, i.e. the trust deed. The trustee must at all times abide by the directions in the document establishing the trust³ and has a fiduciary duty⁴ towards its beneficiaries. Therefore, a trustee is duty-bound to act in accordance with the provisions of the Trusts Act and the trust deed.
4. The trustee owns the trust properties for the benefit of the beneficiaries, and not on their behalf⁵. A trustee is also free to operate the trust in the manner it deems fit, so long as the action of the trustee is within the four walls of what the Trusts Act and the trust deed permit the trustee to do. The other consideration for a trustee is whether such action is for the benefit of the beneficiaries. Lastly, as set out above, such action should not be forbidden by law or should not be contrary to any provisions of law. Given that the trustee is the legal owner of the trust properties, it is also free to act in relation to the trust properties using these guiding principles.
5. While the Trust Act prescribes the general contours of the rights, duties and obligations of a trustee, it does not provide an exhaustive list of actions which a trustee is permitted to take. Instead, as set out above, the test is a negative one – that the purpose of the trust should not be an unlawful one. So long as the purpose of the trust is lawful, the Trusts Act does not provide an indicative or exhaustive list of what such purposes may be.
6. The Trusts Act does not contain any provisions that either permit or prohibit trusts from availing loans. This is entirely governed by the powers conferred on the trustee in terms of the trust deed entered into by the trustee of the Trust. If a trust deed explicitly permits the trustee to avail loans for the benefit of the beneficiaries, the trustee is entitled to raise such debt. In case a borrowing is made pursuant to such provision in the trust deed: (a) the trustee will be the borrower on record; (b) the proceeds of the loan shall be applied towards the lawful purpose of the trust; and (c) in the event of a default in repayment of the loan, the trust properties shall be available to the trustee for applying towards the repayment of the loan and the lenders as set out in the commercial understanding.

¹ *Abdul Rehman v. Trustees of the Maniar Jamat, Ahmedabad*; AIR 1968 Guj 184

² *Hukum Chand Gulabchand Jain v. Fulchand Lakshnichand Jain and Ors.*; AIR 1965 SC 1692 wherein it was held that trustee cannot be said to have taken a loan from himself as a trustee is in charge of the trust funds

³ Section 11 of the Indian Trusts Act, 1882

⁴ Fiduciary duty or relationship is where one person is under a duty to act for the benefit of the other on matters within the scope of the relationship and requires the highest duty of care, as stated in *Sri Marcel Martins v. M. Pinter and Ors.*; AIR 2012 SC 1987

⁵ *W.O.Holdsworth and Ors. v. The State of Uttar Pradesh*; AIR 1957 SC 887

7. The obligation of a trustee is that of a ‘fiduciary duty’ which requires the highest order of care. The highest risk that a trustee is exposed to is that the trustee should not breach or not even appear to breach the terms of the trust. In the event of a breach, a trustee is liable to make good the loss which the trust property or the beneficiary has sustained⁶. Hence, in the event that the trust deed specifically provides that a trustee may undertake certain actions, towards a lawful purpose, for the benefit of the beneficiaries, a trustee is bound to act in accordance with such provisions of the trust deed, and a refusal of the trustee to act in accordance with such provisions may be considered to be a breach of the terms of the trust.

8. **Suggestions**

8.1. In light of the above, it is amply clear that Trusts do inherently have the power to borrow (acting through their trustee). In this vein, listed Trusts are permitted issue listed debt securities in accordance with the SEBI Regulations and the Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2012 (“**SEBI ILDS Regulations**”), which prescribe certain conditions (which are highlighted below). Recently, the Reserve Bank of India (“**RBI**”) has also permitted InvITs to avail loans from banking companies subject to certain conditions. RBI had also recognised this as part of the ECB Master Directions until January, 2019 by explicitly including REITs and InvITs as “eligible borrowers” under the ECB Master Directions (from 2015- December 2018).

8.2. We further understand based on discussions with market participants, even currently various Trusts including, educational trusts and hospital trusts avail of lending from various lenders including banks and NBFCs. It is also important that whilst considering and providing certainty for future transactions (as would be the case with any amendments), the Government should also ensure that any transactions that have already been undertaken are not called into question. It is important to provide therefore that any such amendments are for the purpose of providing certainty in respect of REITs and InvITs and do not prejudice the legality or enforceability of past or future transactions where trusts have been borrowers.

8.3. However, we understand that some discussions are being had in relation to the ability of Trusts to borrow. In this regard, we understand that the Government is considering amendments as suggested in **Annexure I** to the Trusts Act to provide certainty to investors and lenders. We have also provided our thoughts in Annexure I in this regard.

8.4. The government may also consider seeking a confirmation of the above from appropriate constitutional legal functionaries.

⁶ Section 23 of the Indian Trusts Act, 1882

ANNEXURE I

PROPOSED AMENDMENTS TO THE TRUSTS ACT AND COMMENTS

S. No.	Proposed Changes	Comments	Rationale
1.	A “Business Trust” shall mean a Trust as defined under Section 2(13A) of the Income Tax Act, 1961	A “Business Trust” shall mean a Trust as defined under Section 2(13A) of the Income Tax Act, infrastructure investment trusts and real estate investment trusts registered with SEBI in terms of the Securities and Exchanges Board of India (Infrastructure Investment Trusts) Regulations, 2014 or the Securities and Exchanges Board of India (Real Estate Investment Trusts) Regulations, 2014	The changes suggested are to ensure that the definition is aligned with the SEBI Regulations.
2.	Any business trusts as defined in Section [.] shall be registered with any Regulator/Authority and shall comply with the Regulations made by the concerned Regulator/Authority. Such business trusts may carry the business as may be permitted under the said Regulations and shall, subject to the said Regulations and provision in Trust Deed, be entitled to borrow by way of NCD or otherwise and in such manner and to such extent as may be permitted by the said Regulations. Further such business trusts, subject to the provisions in Trust Deed, are permitted to offer security as per terms as may be decided by the Trustee and in accordance with the said Regulations.	Any business trusts as defined in Section [.] shall be registered with any Regulator/Authority and shall comply with the Regulations made by the concerned Regulator/Authority. Such business trusts may carry the business as may be permitted under the said Regulations and shall, subject to the said Regulations and provisions of the in Trust Deed, be entitled to borrow monies, including by way of issuance of non-convertible debentures NCD or otherwise and in such manner and to such extent as may be provided under permitted by the said Regulations. Further, such business trusts, subject to the provisions of the in Trust Deed, are permitted to offer provide security to lenders in terms of the facility documents as per terms as may be	Modified for language consistency, including alignment with comments from SEBI.

S. No.	Proposed Changes	Comments	Rationale
		decided by the Trustee and in accordance with the said Regulations.	
3.	<p>Provided that the aggregate amount of borrowings shall not exceed the total units outstanding as per the last audited balance sheet or any amount prescribed by the Regulations under which the business trust is registered, whichever is lower.</p> <p>Provided further that the aggregate borrowings of the business trust may exceed the total units outstanding with the approval of the unitholders/beneficiaries by way of a Special Resolution. The Special Resolution shall mention the maximum borrowings that can be undertaken by the business trust.</p>	<p>Provided that the aggregate amount of borrowings shall not exceed the total units outstanding as per the last audited balance sheet or any amount prescribed by the Regulations under which the business trust is registered, whichever is lower.</p> <p>Provided further that the aggregate borrowings of the business trust may exceed the total units outstanding with the approval of the unitholders/beneficiaries by way of a Special Resolution. The Special Resolution shall mention the maximum borrowings that can be undertaken by the business trust.</p> <p>Provided that the total consolidated borrowings and deferred payments of the business trusts shall be to the extent and subject to the conditions prescribed under the applicable Regulations.</p>	Please note that the SEBI InvIT Regulations and the SEBI REIT Regulations prescribe the limits up to which an InvIT or REIT may borrow and the conditions to avail such borrowing including obtaining credit rating and unitholder approval. Accordingly, to ensure that the requirements of the SEBI InvIT Regulations and the SEBI REIT Regulations, as applicable, are followed, the said changes proposed are to ensure consistency between the SEBI InvIT Regulations and the SEBI REIT Regulations and the Trusts Act at all times.
4.	Notwithstanding anything to the contrary, the lender shall be entitled to proceed against the Trustee (acting on behalf of the Trust) in respect to such loan/security and shall be entitled to take all such action as is permitted by law, in case of breach of any terms and conditions of the loan/NCDs.	Notwithstanding anything to the contrary, the lender shall be entitled to proceed against the Trustee (acting on behalf of the Trust) in respect to such loan/security and shall be entitled to take all such action as is permitted by law, in case of breach of any terms and conditions of the loan/NCDs.	No changes required.