

Creation of Charge

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Abstract

A charge is a right created by any person including a company referred to as “the borrower” on its assets and properties, present and future, in favour of a financial institution or a bank, referred to as “the lender”, which has agreed to extend financial assistance. Section 2(16) of the Companies Act, 2014 defines charges so as to mean an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage. It also defines need for the creating a charge on company assets and the types of the charge, provision required to register the charge, certificate of registration of charge and what are penalty for not filing charges all these provisions are covered.

Keywords: charge, asset, register, company, pari pasu clause, fixed charge and floating charge

1. Introduction

Generally speaking where the payment of money is secured on land, but no interest in specific immovable property is transferred, the transaction amounts to mere charge and not a mortgage. The distinction between a mortgage and a charge is of fundamental character. There is this well marked distinction between the two that a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immovable property. Dr. Ghose remarks:

“ A charge must be distinguished from a simple mortgage. In every mortgage there must be a transfer of an interest in specific immovable property, while in the case of a mere charge interest is not transferred nor is it necessary that the property to which it relates should be specific. A charge differs from a mortgage not only in the form but also in substance. A plea of purchase for value without notice, for instance, although it may be perfectly good against a charge, will be wholly unavailing against a mortgage.”

A charge cannot be enforced against the property in the hands of a bona fide purchaser for value without notice. While a mortgagee can follow the mortgaged property in the hands of a transferee, and it is immaterial whether the transferee has or not notice of the mortgage. Unlike a mortgage, which can be created only by act of parties, a charge may be created by act of parties as well as by operation of law, a lien on the other hand, is created only by the operation of law. A document which only gives right to payment out of a particular property or which gives property as security for the satisfaction of a debt, or which gives immovable property as security for the payment of maintenance allowance in property, without transferring any interest in the property constitutes a charge on the property and is not a mortgage. Where in the petition to compromise embodied in the decree, it is stated that the property would remain attached “and *liable*” until the satisfaction of the entire decree, a charge is created over the property. So also, in *Chandranath v. Hemnalini* it was observed that “ it is possible to take the view that a charge created by a decree, though it does not differ in any way from other charges, can be enforced against a transferee of the judgement-debtor by way of enforcing the judgement self

and the latter being a party to the judgement cannot be heard to say that he is bound by it...this principle, however, can be applied only when the charge can be enforced by enforcement of the judgement itself, for otherwise no question of estoppel would arise.” Where the law of estoppel cannot operate the provision of Section 100 must be held to be applicable without any limitation.

A “charge” has, however, been held to be a transfer within the meaning of Cl. (2) of Section, Electricity Act, 9 of 1910. The second half of Section 100 of the Transfer of Property Act is the general prohibition that no charge shall be enforced against any property in the hands of a transferee for consideration without any property in the hands of a transferee for consideration without notice of the charge and the exception to the general rule must be expressly provided by law. The real core of the saving provisions of law must be not mere enforceability of the charge against the property in the hands of a transferee for consideration without notice of charge.

2. Definition of Charge: As per Section-2 (16) Charge means- An

- interest or lien
- created on the property or assets of a company or
- any of its undertakings or both as security and includes a mortgage;

Principle rule of Creation of Charge is that “Charge will be created on the Assets of the Company”, Assets as defined in Schedule III of the CA-2013

Provisions of Charge Given Under Chapter Vi of Companies Act 2013 Covers Section- 77 to 87.

3. Need for Creating a Charge on Company's Assets

Practically all the enormous and little organizations rely on share capital and obtained capital for financing their tasks. Acquired capital may comprise of assets raised by giving debentures, which might be made sure about or unbound, or by getting money related help from Financial establishment or banks.

The monetary establishments/banks don't loan their monies

except if they are certain that their assets are protected and they would be reimbursed according to concurred reimbursement plan alongside installment of premium. So as to make sure about their advances they resort to making directly in the advantages and properties of the getting organizations, which is known as a charge on resources. This is finished by executing advance understandings, hypothecation understandings, contract deeds and other comparable records, which the acquiring organization is required to execute for the loaning foundations/banks and so on

4. Type of Charge Registered

Organizations Act, 1956: Section 125 indicates just 9 kinds of charges to be enrolled.

Organizations Act, 2013: Section 77 states that Companies are required to enroll to all kind of charges, with ROC inside 30 days of its creation.

- within or outside India,
- on its property or resources or any of its endeavors,
- whether substantial or something else, and
- situated in or outside India

For Creation of Charge Form CHG-1 will be recorded with expenses recommended under Act. Structure ought to be marked by the Company and the Charge-holder and ought to be recorded together with instrument making charge.

5. Additional Period to Register the Charge

Segment 77-ROC may on application by the organization, permit the enlistment of charge inside 300 days (30 days + extra time of 270 days). In the event that structure will record following 30 days, at that point structure will document with extra charges.

Application to be upheld by a statement in Form CHG-10 from the CS or Director that such tardy recording won't antagonistically influence the privileges of any leasers of the organization.

Rule 4(2) part VI – The Companies (Registration of Charges) Rules, 2014

5. Duty of Registration of Charge

- As per Section 77 it is obligation of Company to Create charge.
- As per Section 78 on the off chance that Company neglects to record structure for enlistment of charge, at that point, the individual in whose favor charge is made will document structure for making of charge. The individual is qualified for recoup from the organization the measure of expenses.

Be that as it may, before filling of structure individual will give 14 days' notification to Company. On the off chance that organization doesn't enlist the charge or show adequate reason, at that point individual himself will record the structure with ROC.

This isn't obligation of Person (in whose favor charge is made) to document structure. Thusly if organization neglect to record structure for enlistment of charge and individual additionally not documented structure then individual won't at risk to take care of any punishment.

6. Certificate of Registration of Charge

In the wake of filling of Creation of charge ROC will give

an endorsement of enrollment of charge in structure CHG-2. The authentication gave by the Registrar under CHG-2 will be indisputable proof that the necessities of Chapter VI of the Act and the guidelines made there under as to enlistment of making of charge, by and large, have been consented to.

7. Time Limit for Filing for Creation of Charge

Within 30 days - Application ought to be made inside 30 days of making of charge in structure CHG-1 with no late expenses.

After expiry of 30 days yet not past 300 days – Application ought to be made before 300 days of production of charge in CHG-10 connected in CHG-1.

After Expiry of 300 days - Application for Condonation of Delay to Regional Director in structure CHG-8.

8. Condonation of Delay for Registration of Charge

- Where the instrument making or adjusting a charge isn't documented inside a time of Three Hundred Days from the date of date of its creation or alteration the Registrar will not enroll the equivalent except if the postponement is overlooked by the Central Government.
- Where the instrument fulfillment of the charge isn't documented inside Thirty Days from the date on which such installment of fulfillment, the Registrar will not enroll the equivalent except if the deferral is supported by the Central Government.
- The application for approbation of deferral will be documented with the Central Government in Form No.CHG-8 alongside the charge. [By Notification F. No. 1/6/2014-CL. V Dated: 21-5-2014 THIS POWER HAS BEEN DELEGATED TO REGIONAL DIRECTOR)
- The request passed by the Central Government under sub-area (1) of segment 87 of the Act will be required to be recorded with the Registrar in Form No.INC.28.

9. Modification of Charge

Arrangements of Modification of charge are totally same as arrangements of Creation of Charge. Subsequent to filling structure for Modification of Charge enlistment center will give endorsement for adjustment of charge in structure CHG-3.

Any adjustment in the terms or conditions or the degree or activity of any charge enlisted under that segment additionally required enrollment.

**Whether Funded Interest is Modification of Charge?

Solu: In Andhra Pradesh State Financial Corp'n v. Guruvayurappan Swamy Oils, appealing party monetary foundation had made charge over properties of organization in-liquidation in regard of chief sum in addition to intrigue. The absolute intrigue was kept in a different record called "Financed Interest Account". Subsequently, there is no change of charge required to make sure about such subsidized intrigue.

10. Satisfaction of Charge

Charge is made as security for credit or debentures or as security for some other reason. On the off chance that the measure of credit is reimbursed or debentures are completely paid or other intention is satisfied, there remains no need of the charge. This is called fulfillment of charge.

According to Section 82 – Form for Satisfaction of charge will be record in structure CHG-4 inside 30 days of fulfillment of charge. On the off chance that organization neglect to record structure CHG-4 inside 30 days of making of charge at that point organization need to go for approbation of postponement for fulfillment of charge.

11. Charges Filing of Which with Roc is not Necessary

- Guarantee doesn't require Registration.
- Charge made by activity of law need not be recorded
- Negotiable Instrument (Hundi) isn't a 'Charge' and enrollment not required.

12. Pledge is not Required to be Filed for Registration

Prior there was rundown of exchange on which charge was required to make. With the institution of the Companies Act, 2013, tire rundown of charges requiring enrollment discarded. In this manner, without a particular rundown of charges to be enrolled, and the wide meaning of "charge", 'promises' and 'liens' were additionally required to be enlisted.

The organizations making promise over offers are necessarily required to enlist the charge, which was not the situation with its antecedent. This is unjustifiable, for instance, there is definitely no holiness in enlistment of a vow as an a possessory security intrigue and the benefit is as of now with the loan specialist. A vow on movables neither makes an intrigue or a lien but instead is an uncommon property.

13. Effect of Registration of Charge

- a. Keep up Register of Charge by ROC: according to Section-81 ROC will keep up Register of Charges in regard of each organization, containing specifics of all charges enlisted
- b. Assessment of Register of Charge: The Register of charges kept up by ROC is open for investigation by any individual on installment of endorsed review expenses.
- c. Considered Notice: ** Any individual planning to loan funds or who has loaned cash to an organization can know which of organization's benefits are as of now charged and degree to which type are charged
- d. Charge restricting even on resulting buyer: Provisions identifying with charge apply even to an ensuing buyer, regardless of whether he had not bought property legitimately from organization. The buyer is required to make sensible enquiries as to title of seller.

14. Penalty for not Filing Charges

In the event that any organization contradicts any arrangement of this Chapter, the organization will be culpable with fine which will not be short of what one lakh rupees yet which may stretch out to ten lakh rupees and each official of the organization who is in default will be culpable with detainment for a term which may reach out to a half year or with fine which will not be under twenty-5,000 rupees however which may reach out to one lakh rupees, or with both.

15. Effect of Non-Registration of Charge

According to Section 77(3) If accuse isn't enlisted of ROC, the charge will not be considered by the outlet or some other Creditor. [The words are Registered' and not 'recorded'. In

this way, unimportant documenting of accuse of Registrar would not be adequate. It must be really enrolled by ROC and authentication of enlistment ought to be given. However, this is so only if company is under winding up. Otherwise, contract or obligation for repayment of the money secured by charge is there even if charge was not registered. 77(4)

16. Register of Charge by Company

- a. Every company shall maintain, at registered office a register of charge in form No. CHG-7.
- b. Copy of the instrument creating the charge shall also be kept at the registered office of the company along with register of charge- (Proviso of Section 85(1))
- c. The entry in the registered authenticated by a director or secretary of the company or the other person authorized.
- d. **Company will maintain this register for life time of Company.
- e. ** Instrument creating charge or modification of charge shall be preserved for a period of 8 year from the date of satisfaction of charge by the Company.

17. Inspection of Register of Charge: Section 85

- a. Register of Charge and Copy of all the instrument creating charge will be open for inspection to Members and Creditor at the registered office of company, without any fee.
- b. The registered will also be opened for inspection of any other person on payment of prescribed fee.
- c. The register and copies of instrument shall be opened during business hours.

18. Process of Creation/ Modification of Charge is as Under

If a company has passed special resolutions under Section 180(3)(c) of the Companies Act, 2013, authorising its Board of directors to borrow funds for the requirements of the company and under Section 180(1)(a) of the Companies Act, 2013, authorising its Board of directors to create charge on the assets and properties of the company to provide security for repayment of the borrowings in favour of the financial institutions/banks or lenders and in exercise of that authority has signed the loan documents and now proposes to have the charge, created by it registration with the ROC, should follow the procedure detailed below

Where the special resolution is passed as required under section 180 of the Companies Act, 2013, form MGT14 of the Companies (Management and Administration) Rules, 2014 is to be files with the registrar.

- Conduct a Board meeting to arrive at a positive decision to avail the facility including security of Charges. In the said business of availing facility, authority to execute necessary documents is also required to be given.
- File extracts of the said resolution with the Registrar of Companies in form^[1] MGT 14 within 30 days of its passing.
- Execute necessary documents for availing the facility including the security being given.
- Make entries in the register of Charges maintained in form CHG-7 forthwith after the creation/ modification/ satisfaction and get it authenticated by Director or Secretary of the company or any person authorized by

the board.

- Submit form CHG-1 (for other than debentures) or Form CHG-9 (for debentures including rectification) with the prerequisite fees within a period of 30 days from the date of creation/ modification of charge.
- Attach the following documents with e-form No. CHG-9/ CHG -1: 9/ CHG -1 A certified true copy of every instrument evidencing any creation or modification of charge. In case of joint charge and consortium finance, particulars of other charge holders. Instrument(s) evidencing creation or modification of charge in case of acquisition of property which is already subject to charge together with the instrument evidencing such acquisitions
- After due compliance, Registrar shall issue certificate of registration in form CHG-2, where charge is registered under section 77(1) or 78 or in form CHG-3, where charge is registered under section 79.
- If CHG-1 (for other than debentures) or Form CHG-9 (for debentures including rectification) is not being submitted within the period of 30 days, however within the period of 300 days, prepare an application for condonation in form CHG-10 which shall be supported by a declaration by the secretary or director of the company that delay shall not affect the rights of creditors. After due compliance, Registrar shall issue certificate of registration in form CHG-2, where charge is registered under section 77(1) or 78 or in form CHG-3, where charge is registered under section 79.
- Where a charge is registered with the Registrar obtain a certificate of registration of such charge in Form No. CHG- 2. Where the particulars of modification of charge is 2 registered the Registrar shall issue a certificate of modification of charge in Form No. CHG- 3
- If CHG-1 (for other than debentures) or Form CHG-9 (for debentures including rectification) is after 300 days, prepare an application for condonation in form CHG-8 and submit the same with Regional Director having territorial jurisdiction over the registered office of the company under The Companies Act, 2013.
- Pay the requisite penalty imposed by the Regional Director having territorial jurisdiction over the registered office of the company. Normally 15 days' time is being given for the payment of penalty.
- After payment of requisite penalty, submit the Chalan with Regional director office with the covering letter containing request to issue and order allowing condonation of delay.
- Submit the order issued by the regional director with the ROC within the stipulated time given in the order itself in form INC 28.
- After the approval of the form INC 28, get the form CHG-1 (for other than debentures) or Form CHG-9 (for debentures including rectification) approved. After due compliance, Registrar shall issue certificate of registration in form CHG-2, where charge is registered under section 77(1) or 78 or in form CHG-3, where charge is registered under section 79.

19. Process of Satisfaction of Charge is as Under

- Gets the letter of satisfaction from the bank containing declaration that there are no dues towards the facility provided.

- Conduct a Board meeting to consider the letter of satisfaction and after taking note of the same in the said board meeting pass the resolution containing authorization to file form CHG-4 with letter of satisfaction as an attachment. It must be noted that the said form CHG-4 is required to be submitted within 30 days of satisfaction. The period of 300 days is applicable in case of creation/modification of charges only and for satisfaction of charges, there is no relaxation of time period.
- Make entries in the register of Charges maintained in form CHG-7 forthwith after the satisfaction and get it authenticated by Director or Secretary of the company or any person authorized by the board.
- Submit form CHG-4. After due compliance, Registrar shall issue certificate of registration of satisfaction in form CHG-5.
- If CHG-4 is not being submitted within the period of 30 days, prepare an application for condonation in form CHG-8 and submit the same with Regional Director having territorial jurisdiction over the registered office of the company under The Companies Act, 2013.
- Process same like above after filling of CHG-8.

20. Types of Charges

1. **Fixed Charge:** Such a charge is against a specific clearly identifiable and defined property. The property under charge is identified at the time of creation of charge. The nature and identity of the property does not change during the existence of the charge. The company can transfer the property charged only subject to that charge so that the charge holder or mortgagee must be paid first whatever is due to him before disposing off that property.
2. **Floating Charge:** Such a charge is available only to companies as borrower. A Floating charge does not attach to any definite property but covers the property of a circulating and fluctuating nature such as stock-in-trade, debtors, etc. It attaches to the property charged in the varying conditions in which happens to be from time to time. Such a charge remains dormant until the undertaking charge ceases to be a going concern or until the person in whose favour charge created takes steps to crystallise the floating charge. A floating charge A floating charge on crystallisation becomes a fixed charge.

a. **Pari Passu Charge**

The term is usually used in case of consortium lending. In a case of such lending, a number of banks or financial institutions join together to lend to banks or financial institutions join together to lend to a single borrower in an agreed ratio against some common securities.

The securities are a charge to all the bankers/financial institutions without any reference like first charge or second charge etc. The term that institutions will have a "pari passu charge" over the assets of the borrower means that the lenders are entitled to have equal rights over the assets as per the agreed share.

In other words, in the absence of sufficient assets to pay each lender, they will lose rotatably without any preferences to anyone or more.

b. **Second Charge**

A creditor holding a second charge by way of mortgage is

entitled to the proceeds after the first charge is met. He must inform the prior mortgagee of his charge because the first mortgagee cannot part with the proceeds or title of the property if he has notice of the second charge.

c. Charging over securities

Charging a security means making it available as a cover for an advance. A banker, in the course of his business, has different kinds of securities submitted to him as cover for advances by his customers. Some securities are, in certain cases, movable while others are immovable.

In certain cases possession of goods is handed over by the borrowers to the bank while, in other cases, it may not be possible or practicable to do so. It is not enough that the security is good but the method by which it is offered as security to the banker must be legal and perfect.

It is, therefore, important that the charge must be complete and all necessary formalities comply with so that in case of default by a borrower. The security will be available to the banker.

It should, however, be noted that whatever form the charge may take, the banker does not become the absolute or exclusive owner of the property; he has only certain defined rights in it until the debt due to him is repaid.

The manner by which some articles or commodities or properties are made available to a baker as security is known as charging of securities.

There are a number of methods by which banker can obtain a charge over the debtor's property. The method used depends on upon.

1. The type of property to be charged
2. The nature of the advance
3. The degree of control over the debtor's property required by the banker. The common method of charging securities are:
 - Lien
 - Hypothecation
 - Pledge
 - Mortgage
 - Assignment
 - Set-off.

d. Crystallization of Floating Charge

When the charge holder takes steps to enforce his charge, a floating charge becomes a fixed charge on the assets covered by that charge. Until a floating charge becomes a fixed charge, the company is free to deal with the property charged in any manner it deems fit. But once the floating charge crystallises, the company cannot dispose off the charged assets without paying of the chargeholder. Otherwise, the chargeholder can recover his dues from the proceeds. Floating charge crystallises or become the fixed in the following: -

1. Where the company ceases to carry on the business, whether the principal money has become payable or not, unless the debenture or trust deed contains the stipulation to the contrary.
2. Upon the commencement of winding up of the company.
3. If a debenture holder, having become entitled to realise the securities by the reason of the fact that the principal money has become payable, intervenes for the purpose

by appointing the receiver or by making an application to the court for appointment of the receiver

e. Punishment for contravention of provisions related to charge Under Companies Act, 2013

- The penalty of an amount not below 1 lakh and not above 10 lakh and
- Every officer in default should be punishable with imprisonment towards the extent of 6 months or fine not below 25 thousand extending to 1 lakh or both.
- Further, willful furnishing of false or improper information or knowing suppression of material information must be liable as :
- For the amount of fraud of at least 10 lakh or 1% of turnover, the individual must be punishable with imprisonment not below 6 months extending till 10 years and a fine of not below amount involved in fraud extending 3 times of such amount for fraud. Though, if the fraud includes public interest, terms of imprisonment will not be below 3 years
- In additional cases, a guilty individual must be punishable with imprisonment up to 5 years or fine up to 50 lakh rupees or both.

f. Condonation of delay in Registration of charge Under Companies Act, 2013

- If form CHG-1/ CHG-4 is not filed within the prescribed time, it must be filed after condonation of delay.
- Such an application would be made through form CHG-8 with prescribed fees.
- However, once the order for this has been passed, the same must be filed in Form INC 28.

g. What is the filing fee of the Satisfaction of Charge as per the Companies (Registration Offices and Fees) Rules 2014?

As per the Companies (Registration Offices and Fees) Rules 2014, the filing fees for the satisfaction of the charge are mentioned below. However, the filing fees depend upon the Nominal Share Capital of the Company –

Nominal Fees-less than 1 lakh Fees-Rs 200	Nominal Fees more than 1 lakh but less than 5 lakhs- Fees-Rs 300	Nominal Fees more than 5 lakhs but less than 25 lakhs- Fees-Rs 400
Nominal Fees more than 25 lakhs but less 1 crore- Fees- Rs 500		More than 1 crore- Fees-Rs 600

Fig 1: a filing fee of the Satisfaction of Charge as per the Companies

h. Consequences in case of Non-Filing of Satisfaction of the Charge

In case of delay in non-filing of the satisfaction of the charge within a period of 30 days from the date of satisfaction of the charge, the additional fee is required to be paid if filed within a period of 300 days from the date of payment of satisfaction of the charge

Table 1

Period of Delay	Additional Fees
Up to 15 days	1 time of normal filing fees
Above 15 days and up to 30 days	2 times of normal filing fees
Above 30 days and up to 60 days	4 times of normal filing fees
Above 60 days and up to 90 days	6 times of normal filing fees
Above 90 days and up to 180 days	10 times of normal filing fees
Above 180 days and up to 270 days	12 time of normal filing fees

i. Maintenance of Register of Charge

Form CHG-7 (Register of Charge) to kept at the registered office of the Company i.e. the particulars of the charge i.e registration & satisfaction of charge shall be entered in the register of the charge and shall be authenticated by

the Company Secretary of the Company or any other person duly authorized by the Board of directors of the company for this purpose. The register of Charge shall be open for inspection by any member or creditor of the company.

Table 2: Difference between Mortgage and Charge

Basis	Mortgage	Charge
Mode of creation	A mortgage is created by Acts of the parties	A charge may be created through Act of parties or by operation of Law
Registration	A mortgage requires registration under the Transfer of Property Act, 1882	A charge created by operation of law does not require registration But a charge created by act of parties requires registration.
Term	A Mortgage is for a fixed term	A Charge may be in perpetuity
Effect	A Mortgage is a transfer of an interest in specific immovable property	A charge only gives a right to receive payment out of a particular property
	A mortgage is good against subsequent transferees.	A charge is good against subsequent transferees with notice.
Liability	A simple mortgage carries personal liability unless excluded by express contract.	In case of charge, no personal liability is created. But where a charge is the result of a contract, there may be a personal remedy.
Transfer	A mortgage is a transfer of an interest in a specific immovable property.	There is no such transfer of interest in the case of a charge. Charge does not operate as transfer of an interest in the property and a transferee of the property gets the property free from the charge provided he purchases it for value without notice of the charge.

21. Conclusion

Every company creating a charge needs to file E-Form CHG-1 with the Registrar of Companies for registration of charge within 30 days of creation of charge.

Penalty for contraventions of any provision of Registration of Charges under the Companies Act, 2013 shall not be less than 1 lakh rupees but which may extend to 10 lakh rupees and every officer of the Company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with a fine not less than 25,000 rupees but which may extend to 1 lakh rupees.

22. References

1. Avtar singh company law book
2. Lesson 15 charge of ICSI
3. <https://taxguru.in/company-law/creation-charges-companies-act-2013.html>