**Course Name- LL.B 4th sem**
**Subject- TPA**
**Teacher- Mrs. Aakanksha**
**Concept- Charge (section – 100)**

**INTRODUCTION**

**Charge" as defined in TPA, 1882**

Section 100 of the TPA, 1882 defines charge as, "Where immovable property of one person is by an act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge." [3]

**Essentials Of a Valid Charge**

There are certain essentials which need to be fulfilled to create a valid charge.

**1.Immovable property**

- The charge must be created against an immovable property which can be a current or future property belonging to the borrower.

It is nothing but a device to create security which can be enforceable in court. [4] To create charge against immovable property, it is necessary that it should be in written form. [5] The most essential thing to be kept in mind is that there must be a clear intention to use the property as a security for the payment of the money.

- A charge cannot be created if the immovable property is not owned by the person from whom the payment is due.

**For example-** A wife sought for the creation of a charge on house property in a maintenance suit. The court held that since the property was neither constructed nor owned by the husband, no charge can be created against such property. [7]

**Does not amount to a Mortgage**

1. A charge is not a mortgage as there is no transfer of property nor any right is transferred but a personal obligation is created or a right to payment out of a specified property is generated.
2. It has been specifically mentioned in section 100 that a charge doesn't amount to mortgage, although all the provisions which apply to a simple mortgage shall also be

applicable to charge. In simple mortgagee, the mortgagor is not required to give the possession of his property to the mortgagee. Under a mutual agreement, it is decided that if the mortgagee fails to pay the money within the prescribed time period, then the property can be sold as per the law. There is a transfer of an interest in the property in a simple mortgage, but there is no such transfer in a charge. Despite this difference, the section says that "The provision hereinbefore contained which apply to a simple mortgage shall, so far may be, apply to charge."

3. A charge is a wider term as it also includes a mortgage i.e. every mortgage is a charge but not every charge is a mortgage.

**The Calcutta High Court held that:**

"If an instrument is expressly stated to be a mortgage and gives the power of realization of the mortgage money by the sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge."

**The charge created by an act of parties**

- The parties themselves create a charge by entering into an agreement. No particular form of words or language is required to create a charge.

It will be sufficient to create a charge if it can be seen from the document that there is a clear intention to use the property as a security for the payment of the money, without transferring any interest or right in the property.

The remedy of the holder of the charge is against the property charged only.

**For example-** A inherited a property from his grandmother. He receives a certain amount of rent from that property. Now on his own volition, he executed an agreement to pay a certain portion of the rent to B. B will have a charge over the said property.

In the said transaction A doesn't owe any money to B nor does B have any right over the rent accruing from that property. But by entering into an agreement for payment of some amount to B, A by his own act has created a charge over the property which can be duly enforceable by B if A fails on his part.

**Charges arising by operation of law**

- A charge can also be created by the operation of law. It means the charge is created without the will or intention of the parties, but the law enforces them to comply with certain obligations.

**For example-** B made full payment of purchase money to A in advance. But A is neither transferring the property nor registering it in the name of B. A charge will be created by the operation of law over the said property in favour of B.

**Exception**

Section 100 provides two exceptions under which no charge can be created. They are as follows:

1. The charge which is created on an immovable property which is also a trust property in favour of a trustee for incurring expenses in the execution of his trust i.e. maintaining the trust property.

**For example**- A and B entered into an agreement for the transfer of a property with a condition that B will maintain A's grandson C, from the rent occurring out of the said property until C turns 18. The expenses incurred by B will be a charge upon the trust property, but this charge cannot be enforced by selling the said property as it would lead to the destruction of the trust which is prohibited under Section 32 of Trust Act.

B can only be reimbursed from the income coming out of such property and can stop any further disposition of the property until his expenses are paid.

**2)** A property upon which a charge had been created is brought by a person in consideration without having any notice of the said charge, then such charge cannot be enforced against him.

**Types of Charge**

1. Fixed Charge
2. The charge is created over ascertainable assets i.e. land, building, machinery, goodwill, copyright etc.
3. At the time of the creation of the charge, there is a clearly specified and defined property, the identity of which doesn't change during the period of the loan.
4. In such an arrangement, the borrower is only left with the possession of the asset and the lender has full control over the asset.
5. The borrower doesn't have the right to sell, transfer or dispose of and prior permission is required.
6. There is an obligation to pay off the due amount first.

**Floating Charge**

- The charge is created over unascertainable assets i.e. assets, vehicles, debtors, etc.
- It is dynamic in nature i.e. the value and quantity fluctuate periodically.
- The borrower has the right to sell, transfer or dispose of and no prior permission is required.
- No obligation to pay off the due amount first.

Crystallization is a process in which the floating charge is converted into a fixed charge. It generally occurs when:

- The borrower defaults on payment and the lender takes action to recover the debt.
- At the time of winding up of the company.
- The company ceases to exist or carry on the business.
- Appointment of a receiver by court.

**Registration of Charges**

Under section 77 of the Companies Act, 2013 every company creating a charge shall register the particulars of charge signed by the company and its charge-holder together with the instruments created.

Therefore all types of charges are required to be registered in accordance with the Act, whether created within or outside India.

A company must file with the Registrar detailed information of the charge, along with the Charge Instrument or its authenticated copy, in respect of certain charges, within 30 days of the creation of a charge. If it is not filed, it shall be void as against the liquidator and any other creditor of the company. This does not, however, mean that the charge is altogether void and the debt is not recoverable. So long as the company does not go into liquidation, the charge is good and maybe enforced.

**Condonation of Delay**

If the registrar is satisfied that the company had sufficient reason for not filing the details and instrument of charge within 30 days of the formation of such charge, then it can allow for such registration after 30 days but within 300 days after the creation of the charge. The request for extension shall be submitted in Form No. CHG-10 and shall be accompanied by a statement from the corporation signed by the secretary or director claiming that owing to such late filing, the rights of the intervening creditors of the company shall have no adverse impact. If the corporation fails to file the charge even during this three-hundred-day span, it may ask the Central Government to prolong the duration in compliance with Secti**on 87.**

**Conclusion**

Hence, every mortgage is a charge but not every charge is a mortgage. A charge is an interest created over an immovable property for securing payment of the amount which is due to the party. The property is not transferred to the lender and only interest is created. It is neither a lien nor a mortgage but some properties of both are present in a charge.