

CHARGE

Meaning of Charge

According to Section 100 of TOPA, where immovable property of one person is by the 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.

Thus according to the definition, a charge comes into existence either by the act of parties or by operation of law.

S No.	Mortgage	Charge
1.	A mortgage is created by the act of the parties.	A charge may be created either through the act of parties or by operation of law.
2.	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.
3.	A mortgage is for a fixed term.	The charge may be in perpetuity.
4.	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.
5.	A mortgage is good against subsequent transferees.	A charge is good against subsequent transferees with notice.
6.	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 (by the act of parties), there may be a personal remedy.
7.	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

Charge by act of parties: When in a transaction for value, both the parties (debtor and creditor) intend that the property existing or future shall be made available as security for the payment of a debt and that the creditor shall have a present right to have it made available, there is a charge.

Charge by Operation of Law: Charges created by law are those which arise on account of some statutory provisions. They are not created by the voluntary action of parties but arise as a result of some legal obligation.

Definition under Company Laws

According to Section 2(16) of the Companies Act, 2013, 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.

Under Company Laws, charge can be created on movable property as well as immovable property.

Kinds of Charges

A charge on the property of the company as security for debts may be of the following kinds, namely:

- (i) Fixed or specific charge;
- (ii) Floating charge

Fixed or specific charge

A charge is called fixed or specific when it is created to cover assets which are ascertained and definite or are capable of being ascertained and defined, at the time of creating the charge e.g., land, building, or plant and machinery. A fixed charge, therefore, is a security in terms of certain specific property, and the company gives up its right to dispose off that property as unencumbered until the charge is satisfied.

It should be noted that the company can deal with or use such property. The charge holder gets priority over all subsequent transferees except a bona fide transferee for consideration without notice of the earlier charge. In the winding-up of the company, a debenture holder secured by a specific charge will be placed in the highest ranking class of creditors.

Floating charge

A floating charge is not attached to any definite property but covers property of a fluctuating type e.g., stock-in-trade and is thus necessarily equitable. A floating charge is a charge on a class of assets present and future which in the ordinary course of business is changing from time to time. Here, the company is free to deal with the property as it sees fit until the holders of charge take steps to enforce their security.

A floating security is not a future security. It is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder of such charge cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor i.e. the company can deal with them without the concurrence of the mortgagee.

Fixed Charge	Floating Charge
It is made specifically to cover assets which are ascertained and definite or are capable of being ascertained and defined, at the time of creating charge e.g., land, building, or heavy machinery	It is a charge on a class of assets present and future which in the ordinary course of business is changing from time to time. Thus it is made specifically to covers the property of fluctuating nature e.g., stock-in-trade.
Here company loses its right to dispose off that property as unencumbered.	Here the company is free to deal with the property as it sees fit till crystallization of charge.
In the winding-up of the company, a debenture holder secured by a specific charge will be placed in the highest ranking class of creditors.	It is an equitable charge for the time being of a going concern. When the floating charge crystallizes, it becomes fixed and the assets comprised therein are subject to the same restrictions as the fixed charge

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Note:

- If company has created any charge on its property, company may sell the whole of its undertaking if that is one of the objects specified in its MOA.
- Company can create fixed charge subsequent to floating charges over the same property. In such a case the fixed charge holder will have priority over the floating charge holder.

Crystallisation of Floating Charge

Crystallisation of floating charge means conversion of floating charge into fixed charge. A floating charge crystallises and the security becomes fixed in the following cases:

- (a) when the company goes into liquidation;
- (b) when the company ceases to carry on the business;
- (c) when the creditors or the debenture holders take steps to enforce their security e.g. by appointing receiver to take possession of the property charged;
- (d) on the happening of the event specified in the deed.

Case Law

- The debentures created a floating charge. Three months' interest became due but the debenture holders took no steps and so the charge did not crystallize but remained floating. The company then made a mortgage of a specific part of its property. Held, the mortgagee had priority. (Government Stock Investment Co. Ltd. v. Manila Railway Co. Ltd., (1897) A.C. 81)

Effect of Crystallisation of a Floating Charge

On crystallisation, the floating charge converts itself into a fixed charge on the property of the company. It has priority over any subsequent equitable charge and other unsecured creditors.

Postponement of a floating charge

The creation of a floating charge leaves the company free to create a legal and equitable mortgage on the same property until the floating charge crystallises. Where such a mortgage is created it has priority over the floating charge which gets postponed. The floating charge is postponed in favour of the following persons if they act before the crystallization of the security:

- (a) a landlord who has not received the rent;
- (b) a creditor who obtains an absolute decree from court;
- (c) a judgement creditor who attaches goods of the company and gets them sold (But if the goods are not sold and the debenture holders take action in the meantime, the floating charge has priority);
- (d) the employees of the company, as well as other preferential creditors in the event of winding-up of the company;
- (e) the supplier of goods to the company under a hire-purchase agreement on terms that goods are to remain the property of the seller until they are paid for in full, has priority over the floating charge.

Invalidity of Floating Charge

- According to Section 332, a floating charge which is created within 12 months immediately preceding the commencement of the winding up proceedings of a company shall be invalid, unless it is proved that the company was solvent immediately after the creation of the charge.
 - o But the charge will be valid to the extent of the amount of any cash paid to the company at the time of or after the creation of, and in consideration for the charge, together with interest on that amount at 5% annum or such other rate as may be fixed by the Central Government.

Restraint on the Power to Create Charges with Priority to a Floating Charge

As the floating charge allows wide powers to the company to deal with its property subject to the floating charge, it is common to insert a clause restricting the powers of the company to create charge with priority to or *pari passu* with it. Thus, if the company creates a mortgage in favour of any person who has notice of the floating charge and restriction, such person ranks after the floating charge. But a person who obtains a valid mortgage, and can show either

- (i) that he was not aware of the existence of the floating charge;
- (ii) that though he was aware of the charge, he was not aware of the restriction,

is entitled to priority by virtue of the legal estate.

Furthermore, where a specific charge is created expressly subject to a floating charge, the specific charge is postponed as from the date when the floating charge crystallises by the appointment of a receiver.

Duty to register charges, etc. (Section 77)

read with Companies (Registration of Charges) Rules, 2014

Registration of Charge with ROC within 30 days [Section 77(1) & Rule 3]

It shall be the duty of every company creating a charge

- within or outside India,
- on its property or assets or any of its undertakings, whether tangible or otherwise, and
- situated in or outside India,

to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in

- Form No.CHG-1 (for other than Debentures) or
- Form No.CHG-9 (for debentures)

with the ROC within 30 days of its creation.

What if charge is not registered within 30 days of its creation?

The Registrar may, on an application by the company, allow such registration to be made

- in case of charges created before the commencement of the Companies (Amendment) Ordinance, 2019
 - o within a period of 300 hundred days of such creation, on payment of such additional fees as may be prescribed; or
 - o the registration of the charge shall be made within 6 months from the date of commencement of the Companies (Amendment) Ordinance, 2019, on payment of such additional fees as may be prescribed and different fees may be prescribed for different classes of companies;
- in case of charges created on or after the commencement of the Companies (Amendment) Ordinance, 2019
 - o within a period of 60 days of such creation, on payment of such additional fees as may be prescribed, or
 - o the Registrar may, on an application, allow such registration to be made within a further period of 60 days after payment of such *advalorem* fees as may be prescribed.

The application for belated registration made in Form No.CHG-1 or Form No.CHG-9, as the case may be, shall be supported by a declaration from the company signed by its company secretary or a director that such belated filing shall not adversely affect the rights of any other intervening creditors of the company. [Rule 4]

Thus any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

Registration by Charge holder if company fails to register [Rule 3(3)]

Where the company fails to register the charge in accordance with rule 3(1) and the registration is effected on the application of the charge-holder, such charge-holder shall be entitled to recover from the company the amount of any fees or additional fees or advalorem fees paid by him 'to the Registrar for the purpose of registration of charge.

Verification of instrument evidencing any creation or modification of charge [Rule 3(4)]

A copy of every instrument evidencing any creation or modification of charge and required to be filed with the Registrar in pursuance of Section 77, 78 or 79 shall be verified as follows-

- (a) where the instrument or deed relates solely to the property situated outside India, the copy shall be verified by a certificate issued either
- under the seal of the company, if any, or
 - under the hand of any director or company secretary of the company or
 - under the hand an authorised officer of the charge holder or
 - under the hand of some person other than the company who is interested in the mortgage or charge;
- (b) where the instrument or deed relates, whether wholly or partly, to the property situated in India, the copy shall be verified by a certificate issued
- under the hand of any director or company secretary of the company or
 - under the hand of an authorised officer of the charge holder.

Section 77 shall not apply to such charges as may be prescribed in consultation with the Reserve Bank of India.

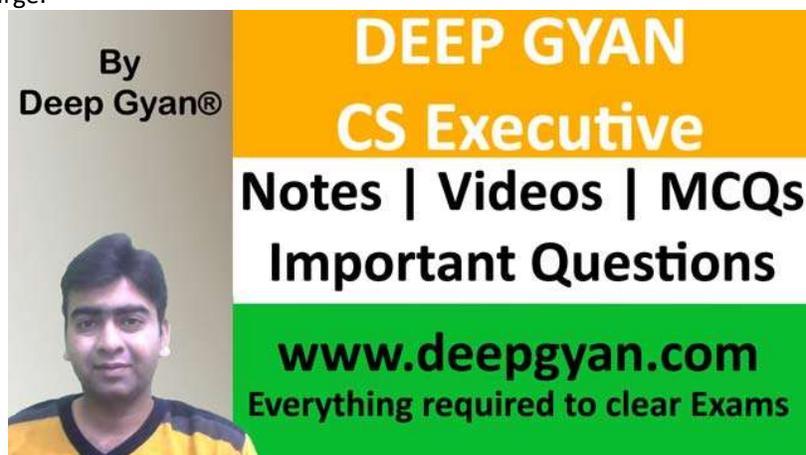
Issuance of certificate of registration of charge by ROC [Section 77(2) & Rule 6(1)/(3)]

Where a charge is registered with the Registrar under sub-section (1), he shall issue a certificate of registration of such charge in CHG-2 and in such manner as may be prescribed to the company and, as the case may be, to the person in whose favour the charge is created.

The certificate issued by the Registrar shall be conclusive evidence that the requirements related to registration of charge under Companies Act, 2013 and the rules made thereunder have been complied with.

Effect of Non-registration of charge [Section 77(3)/(4)]

- No charge created by a company shall be taken into account by the liquidator or any other creditor unless it is duly registered under Section 77(1) and a certificate of registration of such charge is given by the Registrar under Section 77(2).
- But non-registration of charge shall not affect any contract or obligation for the repayment of the money secured by a charge.



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Application for registration of charge by charge holder [Section 78 & Rule 3(3)]

Where a company fails to register the charge within the period of 30 days referred to in sub-section (1) of section 77, the person in whose favour the charge is created may apply to the Registrar for registration of the charge along with the instrument created for the charge, and the Registrar may,

- on such application, within a period of 14 days after giving notice to the company,
 - o unless the company itself registers the charge or shows sufficient cause why such charge should not be registered,

allow such registration on the payment of fee/additional fee according to Section 77(1).

Where registration is effected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company the amount of any fees or additional fees or advalorem fees paid by him to the Registrar for the purpose of registration of charge.

Section 77 to apply in certain matters (Section 79)

The provisions of section 77 relating to registration of charges shall, so far as may be, apply to—

- (a) a company acquiring any property subject to a charge within the meaning of that section; or
- (b) any modification in the terms or conditions or the extent or operation of any charge registered under that section.

As per Rule 6(2), where the particulars of modification of charge is registered under section 79, the Registrar shall issue a certificate of modification of charge in Form No. CHG-3.

Date of notice of charge (Section 80)

Where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.

Register of charges to be kept by Registrar (Section 81 & Rule 7)

- (1) The particulars of charges maintained on the Ministry of Corporate Affairs portal (www.mca.gov.in/MCA21) shall be deemed to be the register of charges for the purposes of Section 81 of the Act.
- (2) The register shall be open to inspection by any person on payment of fee.

Company to report satisfaction of charge [Section 82 & Rule 8]

- (1) A company shall give intimation to the Registrar in CHG-4, of the payment or satisfaction in full of any charge within a period of 30 days from the date of such payment or satisfaction.

Provided that the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of 300 days of such payment or satisfaction on payment of such additional fees as may be prescribed.

- (2) The Registrar shall, on receipt of intimation under sub-section (1), cause a notice to be sent to the holder of the charge calling upon him to show cause within such time not exceeding 14 days, as to why payment or satisfaction in full should not be recorded as intimated to the Registrar, and if no cause is shown, by such holder of the charge, the Registrar shall order that a memorandum of satisfaction shall be entered in the register of charges kept by him under section 81 and shall inform the company that he has done so.

Note:

Notice shall not be required to be sent to charge holder, in case the intimation to the Registrar in this regard is signed by the holder of charge.

- (3) If any cause is shown, the Registrar shall record a note to that effect in the register of charges and shall inform the company.

Satisfaction of Charge [Rule 8]

(1) A company or charge holder shall within a period of 300 days from the date of the payment or satisfaction in full of any charge registered under Chapter VI, give intimation of the same to the Registrar in [Form No.CHG-4](#) along with the fee.

(2) Where the Registrar enters a memorandum of satisfaction of charge in full in pursuance of section 82 or 83, he shall issue a certificate of registration of satisfaction of charge in Form No. **CHG-5**.

Power of Registrar to make entries of satisfaction in absence of intimation from company (Section 83)

- (1) The Registrar may, on evidence being given to his satisfaction with respect to any registered charge,—
- (a) that the debt for which the charge was given has been paid or satisfied in whole or in part;
 - (b) that part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking,
- enter in the register of charges a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking, as the case may be, notwithstanding the fact that no intimation has been received by him from the company.
- (2) The Registrar shall inform the affected parties within 30 days of making the entry in the register of charges kept under sub-section (1) of section 81.

Rectification by Central Government in register of charges (Section 87/Rule 12)

The Central Government on being satisfied that —

- (a) the omission to give intimation to the Registrar of the payment or satisfaction of a charge, within the time required under this Chapter; or
- (b) the omission or misstatement of any particulars, in any filing previously made to the Registrar with respect to any such charge or modification thereof or with respect to any memorandum of satisfaction or other entry made in pursuance of section 82 or section 83,

was

- accidental or
- due to inadvertence or some other sufficient cause or
- it is not of a nature to prejudice the position of creditors or shareholders of the company,

it may,

- on the application of the company or any person interested and on such terms and conditions as it deems just and expedient,

direct that the time for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or misstatement shall be rectified.

The application for condonation under Section 87(1) shall be filed with the Central Government in Form No.CHG-8 along with the fee.

The order passed by the Central Government under sub-section (1) of section 87 of the Act shall be required to be filed with the Registrar in Form No.INC.28 along with the fee as per the conditions stipulated in the said order.

Intimation of appointment of receiver or manager (Section 84 & Rule 9)

(1) If any person

- obtains an order for the appointment of a receiver of, or of a person to manage, the property, subject to a charge, of a company or
- appoints such receiver or person under any power contained in any instrument,

he shall,

- within a period of 30 days from the date of the passing of the order or of the making of the appointment,

give notice of such appointment to the company and the Registrar (in form no. CHG 6) along with a copy of the order or instrument and the Registrar shall, on payment of the prescribed fees, register particulars of the receiver, person or instrument in the register of charges.

(2) Any person appointed under sub-section (1) shall, on ceasing to hold such appointment, give to the company and the Registrar a notice (in form no. CHG 6) to that effect and the Registrar shall register such notice.

Company's register of charges (Section 85 & Rule 10/11)

Every company shall keep at its registered office a register of Charges in Form No. CHG.7 and enter therein particulars of all the charges registered with the Registrar on any of the property, assets or undertaking of the company and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge.

Entries in the register shall be authenticated by a director or the secretary of the company or any other person authorised by the Board for the purpose.

The register of charges shall be preserved permanently and the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge by the company.

Register open for inspection

The register of charges and the instrument of charges kept by the company shall be open for inspection-

- (a) by any member or creditor of the company without fees;
- (b) by any other person on payment of fee.

Punishment for contravention (Section 86)

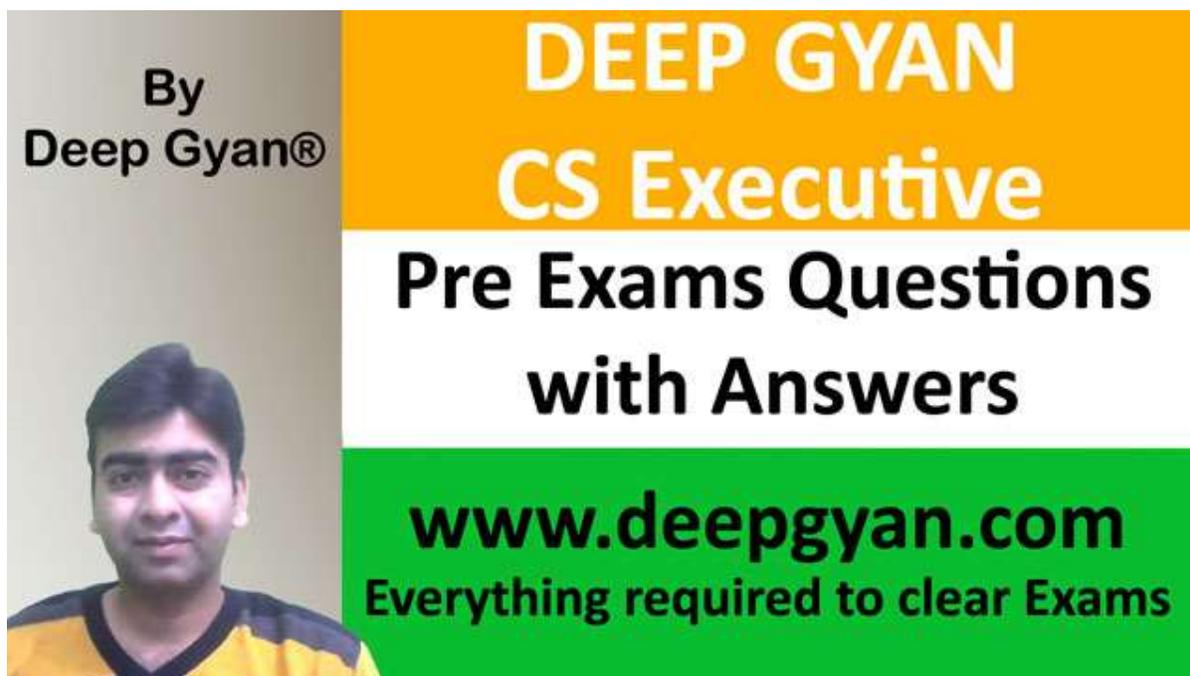
If any company is in default in complying with any of the provisions of this Chapter, the company shall be liable

- to a penalty of five lakh rupees and
- every officer of the company who is in default shall be liable to a penalty of Rs. 50,000.
[Amended by Companies Amendment Act 2020]

If any person wilfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of section 77, he shall be liable for action under section 447

Forms Related to Charge

Application for registration of creation, modification of charge (other than those related to debentures)	CHG – 1
Certificate of registration of such charge	CHG – 2
Certificate of modification of charge	CHG – 3
Particulars for satisfaction of charge thereof	CHG – 4
Certificate of registration of satisfaction of charge	CHG – 5
Notice of appointment or cessation of receiver or manager	CHG – 6
Register of charges to be maintained by Company	CHG – 7
Application to Central Government for extension of time for filing particulars of registration of creation / modification / satisfaction of charge OR for rectification of omission or misstatement of any particular in respect of creation/ modification/ satisfaction of charge	CHG – 8
Application for registration of creation or modification of charge for debentures or rectification of particulars filed in respect of creation or modification of charge for debentures	CHG-9



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