

Charges

100. Charges : Where immovable property of one person is by 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 charge.

COMMENTS

Scope : This section defines a charge. It provides that a charge can be created--

(a) by act of parties, or

(b) by operation of law.

and though immovable property is made a security for the payment of the loan advanced, still the transaction does not amount to a mortgage. Hence the question arises how a charge differs from a mortgage?

Distinction between a charge and a mortgage : A mortgage is distinguishable from a charge in the following particulars :--

- (1) A mortgage is a transfer of an interest in immovable property made by a mortgagor as a security for the loan, whereas a charge is not the transfer of an interest in the property though it is nonetheless a security for the payment of an amount.

- (2) A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties and not by operation of law.
- (3) Under the Transfer of Property Act, Section 59, a mortgage-deed is required to be attested by two witnesses while a charge need not be made in writing, and if reduced to writing, it need not be attested.
- (4) In certain mortgages the mortgagee has the right to foreclose the mortgaged property but in a charge the charge-holder can enforce the charge in the same way as a simple mortgage and, therefore, he cannot foreclose though he can get the property sold.
- (5) When a charge is created by act of parties the specification of the particular fund or property negatives personal liability and the remedy of the holder of the charge is against the property charged only. When there is in addition a personal covenant the security will become collateral to that personal covenant and the security would in that case appear to become a transfer of a right of sale to support the personal covenant, and as the right of sale is a right-*in-rem* the transaction would be a mortgage. For this reason the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage. AIR 1936 Lah. 482.

Distinction between charge and lien : Following is the difference between charge and lien :--

<i>Charge</i>	<i>Lien</i>
1. A charge may be created both by act of parties or by operation of law.	A lien arises only by operation of law.
2. A charge can exist on immovable property only.	A lien can exist on both kinds of properties.
3. A charge-holder can satisfy his claim by selling the property subject to his charge.	A lien-holder satisfies himself by (i) private sale or by (ii) retaining possession of the property.
4. A charge is never possessing in its nature.	A lien is always so.