

TYPES OF CHARGES

MORTGAGE



INVESTOPEDIA

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CREATION OF CHARGE

- **Creation of charge by the borrowers on various kinds of securities/assets means creation of a right in favour of the bank.**
- **By creation of charge, the ownership is not transferred in favour of the creditor. (except in few transaction such as English Mortgage).**

ATTRIBUTES OF GOOD SECURITY

- ◉ **Marketability;**
- ◉ **Ascertain ability;**
- ◉ **Stability of value;**
- ◉ **Storability;**
- ◉ **Transferability;**
- ◉ **Durability.**

KINDS OF CHARGES OVER SECURITIES

Nature of Security	Types of Security	Kind of Charge	Defined in Act	
Immovable Property	Land & Building	Mortgage	Transfer of Property Act (58)	
Actionable claims (i.e. unsecured debts)	Book debts, FDR, NSC, Life Policies	Assignment	Transfer of Property Act (130, 135)	
Movable Property/ Goods	Plant & Machinery, Stocks, Vehicles etc	Pledge or hypothecation or lien as agreed between bank and borrower	Lien	Indian Contract Act (170,171)
			Pledge	Indian Con Act(172)
			Hypothecation	SARFAESI Act -2(n)
Paper Securities	Shares, debentures, mutual fund units, bonds	Lien	Indian Contract Act (170,171)	
Personal guarantee	Promoters and 3 rd party guarantees	Personal liability	Indian Contract Act (126)	

CHARGES

- **Fixed Charge**:- It is created on properties such as Land and Building, Plant & Machinery, whose identity does not change during the period of loan.
- **Floating Charge**:- It is created on assets which undergone change(stock). In floating charge, the security is allowed to be used in the ordinary course of business till the charge crystallizes.
- **Crystallization**:- It means the Floating Charge becomes fixed when the company/firm ceases to be a going concern or upon the commencement of winding up or on the appointment of receiver.
- **1st Charge**:- Where assets are charged to a creditor on first basis, that creditor has the 1st charge.
- **2nd Charge**: Where assets are already charged to a creditor on 1st basis and subsequently the charge is created in favour of another creditor.

PARI PASSU CHARGE

- The term is usually used in case of consortium lending.
- In case of such lending, a number of banks or financial institutions join together to lend to a single borrower in an agreed ratio against some common securities.
- The securities are charge to all the bankers/financial institutions with the condition that they have priority on proportionate basis in the ratio of their loans.
- 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.

HYPOTHECATION

- ❖ As per SARFAESI Act 2002 (Sec 2n), Hypothecation has been defined as a charge in or upon any movable property, existing or future, created by the borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as security for financial assistance and includes floating charge and crystallization of such charges into fixed and movable assets.
- ❖ Hypothecation is an equitable charge, where the borrower is owner and keeps the possession of the security on behalf of the creditor.

PLEDGE

- ◉ U/s 172 of Indian contract act, pledge is bailment (delivery) of goods as security for payment of a loan. Only goods (Sec. 2 (7) of Sales of Goods Act) can be pledged.
- ◉ In pledge, the legal rights are different from hypothecation as the possession of the securities remains with the bank while the ownership remains with the borrower.
- ◉ Delivery of the goods pledged by the pledger to the pledgee is essential for creating a pledge, which may be actual or constructive.

ASSIGNMENT

- ◉ **As per Section 130 & 135 of Transfer of Property Act, assignment is transfer of an actionable claim, which may be existing or future, as a security for loan.**
- ◉ **The transfer of such claim is called the Assignor and the transferee is called Assignee.**

Example: FDR, LIC policy, Future income, Book debt, NSC etc.

LIEN

- ❖ **Lien is the right of one person to retain goods and securities in his possession belonging to another until certain legal debts due to the person retaining the goods are satisfied.**
- ❖ **In other words, it is the right of the creditor to retain the goods and securities in his possession, belonging to a debtor, until the debt due is paid. Lien does not give power of sale but only to retain the property.**

TYPES OF LIEN

- **Particular lien**: Particular lien is that lien which confers the right to retain that particular commodity in respect of which the particular debt arose.
- **General lien**: A general lien confers a right to retain goods and securities not only in respect of a particular debt incurred in connection with them but in respect of the general balance due by the owner of the goods and securities, to the person in possession of them.

TYPES OF LIEN

Banker's lien: As a general rule, the right of lien does not give the person exercising the right, any power or right to sell or dispose of the securities retained. But in case of a bank, it is otherwise. A banker's lien is more than a general lien.

It is an implied pledge and the banker has a right to sell the property after reasonable notice, provide the property comes into his hands in the ordinary course of his business.

BANKER'S LIEN

Section 171 of the contract act lays down that a bankers lien can be applied if:

- The property is in the hands of the banker in the capacity of his customer's bankers;
- the instruments of the money or goods with the banker are not for a specific purpose inconsistent with lien;
- the possession of the instruments has been obtained lawfully as a banker;
- there exists no implied or expressed agreement contrary to the lien.

NEGATIVE LIEN

- ❖ At the time the advance is made, the banker sometimes asks a borrower to execute a letter declaring that his assets are free from any sort of charge or encumbrance.
- ❖ The borrower also undertakes that the assets stated in the said declaration shall not be encumbered or disposed of without a bank's permission in writing so long as the advance continues.
- ❖ This undertaking is known as a Negative lien. Usually the arrangement is drafted in the form of an agreement.
- ❖ The banker cannot directly realize his debts from such assets. However, on account of the above restrictions, the interests of the banker are to a certain extent protected.

MORTGAGE

- ◉ **As per section 58 of Transfer of Property Act 1882, mortgage is transfer of interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.**
- ◉ **The mortgagor only parts with the interest in the property and not the ownership. As regards the possession, except for usufructuary mortgage, the possession remains with the mortgager.**

MORTGAGE

- **As per Sec. 3 of General Clauses Act, Immovable Property includes land, benefit arising out of land and things attached, permanently fastened to earth.**
- **The transferor of interest in property, is called a mortgagor and the transferee is called a mortgagee.**

TYPES OF MORTGAGE

- ❖ **Simple Mortgage;**
- ❖ **Mortgage by conditional sale;**
- ❖ **Usufructuary Mortgage;**
- ❖ **English Mortgage;**
- ❖ **Mortgage by deposit of title deeds (Equitable Mortgage);**
- ❖ **Anomalous Mortgage.**

COMPARATIVE CHART

Kind of charge		Defined (Act)	Definition	Nature of Security	Types of Securities
Mortgage	Simple	58(b) of Transfer of Property Act 1882	Being given separately.	Immovable Property	Land and Building
	Conditional Sale	58(c)			
	Usufructuary	58(d)			
	English	58(e)			
	Equitable	58(f)			
	Anamolous	58(g)			

SIMPLE MORTGAGE - SEC 58(B)

When mortgagor without delivering the possession, bind himself personally to pay the mortgage money and agrees that in the event of his failure to pay the mortgage money, the mortgagee shall have a right to cause the property to be sold.

- Mortgagee can sell the property with court intervention;
- Mortgagee has no right to get any payments out of the rents and produce of the mortgaged property;
- Mortgagor has possession of the property;
- Registration of the mortgage is compulsory;
- Mortgagor is personally liable also.

REGISTERED MORTGAGE

- ❖ In case of Registered Mortgage, charge is created on the property with the Sub-Registrar through a formal, written process as a proof of transfer of interest to the lender as security for the loan.
- ❖ In case of borrower's failure to repay the loan, lender/ bank will have the right to take possession of the property. When the borrower repays the loan to lender/ bank, the title of the property is given back to the borrower.

Registered mortgage is required to be created:

- when original title deed is not available (if it is lost or in case of ancestral property, where title deed is not available).
- Equitable mortgage can be created in notified towns only, if mortgage is required to be created in a town which is not notified, registered mortgage is required to be created.

MORTGAGE BY CONDITIONAL SALE

SEC 58 (C)

- In this, the mortgagor ostensibly sells the mortgaged property on conditions that on default of payment of the mortgage money, the sale shall become absolute or on such payment being made, the sale shall become void or the buyer shall transfer the property to the seller.
- Sale is ostensible and not real.
- If money remains unpaid as per agreement, the sale becomes absolute.
- No personal liability for loan repayment.

USUFRUCTUARY MORTGAGE

SEC 58(D)

- Where the mortgagor delivers the possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from property or any part of such property to appropriate the same in lieu of interest or the mortgage money.
- Mortgage is actual legal possession of the property, till dues is repaid.
- No personal liability.
- Sale is not allowed.
- No time limit specified

ENGLISH MORTGAGE-SEC 58(E)

- Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee, but subject to the condition that mortgagee will re-transfer the property to the mortgagor upon payment of the mortgage money, as agreed.
- Personal liability to pay on a specified date.
- Absolute transfer of the property to the mortgagee, subject to re-conveying (re-transfer) the property if the debt is repaid.

MORTGAGE BY DEPOSIT OF TITLE DEEDS OR EQUITABLE MORTGAGE - SEC 58(F)

- **Most common form of mortgage accepted by banks in India is Equitable Mortgage or Mortgage by deposit of title deeds.**
- **Where a person delivers to a creditor (say bank) or his agent documents of title to immovable property, with the intent to create a security thereon, the transaction is called a mortgage by deposit of title deed or equitable mortgage.**
- ❖ **Deposit at notified centers, (Kolkatta, Chennai, Mumbai and any other town which the State Government concerned may by notification in the Official Gazatte, under the provisions of Sec 58 f of Transfer of Property Act).**
- ❖ **Territorial restriction does not affect the location of the property. i.e. property can be located any where.**
- ❖ **The transaction is not to be reduced to writing;**

MORTGAGE

Anomalous Mortgage : Sec 58(G)

- **A mortgage which is not of any of the above 5 kinds, is an anomalous mortgage.**

Registration of mortgage: Sec 59

- **Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.**

CERSAI

- ◉ **Central Registry of Securitisation Asset Reconstruction and Security Interest (CERSAI) is a central online security interest registry of India.**
- ◉ **It was primarily created to check frauds in lending against equitable mortgages, in which people would take multiple loans on the same asset from different banks.**
- ◉ **A Government company licensed under section 25 of the Companies Act, 1956 having its Registered Office at New Delhi.**
- ◉ **According to the government's directives, financial institutions must register details of security interests created by them with CERSAI within 30 days of its creation.**

REVERSE MORTGAGE

- ◉ A Reverse Mortgage (called a life-time mortgage), is the loan allowed to the sole owner of the house which he doesn't need to pay for the time that the borrower or the co-owner stay there. Instead, the loan is repaid when the borrower/s die, or sells the house, or no longer live there as their primary residence.
- ◉ It essentially converts the home equity into cash, which can be put into varied usages without any requirement to make monthly repayments.

FEATURES OF REVERSE MORTGAGE

- ◉ The borrower/s are not evaluated on the basis of an income criteria to qualify for the loan;
- ◉ The credit history of the borrower/s being not very relevant, is not verified;
- ◉ The amount of loan is determined on the basis of borrower's age, value of the property, rate of interest and lender's norms;
- ◉ No repayment of the loan is required till borrower or any of the co-owner occupies the property;
- ◉ Borrower remains the owner of the property and is liable to pay all property taxes/insurance etc. during the currency of the loan.



Suggestions Comments?

