BLOGS

‘Charge’ under the Transfer of Property Act

Harshita Gulati · 17 Oct 2020

Section 100 states that charge under TPA is where the 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.

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.

It may be that in a particular case, there may not be an actual mortgage of immovable property, in the sense that any interest in the property is transferred to the transferee and yet a person may have a right to recover debt from that property.

A charge need not be in writing. No particular form of words is necessary is that there must be a clear intention to give property as security for payment of money in praesenti.

Requisites of a Charge

- A charge does not contemplate any transfer of an interest in the immovable property.
- The property should be specified and it should be made security for the payment of money. A clear and accurate specification of the property is mandatory for the creation of charge.
- In order to constitute a charge, the form of words is immaterial; it is not necessary to use any technical terms.
- A charge must be created in favour of a particular person specifically named.
- A charge may be created orally, although if it is created by an instrument in writing, it must be registered unless made by a will or unless the amount secured is less than one hundred rupees.

- A charge cannot be created on a future contingency. A charge created by a person on the unknown and uncertain share which one of his heirs may succeed to is invalid as a charge.
- A charge on the future property is valid and operates on such property when it comes into existence
- A charge could be assigned
- A charge cannot ordinarily be split up by apportioning liability amongst various persons.

Charge by Act of parties

A charge by an act of parties can be created by an instrument inter vivos or by will. A will devising immovable properties and directing the devisee to pay certain debts of the testator from these properties creates a charge in them in respect of these debts.

Charge by Operation of Law

Charges by operation of law are based upon the consideration of duty or implied intention on the part of the owner of the property to make it answerable for a specific claim. A charge created by a decree of a competent court is created by operation of law. The creation of charge by operation of a statue does not create an interest in the property.

Enforcement of a Charge

A charge is enforced by sale and if it carries with a personal liability the charge holder is entitled to a personal decree. A person who purchases a portion of a property which is subject to charge with notice of the charge is liable to pay the whole amount.

A charge can be extinguished by an act of parties by a release by the chargee of the debt or security or by novation or by merger.

The distinction between Charge and Lien

- A charge may be created both by an act of parties or by operation of law. A lien arises by operation of law
- A charge can exist on an immovable property only. A lien can exist on both movable and immovable property

- A charge is not possessory in its nature. A lien is possessory in nature
- A charge holder can satisfy his claim by selling the property subject to his charge. A lien holder satisfies himself by private sale or retaining possession of the property.

Doctrine of Merger

A mortgage or a charge can be extinguished by a merger. A merger occurs by the union of a lower and higher security or by the union of a lesser estate and a greater estate. A mortgage effects a division of interest in the mortgaged property as between the mortgagor and the mortgagee. The bundle of interest which remains with the mortgagor is one estate, and the bundle of interest which passes to the mortgagee is another estate.

A merger in respect of a mortgage can arise in three ways

- By the mortgagee acquiring the equity of redemption
- By the mortgagor redeeming the mortgage
- By the purchaser of the equity of redemption redeeming the mortgage.

No Merger in case of Subsequent Encumbrance

Section 101 states that any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

Section 101 abolishes the doctrine of merger in plain terms. In other words, the object of Section 101 is to keep alive a charge. A contract depriving the prior mortgage of his charge upon the property when he becomes its owner under a sale must be a clear one.

A mortgage will be extinguished by merger if there is no interest of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such.

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