

# Lesson 15

## Charges

### LESSON OUTLINE

- Definition and kinds of charge
- Distinction between charge, mortgage and pledge
- Registrable Charges
- Register of Charges
- Duty to register charges
- Verification of Charges
- Procedure for registration of creation/ modification satisfaction charge
- LESSON ROUND UP
- SELF TEST QUESTIONS

### LEARNING OBJECTIVES

A charge is a right created by any person including a company referred to as “the borrower” on its assets and properties, present and future, in favour of a financial institution or a bank, referred to as “the lender”, which has agreed to extend financial assistance. This lesson will help students understand various procedural aspects relating to creation, registration, modification and satisfaction of charges by the companies under Companies Act, 2013.

## 1. WHAT IS A CHARGE

A charge is a right created by any person including a company referred to as “the borrower” on its assets and properties, present and future, in favour of a financial institution or a bank, referred to as “the lender”, which has agreed to extend financial assistance.

Section 2(16) of the Companies Act, 2014 defines charges so as to mean 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.

The following are the essential features of the charge which are as under:

1. There should be two parties to the transaction, the creator of the charge and the charge holder.
2. The subject-matter of charge, which may be current or future assets and other properties of the borrower.
3. The intention of the borrower to offer one or more of its specific assets or properties as security for repayment of the borrowed money together with payment of interest at the agreed rate should be manifested by an agreement entered into by him in favour of the lender, written or otherwise.

A charge may be fixed or floating depending upon its nature.

### “Charge” as defined in Transfer of Property Act, 1882

According to Section 100 of the Transfer of Property Act, 1882, where an 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 which apply to a simple mortgage shall, so far as may be, apply to such charge.

## 2. WHAT IS A MORTGAGE?

A mortgage is a legal process whereby a person borrows money from another person and secures the repayment of the borrowed money and also the payment of interest at the agreed rate, by creating a right or charge in favour of the lender on his movable and/or immovable property.

### Mortgage as defined in Transfer of Property Act, 1882

According to Section 58 of the Transfer of Property Act, a mortgage is the transfer of an 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.

## 3. CHARGE AND MORTGAGE DISTINGUISHED

There is a clear distinction between a mortgage and a charge, the former being a transfer of an interest in immovable property as a security for the loan whereas the latter is not a transfer, though it is nonetheless a security for the payment of an amount.

A mortgage deed includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, one person transfers, or creates in favour of another, a right over a specified property.

## 4. CHARGE AND PLEDGE DISTINGUISHED

According to the generally accepted definition, a ‘pledge’ is a bailment of personal property as security for some debt or engagement, redeemable on certain terms, and with an implied power of sale on default. It consists of a

delivery of goods by a debtor to his creditor as security for a debt or other obligation, to be held until the debt is repaid along with interest or other obligation of the debtor is discharged, and then to be delivered back to the pledger, the title not being changed during the continuance of the pledge.

Unlike a pledge, a 'charge' is not a transfer of property of one to another. It is a right created in favour of one, referred to as "the lender" in the immovable property of another, referred to as "the borrower", as security for repayment of the loan and payment of interest on the terms and conditions contained in the loan documents evidencing charge.

Both a pledge and a charge are the result of voluntary act of parties. Both create security but the nature of the security is different.

## 5. NEED FOR CREATING A CHARGE ON COMPANY'S ASSETS

Almost all the large and small companies depend upon share capital and borrowed capital for financing their projects. Borrowed capital may consist of funds raised by issuing debentures, which may be secured or unsecured, or by obtaining financial assistance from financial institution or banks.

The financial institutions/banks do not lend their monies unless they are sure that their funds are safe and they would be repaid as per agreed repayment schedule along with payment of interest. In order to secure their loans they resort to creating right in the assets and properties of the borrowing companies, which is known as a charge on assets. This is done by executing loan agreements, hypothecation agreements, mortgage deeds and other similar documents, which the borrowing company is required to execute in favour of the lending institutions/banks etc.

As a matter of convenience and practice, as and when more funds are required by companies, they approach the same institutions/banks or certain new institutions/ banks and offer same assets as security for fresh loans. However, when the same assets are charged for a second and subsequent times, a very important question arises as to priority in respect of the charges in favour of different institutions. This situation is managed by securing consent of the earlier lending institutions to the creation of second and subsequent charges on the same assets. With their consents, the charges of all the lending institutions ranks *pari passu*, i.e. on the same footing.

However, the earlier lending institution may not give its consent to the creation of second charge on the ground that the realisable value of the asset charged in its favour is not adequate to cover its loan and as such it cannot share its right of charge with the lending institutions which seek second and subsequent charges.

The real question which alerts the lending institutions is how to ensure that the assets being offered as security for their proposed loans are not already encumbered.

## 6. DUTY TO REGISTER CHARGE

Primarily, 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 creating. Important points in the Act relating to charge creation:

- Any charge created within or outside India-
- on property or assets or any of the company's undertakings-
- Whether tangible or otherwise, situated in or outside India
- Shall be registered.

Hence all types of charges are required under the Act to be registered whether created within or outside India.

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##### **Time limit for registration of a Charge**

A charge created by a company is required to be registered with the Registrar within thirty days of its creation in such form and on payment of such fees as may be prescribed. According to Companies (**Registration of Charges**) Rules, 2014 e-forms prescribed for the purpose of creating or modifying the charge is **Form No.CHG-1** (for other than Debentures) or **Form No.CHG-9** (for debentures including rectification).

**Condonation of delay by Registrar:** The Registrar may on an application by the company allow registration of charge within three hundred days of creation or modification of charge on payment of additional fee. The Registrar may, on being satisfied that the company had sufficient cause for not filing the particulars and instrument of charge, if any, within a period of thirty days of the date of creation of the charge, allow the registration of the same after thirty days but within a period of three hundred days of the date of such creation of charge or modification of charge on payment of additional fee. The application for delay shall be made in **Form No.CHG-10** and supported by a declaration from the company signed by its secretary or director that such belated filing shall not adversely affect rights of any other intervening creditors of the company.

**Condonation of delay by the Central Government:** If company fails to register the charge even within this period of three hundred days, it may seek extension of time in accordance with Section 87 from the Central Government. The same has been discussed later in this chapter.

Application for registration of charge by the charge-holder

According to Section 78 where a company fails to register the charge within the period specified above, the person in whose favour the charge is created may apply to the Registrar for registration of the charge alongwith the instrument created for the charge in **Form No.CHG-1** or **Form No.CHG-9**, as the case may be, duly signed along with fee. The registrar may, on such application, give notice to the company about such application. The company may either itself register the charge or shows sufficient cause why such charge should not be registered. On failure on part of the company, the Registrar may allow registration of such charge within fourteen days after giving notice to the company. shall allow such registration.

Where registration is affected 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 fee or additional fees paid by him to the Registrar for the purpose of registration of charge.

#### **7. CERTIFICATE OF REGISTRATION OF CHARGE**

Where a charge is registered with the Registrar, Registrar shall issue a certificate of registration of charge in Form No.**CHG-2** and for registration of modification of charge in Form No.**CHG-3** to the company and to the person in whose favour the charge is created.

The certificate issued by the Registrar whether incase of registration of charge or registration of modification, shall be conclusive evidence that the requirements of Chapter VI of the Act(Registartion of Charges) and the rules made thereunder as to registration of creation or modification of charge, as the case may be, have been complied with.

Further the Act provides that no charge created by the company shall be taken into account by the liquidator or any other creditor unless it is duly registered and a certificate of registration is given by the Registrar. However, this does not prejudice any contract or obligation for the repayment of the money secured by a charge.

#### **8. ACQUIRING PROPERTY UNDER CHARGE AND MODIFICATION OF CHARGE**

Section 79 of the Act makes it clear that the requirement of registering the charge shall also apply to a company acquiring any property subject to charge or any modification in terms and conditions of any charge already registered.

It provides that the provisions of Section 77 relating to registration of charge shall 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.

The provisions relating to condonation of delay shall apply, *mutatis mutandis*, to the registration of charge on any property acquired subject to such charge and modification of charge under section 79 of the Act.

## 9. VERIFICATION OF INSTRUMENTS

According to the rules, 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, or under the hand of any director or company secretary of the company or 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 an authorised officer of the charge holder.

## 10. SATISFACTION OF CHARGES

According to section 82 read with the rules, the company shall give intimation to the Registrar of the payment or satisfaction in full of any charge within a period of thirty days from the date of such payment or satisfaction in Form No. **CHG-4** along with the fee. Where the satisfaction of the charge is not filed within thirty days from the date on which such payment of satisfaction, the Registrar shall not register the same unless the delay is condoned by the Central Government, which is later discussed in this chapter.

On receipt of such intimation, the Registrar shall issue a notice to the holder of the charge calling a show cause within such time not exceeding fourteen days, as to why payment or satisfaction in full should not be recorded as intimated to the Registrar. 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 maintained by the registrar under section 81 and shall inform the company. If the cause is shown to the registrar shall record a note to that effect in the register of charges and shall inform the company accordingly.

However the aforesaid notice shall not be sent, in case intimation to the registrar is in specified form and is signed by the holder of charge.

Power of Registrar to Make Entries Of Satisfaction in absence of intimation from the company:

There may be times where a company may fail to send intimation of satisfaction of charge to the Registrar but according to section 83 of the Act, registrar may on receipt of satisfactory evidence of satisfaction register memorandum of satisfaction. The evidences may be –

- (a) The debt for which the charge was given has been paid or satisfied in whole or in part; or
- (b) Part of the property or undertaking charged has been released from the charge;
- (c) Part of the property or undertaking ceased to form part of the company's property or undertaking.

The Registrar may enter in the register of charges a memorandum of satisfaction.

The Registrar shall inform affected parties within thirty days of making the entry in the registrar of charges.

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**Certificate of registration of satisfaction of charge:** 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**.

### 11. NOTICE OF CHARGE

According to 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. The section clarifies that if any person acquires a property, assets or undertaking for which a charge is already registered, it would be deemed that he has complete knowledge of charge from the date the charge is registered.

### 12. REGISTER OF CHARGES MAINTAINED IN ROC'S OFFICE

In accordance with section 81 and the rules the Registrar of Companies shall maintain a register containing particulars of the charges registered in respect of every company. The particulars of charges maintained on the Ministry of Corporate Affairs portal ([www.mca.gov.in/MCA21](http://www.mca.gov.in/MCA21)) shall be deemed to be the register of charges for the purposes of section 81 of the Act.

This charge register shall be open to inspection by any person on payment of fee for each inspection.

### 13. INTIMATION OF APPOINTMENT OF RECEIVER OR MANAGER

Section 84 provides that 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 if any person appoints such receiver or person under any power contained in any instrument, he shall, within a period of thirty 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 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.

Any person so appointed shall, on ceasing to hold such appointment, give to the company and the Registrar a notice to that effect and the Registrar shall register such notice.

The notice of appointment or cessation of a receiver of, or of a person to manage, the property, subject to charge, of a company shall be filed with the Registrar in Form No. **CHG.6** along with fee.

### 14. COMPANY'S REGISTER OF CHARGES

Section 85 provides that every company shall keep at its registered office a register of charges in Form No. **CHG.7** which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case such particulars as may be prescribed.

The entries in the register of charges maintained by the company shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be.

Such register of charges shall contain the 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.

All the 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.

A copy of the instrument creating the charge shall also be kept at the registered office of the company along with the register of charges.

**Inspection of Charges:** The register of charges and instrument of charges shall be kept open for inspection during business hours by members, creditors or any other person subject to reasonable restriction as the company by its article impose. 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.

## 15. RECTIFICATION BY CENTRAL GOVERNMENT IN REGISTER OF CHARGES /CONDONATION OF DELAY(SECTION 87)

The Central Government on being satisfied that –

- (i)
  - a. the omission to file with the Registrar the particulars of any charge created by a company or any charge subject to which any property has been acquired by a company or any modification of such charge; or
  - b. the omission to register any charge within the time required under this Chapter or the omission to give intimation to the Registrar of the payment or the satisfaction of a charge, within the time required under this Chapter; or
  - c. the omission or mis-statement of any particular with respect to any such charge or modification 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; or
- (ii) on any other grounds, it is just and equitable to grant relief, it may on the application of the company or any person interested and on such terms and conditions as it may seem to the Central Government just and expedient, direct that the time for the filing of the particulars or for the registration of the charge or for the giving of intimation of payment or satisfaction shall be extended or, as the case may require, that the omission or mis-statement shall be rectified.

Where the instrument creating or modifying a charge is not filed within a period of three hundred days from the date of its creation (including acquisition of a property subject to a charge) or modification and where the satisfaction of the charge is not filed within thirty days from the date on which such payment of satisfaction, the Registrar shall not register the same unless the delay is condoned by the Central Government.

The section implies that the the Central Government has power to condone delay beyond a period of three hundred days. This section empowers Central Government to condone delay for registration of modification of particulars of any charge and for filing of intimation for satisfaction of charges. Further this section empowers central Government to rectify the omission or mis-statement in register of charges. The application may be filed by the company or any other person interested with the Central Government in Form No.**CHG-8** along with the fee.

Where the Central Government extends the time for the registration of a charge, the order shall not prejudice any rights acquired in respect of the property concerned before the charge is actually registered.

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.

## 16. GIST OF E-FILING UNDER CHARGE MANAGEMENT

S.No.	E-Form	Purpose
1	CHG-1	creating or modifying the charge (for other than Debentures)
2	CHG-2	Certificate of registration
3	CHG-3	Certificate of modification of charge
4	CHG-4	intimation of the satisfaction to the Registrar
5	CHG-5	Memorandum of satisfaction of charge
6	CHG-6	Notice of appointment or cessation of receiver or manager
6	CHG-7	Register of charges
7	CHG-8	Application for condonation of delay shall be filed with the Central Government
8	CHG-9	Creating or modifying the charge in (for debentures including rectification)
9	CHG-10	Application for delay to the registrar

All the fees shall be paid in accordance with Annexure 'B' of Companies (Registration offices and fees) Rules, 2014 issued by the Ministry of Corporate Affairs as a circular dated 01/04/2014 and the same is available at [http://www.mca.gov.in/Ministry/pdf/tableoffee\\_01042014.pdf](http://www.mca.gov.in/Ministry/pdf/tableoffee_01042014.pdf)

## 17. CONSEQUENCES OF NON-REGISTRATION OF CHARGE

According to Section 77 of the Companies Act, 1956, all types of charges created by a company are to be registered by the ROC, where they are non-compliant and are not filed with the Registrar of Companies for registration, it shall be void as against the liquidator and any other creditor of the company. In the case of *ONGC Ltd v. Official Liquidators of Ambica Mills Co Ltd (2006) 132 Comp Cas 606 (Guj)*, the ONGC had not been able to point out whether the so called charge, on the basis of which it was claiming preference as a secured creditor, was registered or not. It was held that in the light of this failure, ONGC could not be treated as a secured creditor in view of specific provisions of section 125 and the statutory requirement under the said section. 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 may be enforced.

**Void against the liquidator** means that the liquidator on winding up of the company can ignore the charge and can treat the concerned creditor as unsecured creditor. The property will be treated as free of charge i.e. the creditor cannot sell the property to recover its dues.

**Void against any creditor** of the company means that if any subsequent charge is created on the same property and the earlier charge is not registered, the earlier charge would have no consequence and the latter charge if registered would enjoy priority. In other words, the latter charge holder can have the property sold in order to recover its money.

Thus, non-filing of particulars of a charge does not invalidate the charge against the company as a going concern. It is void only against the liquidator and the creditors at the time of liquidation. The company itself cannot have a cause of action arising out of non-registration [*Independent Automatic Sales Ltd. vs. Knowles & Foster 1962 32 Com. Cases*].



## 18. PARTICULARS OF CHARGES

The following particulars in respect of each charge are required to be filed with the Registrar:

- (a) date and description of instrument creating charge;
- (b) total amount secured by the charge;
- (c) date of the resolution authorising the creation of the charge; (in case of issue of secured debentures only);
- (d) general description of the property charged;
- (e) a copy of the deed/instrument containing the charge duly certified or if there is no such deed, any other document evidencing the creation of the charge to be enclosed;
- (f) list of the terms and conditions of the loan; and
- (g) name and address of the charge holder.

## 19. PROCEDURE FOR REGISTRATION OF CREATION/ MODIFICATION SATISFACTION OF CHARGE

If a company has passed special resolutions under Section 180(3)(c) of the Companies Act, 2013, authorising its Board of directors to borrow funds for the requirements of the company and under Section 180(1)(a) of the Companies Act, 2013, authorising its Board of directors to create charge on the assets and properties of the company to provide security for repayment of the borrowings in favour of the financial institutions/banks or lenders and in exercise of that authority has signed the loan documents and now proposes to have the charge, created by it registration with the ROC, should follow the procedure detailed below:

1. Where the special resolution is passed as required under section 180 of the Companies Act, 2013, form MGT14 of the Companies (Management and Administration) Rules, 2014 is to be filed with the registrar.
2. According to section 77 of the Companies Act, 2013 every company creating any charge created within or outside India on property or assets or any of the company's undertakings whether tangible or otherwise, situated in or outside India shall have to be registered. For the purpose of creating/ modifying a charge file particulars of the charge with the concerned Registrar of Companies within thirty days of creating the **Form No. CHG-1** (for other than Debentures) or **Form No. CHG-9** (for debentures including rectification), as the case may be.
3. Attach the following documents with e-form No. **CHG-9 / CHG-1**:
  - A certified true copy of every instrument evidencing any creation or modification of charge.
  - In case of joint charge and consortium finance, particulars of other chargeholders.
  - Instrument(s) evidencing creation or modification of charge in case of acquisition of property which is already subject to charge together with the instrument evidencing such acquisitions
3. Payment of fees can be made online in accordance with Annexure 'B' of Companies (Registration offices and fees) Rules, 2014. Electronic payments through internet can be made either by credit card or by internet banking facility.
4. If the particulars of charge cannot be filed within thirty days due to unavoidable reasons, then it may be filed within three hundred days of such creation after payment of such additional fee as prescribed in with Annexure 'B' of Companies (Registration offices and fees) Rules, 2014.
5. Such application for delay to the registrar shall be made in **Form No. CHG-10** and supported by a declaration from the company signed by its secretary or director that such belated filing shall not adversely affect rights of any other intervening creditors of the company.

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6. Verification of every instrument evidencing any creation or modification of charge, 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, or under the hand of any director or company secretary of the company or 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.
7. Verification of every instrument evidencing any creation or modification of charge, 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 an authorised officer of the charge holder.
8. Where a charge is registered with the Registrar obtain a certificate of registration of such charge in Form No. **CHG-2**. Where the particulars of modification of charge is registered the Registrar shall issue a certificate of modification of charge in Form No. **CHG-3**.
9. A company shall within a period of thirty days from the date of the payment or satisfaction in full of any charge registered, give intimation of the same to the Registrar in Form No. **CHG-4** along with the fee as prescribed in with Annexure 'B' of Companies (Registration offices and fees) Rules, 2014.
10. Where the Registrar enters a memorandum of satisfaction of charge in full obtain a certificate of registration of satisfaction of charge in Form No. **CHG-5**
11. Incorporate changes in relation to creation, modification and satisfaction of charge in the register of charges maintained by the company 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. Such register is to be kept at its registered office of the company.
12. All the 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.
13. 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.
14. Where the satisfaction of the charge is not filed with the Registrar within thirty days from the date on such payment of satisfaction, an application for condonation of delay shall be filed with the Central Government in Form No. **CHG-8** along with the fee as prescribed in with Annexure 'B' of Companies (Registration offices and fees) Rules, 2014.
15. Where the instrument creating or modifying a charge is not filed with the Registrar within a period of three hundred days from the date of its creation (including acquisition of a property subject to a charge) or modification an application for condonation of delay shall be filed with the Central Government in Form No. **CHG-8** along with the fee as prescribed in with Annexure 'B' of Companies (Registration offices and fees) Rules, 2014.
16. The order passed by the Central Government 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.
17. For all other matters other than condonation of delay, application shall be made to the Central government in Form No. **CHG-8** along with the fee.

[Specimen of the special resolutions under Section 180(3)(c) and Section 180(1)(a), please see *Annexures I and II* at the end of this Study].

## ANNEXURES

## ANNEXURE I

**Specimen of special resolution under Section 180 (3) (c) authorising the Board to borrow for company's business upto a limit beyond paid up capital and free reserves**

Special resolution

**To consider and, if thought fit, to pass with or without modification(s), the following resolution as Special Resolution:**

“RESOLVED THAT pursuant to the provisions of Section 180(3)(c) and other applicable provisions, if any, of the Companies Act, 2013, and subject to such approval as may be necessary, consent of the company be and is hereby accorded to the Board of directors of the company for borrowing, from time to time, such sum of money as may not exceed Rs. .... (Rupees .....), for the purpose of the business of the company, notwithstanding that the moneys to be borrowed together with the monies already borrowed (apart from temporary loans obtained from the company's bankers in the ordinary course of business) will exceed the aggregate of the paid-up capital of the company and its free reserves, that is to say, the reserves not set apart for any specific purpose, provided that the total amount upto which the monies may be borrowed by the Board of directors of the company shall not exceed the aggregate of the paid-up capital and free reserves of the company by more than the sum of ‘ ..... (Rupees ..... ) at any one time.

Resolved further that the Board be and is hereby authorized to do all the acts, deed and things as it may in its absolute discretion deem necessary and appropriate to give effect to the above resolution”

**Explanatory Statement**

The shareholders of the company had, at the extraordinary general meeting of the company held on

....., passed a special resolution under Section 180 (3) (c) for borrowing the maximum amount of Rupees ....., upto which the Board of directors of the company could borrow funds from financial institutions and banks in excess of the company's paid-up capital and free reserves. However, in view of the increased business activities of the company, the said ceiling of Rupees (.....) has been found to be inadequate. Your directors are of the opinion that the ceiling of borrowings by the Board be raised to rupees one hundred crore.

Hence the proposed resolution for consideration and approval by the members of the company. None of the directors is concerned or interested in the proposed resolution.

## ANNEXURE II

**Specimen of resolution under Section 180(1)(a) for creating charge on company's assets and properties**

1. To consider and, if thought fit, to pass with or without modification(s), the following as Special Resolution;

“RESOLVED THAT consent of the Company be and is hereby accorded in terms of Section 180(1) (a) and other applicable provisions, if any, of the Companies Act 2013 or any modification or re-enactment thereof, to mortgaging and/or charging by the Board of directors of the Company by way of equitable and/or legal mortgage on such immovable and movable properties of the Company, both present and future, together with power to takeover the assets of the Company in certain events, to or in favour of Industrial Development Bank of India (IDBI) and The Industrial Finance Corporation of India Ltd. (IFCI) by way of first *pari passu* Charge to secure the Rupee Term Loans of ` 1000.00 lacs and ` 880.00 lacs respectively granted to the Company together with interest at the agreed rate(s), liquidated damages, front end fees, premia on pre payment, costs, charges, expenses and all other moneys payable by the Company under the Loan

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Agreements, Deeds of Hypothecation and other documents executed/to be executed by the Company in respect of the Term Loans of IDBI and IFCI.

RESOLVED FURTHER THAT the Board of directors be and is hereby authorised and shall always be deemed to have been authorised to finalise with IDBI and IFCI the documents for creating the aforesaid mortgage and/ or charge and to do all acts, deeds and things as may be necessary for giving effect to the above resolution.”

2. To consider and, if thought fit, to pass with or without modification(s), the following as Special Resolution;

“RESOLVED THAT consent of the Company be and is hereby accorded in terms of Section 180(1)(a) and other applicable provisions, if any, of the Companies Act 2013 or any modification or re-enactment thereof, to mortgaging and/or charging by the Board of directors of the Company by way of equitable and/or legal mortgage on such immovable and movable properties of the Company, both present and future, in favour of State Bank of India, New Delhi the Company’s Bankers by way of Second Charge to secure the various fund based/non-fund based credit facilities granted/to be granted to the Company and the interest at the agreed rate, costs, charges, expenses and all other moneys payable by the Company under the Deed(s) of Hypothecation and other documents executed/to be executed by the Company in respect of credit facilities of State Bank of India, in such form and manner as may be acceptable to State Bank of India.

RESOLVED FURTHER THAT the Board of directors be and is hereby authorised and shall always be deemed to have been authorised to finalise with State Bank of India the documents for creating the aforesaid mortgage and/or charge and to do all acts, deeds and things as may be necessary for giving effect to the above resolution.”

### **Explanatory Statement Item No. 1 & 2**

Industrial Development Bank of India (IDBI) and The Industrial Finance Corporation of India Ltd. (IFC) have sanctioned Term Loans of ‘ 1000.00 lacs and ‘ 880.00 lacs respectively to the company. These loans are to be secured by First Charge on immovable and movable properties of the Company, both present and future, in the manner, as may be required by IDBI and IFCI. Such mortgage/charge shall rank first *pari passu* Charge with the Charges already created/to be created in favour of the participating Institutions/Banks for their assistances.

State Bank of India, New Delhi has also agreed to grant, in principle, various fund based/non-fund based Cash Credit facilities to the Company. According to the conditions of granting such facilities to the Company, these facilities are required to be secured by a second charge by way of equitable and/or legal mortgage on all the immovable and movable properties of the Company, both present and future on such terms as may be agreed to between the Company, State Bank of India and other existing lenders.

Section 180(1)(a) of the Companies Act, 2013 provides, *inter alia*, that the Board of directors of a public company shall not, without the consent of a public company in general meeting, sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking(s) of the Company or where the Company owns more than one undertaking, of the whole or substantially the whole of any such undertaking. Mortgaging/charging of the immovable and movable properties of the Company as aforesaid to secure Rupee Term Loans and the various Cash Credit facilities may be regarded as disposal of the whole or substantially the whole of the said undertaking(s) of the Company and therefore requires consent of the Company pursuant to Section 180(1)(a) of the Companies Act, 2013.

The Directors recommend the resolutions for approval of the shareholders as ordinary resolutions under Section 180(1)(a) of the Companies Act, 2013.

None of the Directors are concerned or interested in the proposed resolutions.

**Specimen of the Board Resolution under Section 179(3)(d) to borrow Moneys within  
the Authority of the Board.**

The Chairman informed the Board that The Industrial Finance Corporation of India Ltd. (IFCI), New Delhi, has at the request of the company, sanctioned Rupee Term Loan of '..... to meet a part of the cost of Modernisation-cum-Expansion scheme comprising replacement of the existing old stainless steel Distillation plant by copper Distillation Plant, installation of an additional MS Digester and construction of storage lagoons as stipulated by the Pollution Control Board at the Company's existing factory at .....

A copy of the letter of sanction no..... dated ..... received from IFCI (a copy whereof duly signed by the Chairman for the purpose of identification was placed on the table of the meeting).

After some discussions, the following resolution was passed unanimously:-

(I) RESOLVED

1. That the Company do accept the offer of The Industrial Finance Corporation of India Ltd. (IFCI) vide their letter no..... dated ..... to grant to the company rupee term loan of '..... (Rupees..... only) (hereinafter referred to as 'the said Term Loan') on the terms and conditions contained in the Letter of Intent no ..... dated ..... received from IFCI (copy whereof was placed on the table at the meeting).
2. That Shri..... and Shri ..... be and are hereby authorised severally to convey to IFCI acceptance on behalf of the Company of the said offer for financial assistance on the terms and conditions contained in their Letter of Intent referred to above and agree to such changes and modifications in the said terms and conditions as may be suggested and acceptable to IFCI from time to time and to execute such deeds, documents and other writings as may be necessary or required for this purpose.
3. That the company do borrow from IFCI the said term loan of '..... (Rupees..... only) on the terms and conditions set out in the General Conditions No. GC-1-99 applicable to assistance provided by IFCI (hereinafter referred to as 'The General Conditions') and in the Standard Form of Loan Agreement for rupee term loan in addition to the special terms and conditions mentioned in the Letter of Intent no..... dated ..... received from IFCI (Copies whereof were placed on the table at the meeting) and also avail of interim disbursement(s) from time to time as may be allowed by IFCI.
4. That the IFCI will be at liberty to appoint and remove, at its sole discretion, Nominee Director(s) on the Board of directors of the Company from the date of the passing of this resolution and that the appointment of the Nominee director(s) shall not be construed as any commitment on the part of IFCI to grant/ disburse and sanctioned assistance.
5. That the aforesaid Standard Forms of Loan Agreement(s) be and are hereby approved and Shri..... and Shri..... be and are hereby severally authorised to accept on behalf of the Company such modifications therein as may be acceptable to IFCI and finalise the same.
6. That the Common Seal of the Company be affixed to the stamped engrossment(s) in duplicate of the loan agreement(s) (as per the standard form(s) with such modifications as may be agreed to between IFCI and the company) in the presence of one of the officers i.e. Shri ..... and Shri ..... who shall sign the same in token thereof.
7. That the Company shall execute the Loan Agreement(s) relating to the above facilities within the period stipulated by IFCI, the condition being that till such agreement being executed there is no binding obligation or commitment on the part of IFCI to advance any money or incur any obligation thereunder.

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8. That the standard forms of the following documents namely:-
  - (i) Deed of Hypothecation
  - (ii) Undertaking for meeting shortfall/overrun
  - (iii) Undertaking regarding non-disposal of shareholdings
  - (iv) General Declaration and Undertaking(s) placed before the meeting be and are hereby approved and that Shri..... of the Company be and are hereby severally authorised to finalise, on behalf of the company, the said documents and also to approve and finalise such other deeds, documents and writings as may be required by IFCI in connection with the above facilities.
9. That the Common Seal of the Company be affixed to the stamped engrossment(s) of the Deed of Hypothecation and to such other documents as may be required to be executed under the Common Seal of the company in favour of IFCI to secure the aforesaid facilities in the presence of one of the officers i.e. Shri ..... and Shri..... who shall sign the same in token thereof.
10. That Shri..... and Shri..... of the Company be and are hereby severally authorised to accept amendments to such executed loan agreement/deed of hypothecation and other documents as and when become necessary and to sign letter(s) of undertakings, declarations, agreements and other papers which the company may be required to sign for availing of the required facilities and, if so required, the Common Seal of the Company be affixed thereto in the presence of any one of the said officers, who shall sign the same in token thereof as required by the Articles of Association of the Company.
11. That the company do file the particulars of the charge(s) to be created in favour of the IFCI with the concerned Registrar of Companies within the time prescribed by law therefor.
12. That the copies of foregoing resolutions certified to be true copy by the Company Secretary be furnished to the IFCI and they be requested to act thereon.

### LESSON ROUND-UP

- A charge is a right created by any person including a company referred to as “the borrower” on its assets and properties, present and future, in favour of a financial institution or a bank, referred to as “the lender”, which has agreed to extend financial assistance. The power of the company to borrow includes the power to give security also.
- Mortgage is created by the act of parties whereas a charge may be created either through the act of parties or by operation of law.
- A company is required to file e-form CHG-1 or CHG-2 through MCA portal giving complete particulars together with the instrument creating charge within 30 days of creation of charge under Section 77 of the Companies Act, 2013.
- For intimating modification of charge, e-form CHG-1 or CHG-2 is required to be filed within 30 days of modification. A variation in the rate of interest payable on the loan amount by the borrowing company to the lending institution or the bank will constitute a modification of charge, unless the terms of variation are covered in the original charge.
- A registration of charge constitutes a notice to whosoever acquires a future interest in the charged assets.

- In e-governance era, there is a facility for inspection of charge through electronic means using internet.
- The certificate issued by the Registrar whether in case of registration of charge or registration of modification, shall be conclusive evidence that the requirements of Chapter VI of the Act (Registration of Charges) and the rules made thereunder as to registration of creation or modification of charge, as the case may be, have been complied with.
- Every company is required to keep at its registered office a register of all charges as well as a copy of every instrument creating any charge.
- Company may apply to Central Government for extension of time for filing particulars to ROC for creation, modification or satisfaction of charge in form CHG-8.
- Company or any person interested in the charge can make an application to the Central Government for rectification of Register of charges in form CHG-8.
- For intimating memorandum of satisfaction of charge to ROC, e-form CHG-5 is required to be filed within 30 days from the date of such satisfaction.

### SELF-TEST QUESTIONS

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation).

1. What is a charge? State the procedure to be followed by a company for registration of a charge.
2. Draft a resolution to borrow for company's business upto a limit beyond paid-up capital and free reserves.
3. State the procedure to be adopted by the company for satisfaction of a registered charge.
4. Draft resolution for creating a charge on the company's assets and properties.
5. What are the consequences of non registration of charge?
6. Distinguish between:
  - (i) Charge and Mortgage
  - (ii) Charge and Pledge.
7. E-governance is stakeholders friendly with respect to charges. Comment.