

# **Rajput Jain & Associates**

## **Chartered Accountant**

**A Guide to Registration  
of Charge under the  
Companies Act, 2013**

**New Delhi / Varanasi / Mumbai / Faridkot /  
Noida**

## **INTRODUCTION**

Section 2(16) of the Companies Act, 2013 (“the Act”) defines ‘charge’ 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 present definition in the Act is a “means” definition and hence an exhaustive as to cover encumbrances on the assets or property or undertaking of a company offered by way of security against any borrowing undertaken and also includes a mortgage.

## **LEGISLATIVE BACKGROUND**

Initially, the only method available to Corporates to raise money for large scale projects was by issue of equity or preference which constitutes the company’s share capital. As capital requirements became more pressing, alternative modes of raising funds by way of loans were explored and the concept of capital loan came into being.

Corporate Borrowing has its own peculiarities and challenges. No single Individual may be in a position to meet the loan requirement. Loan-money is, therefore, to be raised from a large number of persons very much in the same way as Share Capital.

Where the company goes in for multiple loans, the same assets are charged to several lenders and also to several lenders in a series. That raises a question who shall have priority. This brought about the application of the concept of pari-passu ranking.

Since other trade creditors have also to seek payment only out of company assets, the problem tackled as to how they should know, before supplying more credit, what assets would be available as security for their payment?

The Companies Act, 2013 (and before that, the Companies Act, 1956) prescribes registration of charge with ROC. Section 77 requires the registration of all the charges. Registration of Charge identifies the assets which are subject to the Charge.

## **REGISTRATION UNDER DIFFERENT LAWS**

### ➤ Registration under the Companies Act, 2013:

Clearly, the provision will apply only where the borrower is a company. The MCA Registry is concerned repository.

The primary obligation for registration is on the borrower. However, the chargeholder may also file registration of charges in its favour.

➤ Registration under SARFAESI Act, 2002:

The SARFAESI Act, 2002 enacts provision for enforcement of security interest by secured creditors. A central registry formed under the provision of Section 20, is called CERSAI. The registry has been created for the purpose of registration of transaction of securitization and reconstruction of financial assets and creation of security interest under the said Act.

It is also important to note that the SARFAESI Act, 2002 clearly states that the provisions relating to the central registry are in addition to those relating to registration under the Companies Act.

➤ Registration of Information with Information Utility under IBC:

The IUs also get the information authenticated by other parties connected to the debt and store the same and provide access to such information to concerned stakeholders. Registration of information with IUs, however, has no impact either on the validity or priority of security interest.

## CREATION OF CHARGE

### Governing Provision:

- Section 77 of the Companies Act, 2013
- The Companies (Registration of Charge) Rules, 2014 (“the Rules”)

### Section 77 of the Companies Act, 2013

#### Section 77(1):

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 such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation:

**1<sup>st</sup> Proviso:** Provided that the Registrar may, on an application by the company, allow such registration to be made:

(a) in case of charges created before the commencement of the Companies (Amendment) Ordinance, 2019, within a period of 300 days of such creation; or	(b) in case of charges created on or after the commencement of the Companies (Amendment) Ordinance, 2019, within a period of 60 days of such creation, on payment of such additional fees as may be prescribed:
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**2<sup>nd</sup> Proviso:** Provided further that if the registration is not made within the period specified:

(a) <u>in clause (a) to the first proviso</u> , 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;	(b) <u>in clause (b) to the first proviso</u> , 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.
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**Observations by Author:**

**1. Applicability of Section 77 of the Act:**

*The provisions applies to a company – and therefore covers all companies incorporated under the 2013 Act or under any previous company law.*

*It is important to note that Section 77 is also applicable to foreign companies by virtue of Section 384(4) of the 2013 Act which makes all sections of this chapter applicable to foreign companies which create or acquire charges on properties.*

**2. Obligations to Create a Charge**

*The Obligation is on the entity which creates a charge on its property or assets or any of its undertakings.*

*In case of third party Securities, where charge is created by a third party in favour of creditor for loan taken by the borrower, it is the obligation of the entity creating the charge to register the charge.*

**3. The charge may be created within or outside India.**

**4. Assets or Properties:**

*The assets or properties, belonging to the Company, may be situated in or outside India. The duty is not limited to mere creation of charge, if a company acquires a property subject to charge, the same also amounts to a registrable charge.*

**5. Form and Manner of Registration**

*As per Rule 3, Form for creation of charge is Form CHG-1 (other than debenture) or Form CHG-9 (debentures).*

*For registration of charge as provided in sub-section (1) of section 77, the particulars of the charge together with a copy of the instrument, if any, creating the charge duly signed by the company and the charge holder shall be filed with the Registrar within a period of thirty days of the date of creation of charge along with the fee.*

## **6. Verification of Copy of Instrument Evidencing Creation of Charge**

Rule 3 makes provision for verification of copy of instrument evidencing creation/modification of charge 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:

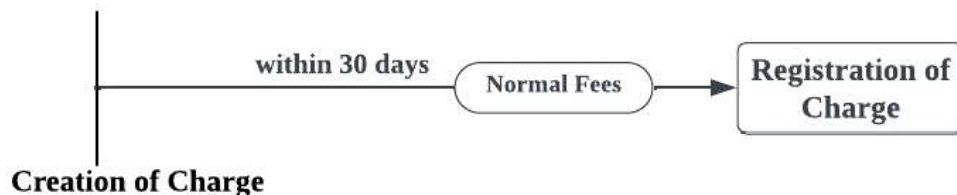
- (a) under the seal, if any, of the company, or
- (b) under the hand of any Director, or
- (c) under the hand of CS, or
- (d) under the hand of an Authorised Officer of the Charge holder, or
- (e) under the hand of some person other than the company who is interested in the mortgage or charge;

(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:

- (a) under the hand of any Director, or
- (b) under the hand of CS, or
- (c) under the hand of an Authorised Officer of the Charge holder, or

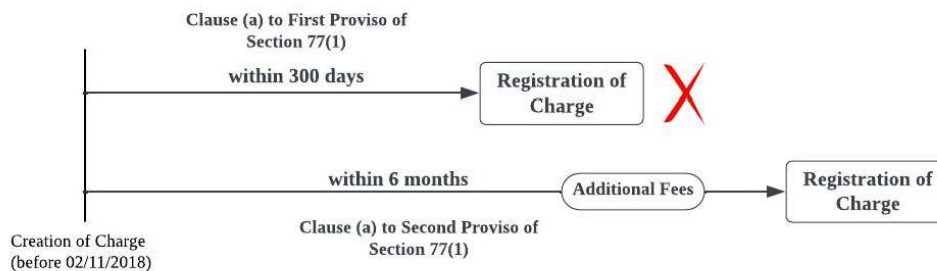
## **7. Time-Limit for Registration of Charge**

A charge is to be registered within 30 days of its creation.

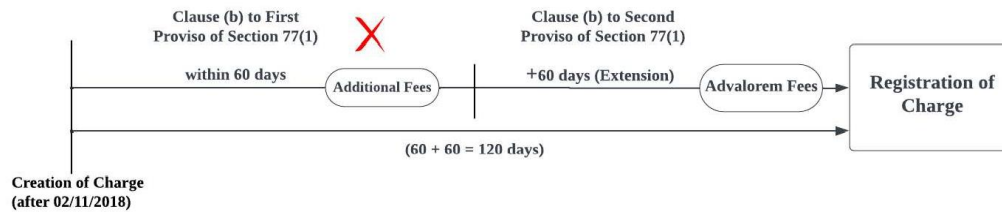


***Extension may be allowed by the Registrar, on application by the Company. The time limits have been prescribed in the first and second provisos to Section 77(1).***

**Situation 1: Charge Created before the commencement of Companies (Amendment) Ordinance, 2019**



Situation 2: Charge Created after the commencement of Companies (Amendment) Ordinance, 2019



***If the Company fails to register the charge even within the extended timelines (i.e., 120 days): Whether it is possible to get the delay condoned by the Central Government?***

*Section 87 of the CA, 2013 empowers the CG to condone delays and allows rectification of the register of charges in terms of the said section read with Rule 12 of Companies (Registration of Charges) Rules, 2014.*

*Section 87 has undergone amendment vide the 2019 amendment. Section 87 can only be applied for condonation of delay in case of 'satisfaction', but not the registration of creation or modification of charges.*

*The amendment in Section 87 has been made in view of the recommendations made by the Committee in 2018 Report.*

***Report of the Committee to Review of Offences under the CA, 13 [Report, 2018]:***

*The Committee recommended as follows:*

4.2 The present provisions allow a reasonably long period of time for reporting creation or modification of charges. In fact, under section 87, no upper limit is prescribed for condonation of delay for registration and modification of charges. Such a provision has been seen to be breeding laxity on the part of the companies as well the creditors in timely reporting. There is no doubt that a delayed reporting may have an adverse effect on the interest of shareholders and secured creditors at the time of winding up. Therefore it is necessary to make the companies more vigilant in this regard and ensure that charges are reported in a timely manner.

4.3 The Committee recommends that this period of 300 days for creation and modification of charge under section 77 be reduced to 60 days, i.e. 30 days of normal filing period and 30 days with additional fees. The provision of seeking extension of time under section 87 as per the second proviso to section 77(1), is also required to be modified, whereby a prohibitive ad valorem fees based on the amount of charge be levied for creation/modification of charge beyond 60 days but within 120 days. After 120 days the creation/modification of charge would not be registered.

4.4 The Committee also recommends that sub-clause (a) and sub-clause (b) of clause (i) of sub-section (1) to section 87 which deals with extension of time in respect of registration and modification of charge be omitted. Clause (ii) of sub-section (1) to

section 87, which deals with 'just and equitable' ground for registration of charge, is also required to be omitted. Therefore the section 87, dealing with rectification of charge should remain applicable only in cases of rectification of mis-statement/omission in an existing charge or for extension of time in case of satisfaction of charge. Wilful suppression with respect of reporting creation/modification of charges should attract the provision of Section 447.

*It is clear from a perusal of Report 2018 as well as the amendment made in Section 77 and Section 87, that the intention of the legislature was to ensure timelines in registration of charges, as delayed reporting may adversely impact the shareholders and secured creditor at the time of winding up.*

*Therefore, it might not be possible to take recourse to the generic provision of Section 460 of the 2013 Act, which provide for condonation of Delay by the CG.*

**3rd Proviso to Section 77(1):** Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

**Observation:**

**Priorities based on Creation of Charge Vs. Priorities based on the Date of filing.**

*'Subsequent' should appropriately be referring to "subsequent creation or acquisition of any right in respect of the property. That is to say, unaware of a charge pending registration during the normal time allowed for registration, if a person acquires an interest on the property which is subject of such charge, that person's right shall not be prejudiced.*

For example:

- ABC Ltd. has created a Charge on an Asset on 1st April in favour of Creditor M. ABC Ltd. waits to file a particular of charge for the 30-day ordinary filing period.
- In this meantime, Another Creditor N, find the asset free of charge and acquire encumbrance over the same and file the charge immediately on 10th April.
- M files a charge on 29th April, Will N has priority over M?

*In that case, N has priority over M.*

*It is important to note Rule 4 which requires that, where the Company makes an application to Registrar for delayed registration of Charge, the application 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.*

*(This seems to be referring to a case of belated registration, and not the charges/interests created during the invisibility period.)*

*So, we can say that India is moving to the filing-based system of priorities by Insertion of 3rd proviso.*

### **Section 77(2): Certificate of Charge**

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

*As per Rule 6, the Certificate is issued in Form CHG-2.*

*According to Rule 6(3), The certificate issued by the Registrar under sub-rule (1) and sub-rule (2) shall be conclusive evidence that the requirements of Chapter VI of the Act 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 registration acts as a notice to the public at large regarding the interest of chargeholder in the charged property. Therefore, a third party will be entitled to the property, however, subject to the interest of the chargeholder.*

### **Section 77(3): Effects of non-registration of Charge**

Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be, or **any other creditor** unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).

#### **Observation:**

- *The effect of this provision is not cancellation of debt, rather it only renders the charge void.*
- *So, the Creditor in whose favour charge is created cannot claim secured status before the liquidator or any other creditor.*
- *The provision is applicable in following 2 situations:*
  - (i) *When the company goes into winding-up proceedings*
  - (ii) *All scenarios prior to the winding-up.*

***•In such situation, can the Creditor recourse against the Company for repayment of money?***

*Section 77(4) provides that Nothing in sub-section (3) shall prejudice any contract or obligation for the repayment of the money secured by a charge.*

*As provided in above mentioned provision that non-registration of charge would not suppress any contract or obligation for the repayment of the money secured by a charge. So, the transaction would survive, Creditor can recourse against the Company for repayment of money.*



*Non-registration would not render the transaction void, it only impacts the secured status of Creditor.*

*It is unfair to the Creditor to bear the consequence of Non-Registration of Charge by the Company as it is observed that obligation to register the Charge is on the Company creating the Charge.*

*To remove this discrepancy, Section 78 of the Companies Act, 2013 enables the chargeholder to make application to the Registrar for registration of Charge.*

### **Section 78: Application for Registration of Charge**

Where a company fails to register the charge within the period of thirty days referred to in sub-section (1) of section 77, without prejudice to its liability in respect of any offence under this Chapter, the person in whose favor the charge is created may apply to the Registrar for registration of the charge along with the instrument created for the charge, within such time and in such form and manner as may be prescribed and the Registrar may, on such application, within a period of fourteen days after giving notice to the company, unless the company itself registers the charge or shows sufficient cause why such charge should not be registered, allow such registration on payment of such fees, as may be prescribed:

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

### **Observation**

*Section 78 provides that where a company fails to register a charge within the period of 30 days, then the person in whose favour the charge is created, may apply to the registrar for registration of charge. However, the company would still be liable for non-compliance with Section 77(1), under Section 86 of the Act.*

*Other procedural formalities remains the same for filing the particulars of charge as under Section 77*

### **Recovery of fees from the Company:**

*The proviso to Section 78 of the Act allows for person in whose favour the charge is created to recover the fees paid by such person to Registrar from the Company.*

*Rule 3(3) also provides that such fees include any additional or ad-valorem fees paid by the charge-holder to the Registrar, for the purpose of registration of charge.*

## **MODIFICATION OF CHARGE**

### **Governing Provision:**

- Section 77 of the Companies Act, 2013
- The Companies (Registration of Charge) Rules, 2014 (“the Rules”)

### **Section 79: Section 77 to apply in certain matters.**

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.

*Section 79 provides that the provision of Section 77 of the Act, relating to registration of charges shall also apply in both the cases as mentioned in clause (a) and (b). Therefore, all the formalities pertaining to the registration of charge would apply to the modification as well. As such, rule 3 and rule 4 would apply to such modification/acquisition as well.*

### **Rule 5: Application of Rules in Certain Matters.**

*The provisions of rule 4 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.*

*Rule 5 also clarify that the provision of rule 4 shall apply to Section 79 as well.*

### **Instances of Modification of Charge**

1. *Increase in amount of Loan or credit facility.*
2. *Charge of the same amount of loan by way of additional security on different property.*
3. *Inclusion of different type of loan or credit facility within the overall limit or with additional limit.*
4. *Change in terms relating to the maintenance of margin or in the period of repayment of a loan or any other change in repayment terms.*
5. *Deposit of additional title deeds in respect of the same property.*
6. *Change in any respect relating to the charge as result of change in law.*
7. *Assignment of Charge*
8. *Creation of a second charge in favour of new creditor on the property already charged to another creditor.*

## **MODIFICATION OF CHARGE**

### **Governing Provision:**

- Section 81 & 85 of the Companies Act, 2013
- The Companies (Registration of Charge) Rules, 2014

### **Section 81. Register of Charges to be kept by Registrar**

(1) The Registrar shall, in respect of every company, keep a register containing particulars of the charges registered under this Chapter in such form and in such manner as may be prescribed.

(2) A register kept in pursuance of this section shall be open to inspection by any person on payment of such fees as may be prescribed for each inspection.

### **Observation**

*Section 81 separately provides for maintenance of register of charges by the Registrar with respect to Each company and Section 85 provides for maintenance of register of charge by the Company.*

*Under this current e-filing regime, a physical register of charge is no longer required to be maintained by registrar. The particular of charge filed by a company are registered electronically and a Charge Identification Number is generated and simultaneously entered into the online "Index of Charge" maintained by the registrar, which can be viewed by any person without payment of fees.*

### **Section 85. Company's Register of Charges**

(1) Every company shall keep at its registered office a register of charges in such form and in such manner as may be prescribed, 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:

Provided that 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.

(2) The register of charges and instrument of charges, kept under sub-section (1) shall be open for inspection during business hours—

(a) by any member or creditor without any payment of fees; or

(b) by any other person on payment of such fees as may be prescribed,

subject to such reasonable restrictions as the company may, by its articles, impose.

**Observation**

- *Every Company is required to keep a register of Charge. The register of charge has to be maintained as per Form No. CHG-7 as prescribed by Rule 10(1) by every company and keep at its registered office of the Company. The form requires various particulars to be included as given in Section 85.*
- *It may be noted that Section 120 of the Act is an enabling provision which states that without prejudice to any other provision of the 2013 Act, any any document, record, register, minutes, etc. required to be kept by a company or allowed to be inspected or copies to be given to any person by a company under this Act, may be kept or inspected or copies given, as the case may be, in electronic form in such form and manner as may be prescribed. Also note that the 'books and paper' as defined Section 2(12) include register, etc maintained in physical or electronic mode.*
- *A copy of the instrument creating the charge has also to be kept at the registered office of the Company along with the register.*
- *As noted under Section 77, while an instrument 'creating the charge may not be there, any instrument which records/acknowledges a charge must be kept in a similar manner to that required with respect to instrument creating the charge.*
- *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.*
- *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 8 years from the date of satisfaction of charge by the company.*

**SATISFACTION OF CHARGE****Governing Provision:**

- Section 82 of the Companies Act, 2013
- The Companies (Registration of Charge) Rules, 2014

**Section 82. Company to Report Satisfaction of Charge**

(1) A company shall give intimation to the Registrar in the prescribed form, of the payment or satisfaction in full of any charge registered under this Chapter within a period of thirty 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 three hundred 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 fourteen days, as may be specified in such notice, 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:

Provided that the notice referred to in this sub-section shall not be required to be sent, in case the intimation to the Registrar in this regard is in the specified form and 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.

(4) Nothing in this section shall be deemed to affect the powers of the Registrar to make an entry in the register of charges under section 83 or otherwise than on receipt of an intimation from the company.

#### **Observation**

*A Company must intimate the Registrar in Form CHG-4 of the payment or satisfaction in full of any charge registered within 30 days of such payment or satisfaction. There is no exception for foreign companies.*

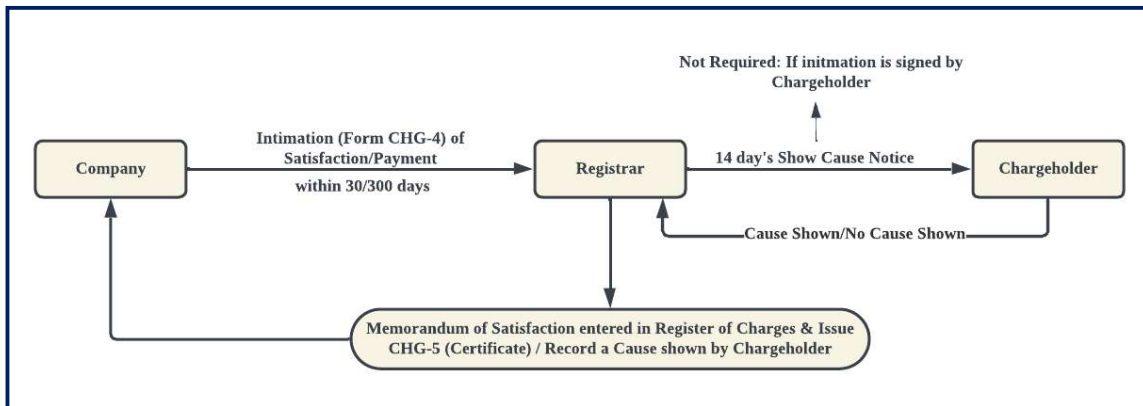
*First proviso to the Section 82(1) provides that registrar may allow such intimation of payment or satisfaction to be made within 300 days of such payment or satisfaction on an application made in this behalf.*

*Rule 8(1) was amended by the Companies (Registration of Charge) Amendment Rules, 2018, which extends the time limit for giving the intimation from 30 days to 300 days. Also, prior to this amendment, only the concerned company was obliged to file intimation of payment or satisfaction of charge. However, after the amendment, the charge holder can file the intimation to the Registrar.*

*It is important to note that the section use two expressions – ‘payment’ and ‘satisfaction’. Hence, a charge need to be extinguished solely by payment of underlying loan. The charge can also be satisfied by any other act of a company.*

*For example, Where the company enters into compromise or compromise with the Creditors under a Scheme of Arrangement or Resolution plan submitted by Resolution Applicant is approved under IBC., the debt can be said to be “satisfied” in full.*

*Further, when the registrar enters the memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.*



### ***Omission to file satisfaction and application to CG***

*Section 87 empowers the CG to direct that the time for giving intimation of appointment or satisfaction shall be extended. Therefore, where the Company fails to give intimation to the Registrar under Section 82, it can take recourse to Section 87, subject to the provision of that Section.*

## **Penal Provisions/Consequences for Non-Registration of Charge**

### **Section 86 of the Companies Act, 2013**

(1) 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 5 lakh rupees and every officer of the company who is in default shall be liable to a penalty of 50,000 rupees.

(2) 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.

### **Observation**

*Section 86 makes penal/provisions for contravening any of the procedure of Chapter VI on registration of Charges.*

*It may be noted that Section 86(1) does not deal with contraventions by any person other than the Company and an officer of the Company who is in default. Therefore, if there is any contravention of Section 84, which requires a person obtaining the order of appointment of receiver or manager to intimate the same to Registrar, the same may not be covered under Section 86(1).*

*Section 86(2) states that, if any Person willfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered under Section 77, the person is liable for action under Section 447.*

*Note that Section 86(2), unlike Section 86(1), applies to any person, while Section 86(1) applies only to the Company or an Officer in default. Section 86(2) has been inserted on the recommendation of Committee in the 2018 Report.*

*The list of offence as may be covered under Section 86(1) are –*

<b>SECTION 77:</b>	<i>Failure of the Company to Register Charge within Timelines (Including Extending Timelines)</i>
<b>SECTION 79(1)(A):</b>	<i>Failure of the Company to register Charges on acquiring any property subject to a charge.</i>
<b>SECTION 79(1)(B):</b>	<i>Failure of the Company to register modification in terms and condition of Charge registered under Section 77.</i>
<b>SECTION 82:</b>	<i>Failure of the Company to give intimation to the registrar of payment or satisfaction in full of any charge registered within timelines.</i>
<b>SECTION 85:</b>	<i>Failure of the Company to keep register of charge at registered office.</i>
<b>SECTION 85:</b>	<i>Failure of the Company to keep register open for inspection.</i>



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