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**DOCTRINAL ANALYSIS OF SECTION 100 OF TRANSFER OF  
PROPERTY ACT, 1882**

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**Abstract**

*Sec 100 of Transfer of Property Act, 1882 deals with concept of charge on immovable property, a security interest falling short of mortgage yet secures interest of the creditor. This doctrinal analysis undertakes a critical study of section 100 through statutory interpretation, judicial precedent and comparative analysis of concepts like mortgage and lien. The research analyses essential elements of valid charge, its creation either through operation of law or act of parties. There is no note on how the transferee for consideration without notice is protected. The research further evaluates formalities like requirement of registration, notice and enforceability of charges, their priority and the extent to which equitable principles apply to charge. This article also covers the procedural aspect through analysis of Civil Procedure Code, 1908 in relation with section 100 of Transfer of Property Act, 1882.*

**Keywords:** *Charge, security, mortgage, extinguishment, notice, creditor, attestation, priority.*

**INTRODUCTION**

According to the Osborn's *Dictionary in Property Law*, "Charge" is defined as a form of security for payment of debt or the performance of an obligation, involving the right of the creditor to receive payment out of the proceeds of the sale of specific property. Section 100 of the Transfer

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of Property Act, 1882 deals with charge on immovable property. Charge can be defined as creation of security over an immovable property for payment of money advanced. Though it has similar characteristics as a simple mortgage, it doesn't amount to a mortgage. The proviso to section 100 clarifies that the provision does not apply to charges created in case of charge over trust property and that a transferee for consideration who acquires the property without notice of charge is protected.<sup>1</sup> The essentials for creation of charge are intention, identification of specific immovable property, notice and the conditions analogous to simple mortgage. A charge may be created by the act of parties or operation of law. The extinction of charge is done by novation, merger and by act of parties. With respect to priority between charges, the law mandates registration and its role in priority between charges. It further draws a distinction between a charge and a mortgage, as well as a charge and a lien. In conclusion, the article elaborates on procedural aspect of Charge under Civil Procedure Code.

## ESSENTIALS OF VALID CHARGE

The following are essentials for creation of a valid charge namely:

- 1. Immovable property:** The Charge can be created on immovable property only. An immovable property must be made security in a clear cut term.<sup>2</sup>
- 2. Modes of execution charge:** It can be created either by act of parties or by operation of law.
- 3. Objective of charge:** The main object of charge is creation of security upon payment of money advanced. The security for charge must be specific immovable property otherwise charge would be void for ambiguity.<sup>3</sup>

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<sup>1</sup> Section 100 of Transfer of Property Act, where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provision herein before applied to simple mortgage, so far as may be applied to charge. Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, [and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge].

<sup>2</sup> Vyasaya Raju v. Damodar Sahu, AIR 1957, Orissa 32.

<sup>3</sup> Mohini Debi v. Purna sashi, AIR 1932 Cal 451.

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- 4. Intention:** No particular form of words is prescribed for creation of charge. All that is necessary is that there must be a clear intention to create charge on specific property as security for payment of money.<sup>4</sup>
- 5. Not to be a mortgage:** The transaction involved in securing payment of money should not be a mortgage. If it involves transfer of any interest as in mortgage, section 100 cannot be invoked. The very purpose of charge is to create security not transfer of interest. If the instrument is not on the face of it a mortgage but directs the realisation of money from particular property without referring to sale, then charge is created.<sup>5</sup>
- 6. The property must be specific:** The property on which charge created must be specific, certain and identifiable. In *Dattraya Shankar Mote v. Anand Chintaman Datar*<sup>6</sup>, it was held that charge must be made on specific property which are clearly defined. A vague reference like 'all my property' does not create a charge. The intention behind this essential is to prevent ambiguity. Thereby not defeating the object of creating a security.
- 7. Conditions of simple mortgage apply to charge:** since charge and simple mortgage are on the same line with respect to creating security for money advanced, charge has similar rights and liabilities of simple mortgage. Court emphasised that remedies pertaining to simple mortgages like right through sale can be availed by the charge-holder.<sup>7</sup>
- 8. Notice of charge:** No charge can be enforced against a bonafide transferee for consideration without notice of charge being served.

## CREATION OF CHARGE

The charge can be created either by

- Act of parties or
- By Operation of law.

### Act of parties

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<sup>4</sup> J.K. (Bombay) Pvt Ltd v. New Kaiser I Hindspg and wvg co Ltd, AIR 1970 SCC 1041.

<sup>5</sup> Gobinda Chandra v. Dwaraka Nath, 35 Cal 87.

<sup>6</sup> 1974 2 SCC 799

<sup>7</sup> State Bank of India v. Indexport registered, 1992 AIR 1740

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A charge is said to be created by parties when there is an agreement to make any particular immovable property as security for payment of money advanced. The instances of charge created by the act of parties are drawn out in following cases. A charge created by a compromise decree is treated as one created by act of parties.<sup>8</sup> A covenant in a lease empowering the lessee to retain a part of rent in satisfaction of previous loan to lessor amounts to charge<sup>9</sup>. An agreement by which an owner of a share in a village receives instead of his share, a lump sum out of income is charge<sup>10</sup>. An agreement to pay rent from estate inherited by brother from his grandmother to his sister amounts to creation of charge in favour of his sister<sup>11</sup>. An agreement which gives immovable property as security for failure of payment of maintenance allowance in perpetuity constitute a charge<sup>12</sup>. If there is an agreement between parties in creating charge, then it is called charge created by “*act of parties*”.

### Operation of Law

A charge is said to be created by operation of law if there an statute mandating to that effect or legal obligation as result of court order and not by act of parties. The instances of charge created by operation of law (under transfer of property act) include:

- Seller’s charge for unpaid purchase-money under section 55(4)(b) of Transfer of Property Act<sup>13</sup>. A seller’s charge is created in favour of the seller when the buyer has not paid the whole purchase money. Even if ownership passes to the buyer, the property remains as a security for unpaid purchase money.
- Buyer’s charge for pre-paid purchase-money under section 55(6)(b) of Transfer of Property Act<sup>14</sup>. This type of charge is created when buyer in anticipation of delivery of

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<sup>8</sup>Maheshpuri v. Ramachandra, AIR 1944 Nag 1.

<sup>9</sup>Nathan Lal v. Durga Das, AIR 1931 All. 62.

<sup>10</sup>Rustamali v. Afiab Khan, AIR 1943 Bom 414.

<sup>11</sup>Chalamanna v. Subbamma, 1884 7 Mad 23: 7 Ind Jur 465

<sup>12</sup>Matlub Hasan v. Kalawati, AIR 1933 All. 934.

<sup>13</sup> Section 55(4)(b) - Where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer,

<sup>14</sup>Section 55(6)(b)- unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller’s interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

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property partly or wholly pays purchase money. It creates no interest in concerned property but creates a security for repayment.

- Charge with respect to surplus sale proceeds of revenue sale under section 73(1) of Transfer of Property Act<sup>15</sup>. When an immovable property subject to charge is sold for arrears of land revenue or other public duty or tolls and there is surplus left after payment of such arrears, then the charge-holder is entitled to have his charge transferred to that surplus amount.
- Charge in favour of co- mortgagor entitled to contribution under section 82 of Transfer of Property Act, 1882<sup>16</sup>. Where a property owned jointly by two or more person is subject to a mortgage and upon redemption one of the co-owners pays more than his proportionate share of the mortgage amount, such co-owner is entitled to claim contribution from the other co-owners to the extent of the excess paid. In order to realise the money paid, section 82 enables charge on other properties for payment of contribution.

However, inclusion of term ‘charges by operation of law’ in definition was criticised as inconsistent with scheme of Transfer of Property Act which involve transfer by act of parties<sup>17</sup>. Later, Supreme Court stated that plain reading of section 2(d) of Transfer of Property Act<sup>18</sup>leaves no doubt that section 100 governs charge created by operation of law<sup>19</sup>.

In *Ai Champday Industries Ltd v. Official Liquidator&Anr*,<sup>20</sup>the Supreme Court held that in order for the encumbrance to become a charge, there must be a burden on land due to statutory provision resulting in diminishing of value of property. The tax dues on property can also be

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<sup>15</sup> Section 73(1) of Transfer of Property Act - where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

<sup>16</sup> Section 82 of Transfer of Property Act - where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

<sup>17</sup>Corporation of Calcutta v. Arunchandra Singha, AIR 1934 Cal 862.

<sup>18</sup>Section 2(d) of Transfer of Property Act - save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction:

<sup>19</sup>Laxmi Devi v. Mukund Munwar, AIR 1965 SC 834.

<sup>20</sup>(2009) 4 SCC 486.

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considered as a charge.<sup>21</sup> However, electricity bill dues are not considered as charge.<sup>22</sup> A charge created by consent decree over certain property of the husband for maintenance of the deserted wife, for her life is said to be a charge by operation of law.<sup>23</sup>

## KINDS OF CHARGES

There is no classification of charges as per provisions of statutes. However, charges can be classified into following types. They are:

- Contingent charge
- Floating charge
- Trustee's charge
- Decree Charge

### Contingent Charge

A contingent charge is created on the happening or non happening of an uncertain event. If such an uncertain event is said to happen in future, then charge can be invalidated. However, "charge is created on the happening of a certain event."<sup>24</sup> "A charge to secure a future liability which is contingent and liable to arise in future is valid"<sup>25</sup>. "These contingent charges are commonly observed in family arrangements, property settlement and useful instruments in drafting deeds.

### Floating Charge

The floating charge is an equitable charge on assets. This comes under ambit of Company Law the debentures issued by company are secured by floating charge of present or future property of the company. It is dealt under section 332<sup>26</sup> of Companies Act, 2013. It has no relevance under Transfer of Property Act.

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<sup>21</sup>Swagatika Impex (P) Ltd v. UCO Bank, AIR 2012 MP 132.

<sup>22</sup> Haryana State Electricity Board v. Hanuman Rice mills, Dhanauri, AIR 2010 SC 3835.

<sup>23</sup>Rundibala Roy v. Putubala, AIR 1985 Cal 47.

<sup>24</sup>Supra 4

<sup>25</sup>Umarao Singh v. Tansukh Raj, AIR 1934 Bom 24

<sup>26</sup> Where a company is being wound up, a floating charge on the undertaking or property of the company created within the twelve months immediately preceding the commencement of the winding up, shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except for the amount of any cash paid to the company at the time of or subsequent to the creation of, and in consideration for, the charge,

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### Trustee's Charge

A trustee, under section 32 of the Trust Act, 1882<sup>27</sup>, can claim charge on income and corpus of trust estate for all money expended in maintenance of trust. It is mentioned in proviso of section 100 of Transfer of Property Act that charge under Transfer of Property Act not applicable to charge of a trustee. The trustee has priority over the beneficiary, such that returns can be claimed by the beneficiary only after claim of charge realised by the trustee for expenditure made during the maintenance of the estate.<sup>28</sup>

### Decree Charge

A charge created neither by act of parties nor by operation of law but by decree of court is known as Decree Charge. Irrespective of whether notice of charge has been served, a charge created by decree is binding on the bona fide transferee<sup>29</sup>. However, it was reversed and reiterated as per section 100 of Transfer of Property Act that bona fide transferee is protected if notice of charge is not served<sup>30</sup>. The protection application to bona fide transferee is not available to court-auction purchaser since auction purchase doesn't come under the ambit of transfer as defined by Transfer of Property Act<sup>31</sup>

## REGISTRATION OF CHARGE

The provision doesn't mandate writing, even oral charge is valid. However, if it is reduced to writing, it must be registered under section 17(1)(b) of The Registration Act, 1908<sup>32</sup>, when

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together with interest on that amount at the rate of five per cent. Per annum or such other rate as may be notified by the Central Government in this behalf.

<sup>27</sup>Section 32 of Trust Act, 1882 - Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or the realisation, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting and disposition of the trust-property without previous payment of such expenses and If the trust-property fail, the trustee is entitled to recover from the beneficiary personally.

<sup>28</sup>Peary Mohun Mukherjee v. Narendra Nath, (1910) ILR 37 Cal 229.

<sup>29</sup>Gasiram v. Kundan Bal, I.L.R. (1941)Nag 513.

<sup>30</sup>Mt. Indrani v. Maharaja Narain, (1937) Oudh 217.

<sup>31</sup>Surayya v. Venkatarmanamma, (1940) Mad. 701.

<sup>32</sup>Section 17(1)(b) of The Registration Act, 1908 - Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

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instrument is non-testamentary of value 100 or upwards. Prior to the Amendment Act of 1929, there was no statutory requirement with respect to registration. However, pursuant to the Amendment Act of 1929, the introduction of a proviso extending the incidents of a simple mortgage to a charge made registration mandatory where the value of the property exceeded the prescribed limit. *In Shiv Rao v. Official Liquidator*<sup>33</sup>, it was held that deed assigning mortgage decree required registration and absence of such registration creates no charge.

## NOTICE OF CHARGE

It is mentioned in the proviso of section 100 of Transfer of Property Act that charge cannot be created against bona fide transferee for consideration without notice of charge. However, in some cases, charge created by decree was enforceable against transferee for consideration without notice<sup>34</sup>. A person who purchases a property with charge and informed of it by notice, then he is liable to pay the entire amount. Then the purchaser may claim through suit for contribution.<sup>35</sup>

## ENFORCEMENT OF CHARGE

A charge declared in a suit must be enforced through suit.<sup>36</sup> A charge is enforceable by sale<sup>37</sup>. If a portion of charged property is relieved without consent of charge-holder, then he may sue entire property to realise the charge and the principle of rateable distribution becomes inapplicable.<sup>38</sup>

## EXTINGUISHMENT OF CHARGE

The charge can be extinguished in three ways. Namely,

- By act of parties, that is, when charge-holder releases his claim and security, charge gets extinguished. Though right to claim is extinguished, debt still exist and it can be recovered as unsecured debt.
- By Novation, which means the act of charge-holder entering into a new agreement thereby cancelling the effect of prior agreement creating a charge.

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<sup>33</sup> AIR 1940 Mad 140.

<sup>34</sup> Mahadeo Prasad v. Anandhi Lal, Lal (1925) ILR 47 All. 90.

<sup>35</sup> Parshair Lal v. Brij Mohan Lal, (1935) ILR 11 Luck. 575.

<sup>36</sup> Matangini Dasse v. Chooneymooney Dasse, (1895) 22 Cal 859.

<sup>37</sup> Lalitha Kariappa v. Sanjeevi, AIR 2006 Kant 25.

<sup>38</sup> Hussein Mirza v. Raghubir Dayal, AIR 1947 Oudh 122.

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- By merger, that is union of lower interest or security with higher interest or security. That is extinguishing claim through absorption in another.

## PRIORITY OF CHARGE

Section 48 of Transfer of Property Act is based on the maximum '**qui prior est tempore posterior est jure**', which means those who are prior in time are prior in law (doctrine of priority). This section put forth an important principle that no man can convey a better title than what he has. Applying this doctrine, it is inferred that charge created prior in time has priority over subsequent charges. However, there are certain exceptions to this doctrine of priority in terms of charge. They are

- Statutory charges which are created by operation of law take priority over contractual charges. Statutory charges may include buyer's charge under section 55(6)(b)<sup>39</sup> of Transfer of Property Act or Charge for contribution under section 82<sup>40</sup> of the same Act. It also includes government dues under revenue laws or municipal taxes creating the first charge on the property.
- Prior charge-holder can lose the right to claim for want of notice, whether actual or constructive, to bonafide purchasers for consideration.
- If claim of prior charge-holder involve any element of fraud, priority doctrine cannot be attracted.
- Non-registration of charge where registration is compulsory prevents the application of priority doctrine.
- Doctrine of priority is not applicable to charges created in **parri passu**, that is when multiple charges are created simultaneously or agreed to rank equally. Claims for charge are dealt with proportionately and no chronology is followed.

## CHARGE V. MORTGAGE

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<sup>39</sup>Ibid, Supra 16

<sup>40</sup>Ibid, Supra 18

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A mortgage is considered to be species of charge with transfer of interest. But charge has no transfer of interest. In *Gokul Das v. Eastern Mortgage and Agency Co*<sup>41</sup>, it was held that charge is only a payment out of Property without transfer of interest.

Charge is created either by act of parties or by operation of law, whereas mortgage is created by act of parties alone. Every mortgage is a charge but not every charge is a mortgage.<sup>42</sup> A charge cannot be treated as a mortgage unless requirements under transfer of property act are met.<sup>43</sup> The mortgage is for securing a debt, whereas charge acts as security for payment of money, may or may not be a debt. The Limitation period to enforce a mortgage is 30 years, whereas the limitation period for charge is 12 years as per Article 61<sup>44</sup> and 62<sup>45</sup> of the Limitation Act, 1963, respectively. Prior mortgage is given priority in realising the debt over subsequent mortgage. However, charge has priority rules but weaker than mortgage, the priority is postponed by notice or act of parties. Mortgage gives rise to *right in rem*. Charge gives rise to *right ad rem*. A mortgage is for a fixed term and redeemable whereas charge create liability in perpetuity not capable of redemption.<sup>46</sup> A charge need not be attested and proved in same way as mortgage<sup>47</sup>.

## CHARGE V. LIEN

Lien is retaining of goods by person until any debt or amount due is paid. There is no definition of lien. However, Indian Contract Act, 1872 provide its classification as general lien under section 171<sup>48</sup> and particular lien under section 170<sup>49</sup>.

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<sup>41</sup>AIR 1924 PC 48

<sup>42</sup>Dattatraya Mote v. Anand Datar (1974) 2 SCC 799

<sup>43</sup>Vannatankandy Ibrayi v. Kunhabdulla Hajee, (2001) 1 SCC 564.

<sup>44</sup>Art 61: To redeem or recover possession of immovable property mortgaged -Thirty years - when the right to redeem or to recover possession accrues.

<sup>45</sup>Art 62: To enforce payment of money secured by a mortgage or otherwise charged upon immovable property Twelve years - When the money sued for becomes due.

<sup>46</sup>Matlub Hasan v. Kalawati, AIR 1933 All. 934.

<sup>47</sup>Ramasami Iyyengar v. Kuppusami, AIR 1921 Mad 514.

<sup>48</sup>Sec 171: Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

<sup>49</sup>Sec 170: Where the Bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

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A lien arises only by operation of law whereas charge arises as result of act of parties as well as operation of law. Lien can be created in both movable and immovable property. Charge can be created only in immovable property. A lien-holder can only retain the possession of property whether movable or immovable until his claim is satisfied. However, charge-holder can hold property until repayment or can file suit for recovery of money through suit.

## **CHARGE UNDER CIVIL PROCEDURE CODE**

Transfer of Property Act, 1882 provides substantive aspect of Charge. Procedural aspect of Charge is dealt under Civil Procedure Code, 1908. Since proviso to section 100 of Transfer of Property Act put forth that provision pertaining to simple mortgage applies to charge, Order XXXIV of Civil Procedure Code<sup>50</sup> gets attracted. The remedy for simple mortgage is sale of mortgage property and money suit which is applicable to Charge as well. Therefore, remedy for Charge can be sought under Order XXXIV Rule 14 of Civil Procedure Code.<sup>51</sup> Rule 14 provides for sale of mortgage property through institution of suit for sale. Order XXI Rule 30 provide for claim of interest through payment of money as an alternative relief by sale of concerned property upon which interest is claimed.<sup>52</sup> Thus, through this provision remedy for charge can be claimed under money suit as an alternative relief.

## **CONCLUSION**

The doctrinal analysis of Section 100 of the Transfer of Property Act, 1882 brings out essential role in the law relating to charges by clearly distinguishing a charge from other proprietary interests such as mortgages and lien. A charge creates a right over specific immovable property without transferring any interest, thus protecting the rights of the charge-holder with the proprietary rights of the owner. The section put forth that a charge are created by act of parties or by operation of law, reflecting the legislature's intent to protect equitable claims such as unpaid

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<sup>50</sup>Order XXXIV – Suits relating to Mortgage of Immovable Property

<sup>51</sup>Order XXXIV Rule 14 - Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II Rule 2.

<sup>52</sup> Order XXI Rule 30 - Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

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purchase money, contribution, or maintenance. At the same time, the proviso to Section 100 safeguards transferees for value without notice, thereby promoting certainty and security in property transactions. Thus, Section 100 functions within the framework of the Transfer of Property Act, ensuring justice between parties while maintaining the stability of property rights. Overall, the provision embodies a harmonious integration of equity and statutory law, underscoring its relevance in Indian property jurisprudence.



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