Section 5

Mortgages & Charges
Inherent borrowing powers of a company

General permission to borrow
- MoA & AoA of the company is deemed to contain the powers to borrow money from banks etc. It also includes the powers to issue securities for raising finances.

Restriction on borrowing
- As discussed in earlier topics, few companies are required to obtain a certificate of commencement of business before commencing their business, such companies cannot exercise any borrowing powers until the date they obtain a certificate of commencement of business.

Ultra-Vires borrowings
- The power to borrow money rests with the directors of the company and they are allowed to borrow money once they have passed a resolution in their meeting.
- Company may restrict their powers to borrow by its AoA, that the borrowings exceeding a certain amount may be made only with the prior approval of members in a general meeting.
- Hence if the directors exceed their authority in such a case, the borrowing shall be considered as ultra-vires borrowings.
Forms of borrowings

- Through Debentures
- From Banks etc.
- From Shareholders etc.

**Debentures**
The securities issued to borrow money are named as debentures.

**Borrowings from credit institutions**
- Credit institutions include the commercial banks, investment banks, NBFCs, modarbas and all other business organisations providing facilities for loan against the interest or against participation in profits.

**Borrowing from other sources**
- Other sources for obtaining loans may include the sponsors or controlling shareholders who at times facilitate the company with financial help.
Debenture - Definition

Debenture

*Debenture* includes

- debenture stock,
- bonds,
- term finance certificate – TFCs or
- any other instrument evidencing a debt, whether constituting a mortgage or charge on the assets of the company or not.
Types of security – Concept

Pledge

Title = No
Possession = Yes

Mortgage

Title = Yes
Possession = No

Charge

Title = No
Possession = No
Types of security - Definitions

Pledge
Contract Act defines pledge as a ‘bailment’ of goods as security for the repayment of a debt or performance of a promise.

Mortgage
A mortgage means an interest or lien created on the property or assets of a company or any of its undertakings or both as security.

Charge
- A charge is security for the payment of a debt or other obligation that does not pass ‘title of the property’ or any right to its possession to the person to whom the charge is given.
Types of Charge - Concept

**Fixed charge**

- created on a specific asset for a defined amount,
- the asset under fixed charge cannot be replaced or sold without prior approval of beneficiary of charge,
- in the event of winding up, holder or beneficiary of the fixed charge possess right of priority in respect of asset secured under the fixed charge.

**Floating charge**

- may be created on any class of assets meaning thereby that the asset is not fixed under the floating charge,
- may be created on the entire undertaking of the company,
- the assets under floating charge may be replaced by the company however overall value of class of assets under the charge should not reduce below an agreed amount
Registration of mortgage or charge

Following mortgage or charge, and pledge should be registered:

• On any immovable property;
• For securing any issue of debentures;
• On book debts of the company;
• On the property of the company, including stock-in-trade;
• On a ship or aircraft;
• On goodwill or on any intellectual property;
• On any movable property of the company;
• For the issue of any instrument in the nature of redeemable capital;
• Based on conditional sale agreement, namely, lease financing, hire-purchase, sale and lease back, and retention of title, for acquisition of machinery, equipment or other goods:
Procedure for registration of mortgage or charge

Whenever the company enters into any of the mortgages and charges (which required to be registered) it is the duty of the company to get the particulars of charge registered with the registrar within **thirty days** of the creation of the same.

The particulars required to be produced to the registrar include

- the agreements for loan or debt and
- other information prescribed
Payment or satisfaction of mortgage or charge

Satisfaction of mortgage or charge means that the company has paid for the amount of debt or loan against which the property of the company was secured.

It is in the company’s own interest to inform the registrar that the charge has been satisfied so that the stakeholders i.e. investors and lenders should know that all of the debt has been paid off.

The particulars of satisfaction of mortgage/charge shall be submitted to the registrar within thirty days from the date of satisfaction/repayment.
Rights to inspect the copies of instruments creating charges

Company is required to keep the copies of the instruments creating charges or relating to the registration of charges or any rectifications therein at its registered office.

Any creditor or member of the company can inspect the copies of the instruments so placed and the register of mortgages or charges of the company free of cost at all reasonable times.