

**(2001) 07 GUJ CK 0089**  
**In the Gujarat High Court**

**Case No :** Company Application No. 216 of 1997 in Company Petition No. 21 of 1984

The Regional Director

APPELLANT

Vs

O.L. of Prasad Mills Ltd.

RESPONDENT

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**Date of Decision :** 03-07-2001

**Acts Referred:**

Companies (Amendment) Act, 1985 — Section 529A  
Companies Act, 1956 — Section 529, 529(A), 530  
Employees State Insurance Act, 1948 — Section 40(4), 94  
Income tax Act, 1922 — Section 46(2)  
Provincial Insolvency Act, 1920 — Section 61  
Transfer of Property Act, 1882 — Section 100, 58  
Workmens Compensation Act, 1923 — Section 14

**Citation :** (2001) 07 GUJ CK 0089

**Hon'ble Judges :** K.M. Mehta, J

**Bench :** Single Bench

**Advocate :** S.R. Shah, for the Appellant; M.D. Pandya, with Official Liquidator, for the Respondent

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## Judgement

1. The applicant - Regional Director ESI Corporation, Ahmedabad has taken out judges summons with a prayer that this Court may direct the

Official Liquidator of M/s. Prasad Mills (Unit of GSTC) (in Liquidation) who is in possession of assets of the property, to pay employees"

contribution, interest, damages and surcharges thereof to applicant Corporation forthwith as its trust money and not a part and parcel of the assets

of the company. The applicant Corporation however prayed that this Court may direct the Official Liquidator of the aforesaid company (in

Liquidation) to pay such amount in priority of all other debts, including the secured creditors. In support of the same, an affidavit of Mr.

B.S.Gandhi, Inspector holding the office of ESI Corporation dated 1.7.1997

before this Court has been filed.

FACTS:

2. The facts giving rise to the present application are as stated in the affidavit as under: The Employees State Insurance Corporation is a statutory

Corporation, constituted under the Employees' State Insurance Act, 1940 (hereinafter referred to as "Act"). As per the provisions of said act, the

aforsaid Mill Company (in Liquidation) was a "Covered Establishment" and it has deducted the employees' contribution from the wages of the

employees as well as it had to pay the employer's contribution, but it had failed and neglected to make the payment thereof to the applicant-

Corporation as per the provisions of Section 40 of the Act. It was stated that the said company was taken into liquidation by an order of this

Hon"ble Court on 22.11.1989 and the Official Liquidator was appointed to take over the charge of the assets of the Company. It had, in fact,

taken over the assets of the said company in its possession and the same are still lying with the Official Liquidator. It was stated that in view of the

provisions of the Act, the amount of employees' contribution is "trust money" in the hands of the employer- the Company in liquidation. It does not

form part of the assets of the company. The said employees' contribution in the hands of the employer, being a trust money, to the extent of

employees' contribution. After the winding up order, in the hands of the Official Liquidator, it cannot be considered to be, it cannot be treated to

be an assets of the company. To that extent, the amount of employees' contribution is recoverable by the applicant from the Official Liquidator. In

support of the same, the applicant Corporation has cited a decision reported in 46 Company Cases 1 in the case between Baroda Spg. & Wvg.

Mills Co. Ltd. (in Liquidation) Vs. Baroda Spg. & Wvg. Mills Co-operative Credit Society Ltd. decided by Justice D.A.Desai, (as he was then)

and also the judgment in Company Application No. 72 of 1991, decided by Justice S.D.Shah reported in 87 Company Cases 284. It was

therefore submitted that the employees' contribution which was deducted by the company from the emoluments payable to the employees was the

amount held by the company interest and it was not liable to be intermingled with the company's assets or properties. It was submitted that the

company could not have utilized the said amount as it was a trust amount and,

therefore, the ESI Corporation must get priority for the aforesaid claim. It was further submitted that the amount to the extent of the employees' contribution gets priority over the secured creditors also.

3. It was further submitted that the employees' contribution has been intermingled by the company with its assets and has failed to keep it apart.

Even the Official Liquidator, the respondent, has also not set it apart. It is further submitted that when such a company is ordered to be wound up,

the accounts of the company, which shows the amount of the employees' contribution, that much amount claimed by the ESI Corporation, the

applicant, from the Official Liquidator, would get priority to any other creditor. It was further submitted that the company would secure the

character of an agent of the ESI Corporation and the company would have that legal title to have beneficial interest in the money so deducted from

the employees' emoluments. Since the company had neither legal nor beneficial interest in the property to the extent of the employees'

contribution, the Official Liquidator also could not mix the amount with the funds of the company and had the liability to pay interest. The company

to the extent of the employees' contribution is thus entrusted with the Trust money and could not form part of the assets of the company in the

hands of the Official Liquidator. It was submitted that the secured creditor bank is also not entitled to retain any amount to the extent of

employees' contribution and shall hand over the amount with interest to that extent to the applicant, ESI Corporation.

4. It was submitted that in so far as the employer's contribution is concerned, it is a "debt due and payable" by the company in liquidation in the

hands of the Official Liquidator, the respondent, and in view of section 94 of the Employees' State Insurance Act, 1948, (ESI Act for short) it is

clearly provided that the amount of contribution, both employer's contribution and the employees' contribution, etc. therefore, includes the interest,

damages, surcharge, etc., and the same amount will be considered to be due to the Corporation to have priority over other debts and, it is ,

therefore, held that even in a case where the company is in liquidation u/s 53, the amount of the employer's contribution would also be paid in

priority to all other debts. Thus, the employees' contribution is a "trust money" and, therefore, the amount in the hands of the Official Liquidator of

the aforesaid company is not the property of the company and, therefore, to that extent, the Official Liquidator is bound to pay the amount of the employees' contribution, which is intermingled with the company's property and which is lying in the hands of the Official Liquidator should be paid without treating it to be a part of the Company u/s 40(5) read with the aforesaid two judgments of the Gujarat High Court. It was further submitted that in so far as the employees' contribution is concerned, in view of Section 94 of ESI Act, the amount of contribution and other dues of interest, damages, surcharge, etc. are given priority to all other debts u/s 94 of the ESI Act and, therefore, the Official Liquidator is bound to give that amount also to the ESI Corporation, the applicant, in priority to all the debts, which, in the submission of the applicant, would mean that all other debts include even the secured debts and, therefore, the Official Liquidator is bound to pay the total amount, which is claimed by the applicant Corporation from the Official Liquidator with regard to the aforesaid mill in liquidation, the assets and properties of which are taken over by the Official Liquidator, to pay the said amount forthwith.

5. When this matter reached hearing it is ordered that petitioner to serve copy of application to the Official Liquidator and Official Liquidator to file

reply on 17.2.1998 and thereafter also the applicant prayed for leave to amend, the same is granted. Therefore, State Bank of India, ICICI Ltd.

and HDFC are joined as respondents nos. 2,3 and 4 in this matter.

6. Mr. Roshan Desai learned advocate appears on behalf of State Bank of India and IDBI. As far as the State Bank of India - secured creditors is

concerned, an affidavit in reply has been filed on 26.6.2000 in this behalf. On behalf State Bank of India it was stated that the company in

liquidation was sanctioned and granted financial assistance to the extent of Rs. 345 lacs. As a security for the repayment of the amount due and

payable, the company in liquidation credited equitable mortgage by deposit of title deed in favour of the State Bank of India on 17.2.1975. The said

equitable mortgage was extended on 26.5.1981, as further extended on 4.3.1986. Copy of the memorandum of entry extending equitable

mortgage on 26.5.1981 and further extended on 4.3.1986 produced by the State Bank of India is taken on record of the case.

7. It was also stated that as regards the employees' contribution is for the

period from 1.1.1979 to 30.11.1980, from 1.1.1978 to 31.12.1987, from 1.8.1976 to 31.7.1977 and 1.11.1986 to 30.11.1986. It was also stated that the amount was deducted from the wages of the workers but the amount is not paid. It was also stated by the applicant that a credit entry exit in the Books of Accounts of the company. Except that, the Regional Director has not stated whether the amount in fact was deducted and paid. It was further stated that Regional Director has not produced any other evidence to show that the workers of the Mill company have complained that though the contribution is deducted, the same has not been paid by the company. It was stated that the amount is deducted but in fact no proof whatsoever has been led by the applicant to show that the amount in fact has been deducted. It was further stated that if the amount deducted in the year 1976 was not paid, why waited for a period of 22 years to claim the said amount now claiming to be a Trust money It was also submitted that the claim if any, is barred by the Law of Limitation and as such the applicant is not entitled to claim the same. It was also submitted that the officers of ESI Corporation are negligent in performing their duties by not initiating action against the company and its Directors and not prosecuted the Directors and/or the Officers concerned for not making payment of the amount alleged to have been deducted.

8. It was submitted that the applicant failed to prove that the amount was deducted is intermingled with the assets of the company. It was also stated that except averment, no evidence, documentary or oral, had been produced by the applicant to show that in fact the amount of Trust money was intermingled with the assets of the company in liquidation. It was submitted that u/s 529 of the Companies Act, 1956, on the security so realized, only two persons has claimed; one is the Secured Creditor and other workers as per the provisions of the said section. It was also submitted that as per the said section, workers are entitled to 25% of the value of the securities and Secured Creditors are entitled to 75% of the value of the securities. Except the worker and the Secured Creditors, nobody else including the Statutory Corporation like ESI has any right to claim distribution from the amount realized by the Secured Creditors from the sale of the Security. It was submitted that as per the provisions of Section 45B of the Act, the amount is to be realized as arrears of Revenue. It

was submitted that the claim falls within the provisions of Section 530 of the Companies Act and not as claimed by the applicant. It was submitted that the provisions of Section 530 of the Companies Act, it is clear that the amount shall be paid in priority to all other debts subject to provisions of Section 529A of the Companies Act. It was stated that as per subsection (10) of Section 530 of the Companies Act the amount as arrears of land revenue is to be paid in priority to all other debts only if the same has become due and payable within 12 months before the date. It was stated that in the present case the amount has become due and payable in the year 1976 and in the year 2000 the claim is made and even if the claim is required to be entertained, the same cannot be decided under the provisions of Section 530 of the Act and not in priority to the claim of the Secured Creditors as contended by the applicant.

9. Mr. Roshan Desai for State Bank of India contended that even if there was deduction, the same cannot be claimed by the applicant from the sale of the Security by the Secured Creditors. It is also submitted that the question of intermingling the trust money with the security also does not arise since the mortgage was created much prior to the deduction being made by the company. It was also submitted that the amount in the nature of trust money held by the company do not form part and parcel of the company of the company's assets in the hands of the liquidator. When the liquidator took possession, no assets of the company were available and the liquidator has not taken possession of any of the assets of the Secured Creditors and as such the Official Liquidator is only a custodian and trustee on behalf of the Secured Creditors. It was further submitted that the property or money, which can be identified as belonging to or held by the company in trust, is recoverable from the liquidator. In the present case no such proof has been led and as such the applicant is not entitled to claim any amount from the secured creditors.

10. It may also be stated that the Official Liquidator has filed his report on 28.8.1998 and also on 16.6.2000. The Official Liquidator has also stated that the employees' contribution if any deducted by the company from the wages of the employees as alleged cannot be said to have been intermingled with the assets of the company, as the company has not generated or acquired any further assets out of the employees contribution if

any deducted and alleged to be hold by the company in trust. The said contribution ought to have in liquid, in a separate head or account, whereas

the Ex-Direcotrs of the company have not handed over any liquid funds to the Official Liquidator specifically earmarked or held in a separate

account as employee's contribution. Therefore, if any money was held by the company in trust as employee's contributions alleged, it appears to

have been misused or misapplied somewhere else by the Ex-directors of the company in breach of trust and therefore applicant corporation may

sue the Ex.directors of the company for breach of trust or any other appropriate legal remedy against them. It was further stated that the provisions

of Section 94 of the ESI Act, 1948 this Hon''ble Court may be pleased to find that the amount if any due in respect of any contribution or any

other amount payable under, ESI Act, 1948 in case of companies in liquidation, shall squarely fall as a preferential claim u/s 530 of Companies

Act, 1956 and not in absolute priority over all other kinds of dues and debts. The Official Liquidator therefore, submits that the claim of ESI

Corporation filed with the Official Liquidator, will therefore be classified as preferential claim u/s 530 of Companies Act, 1956 and shall be dealt

with accordingly by the Official Liquidator at the appropriate time after discharging company's debts and liabilities falling u/s 529A of the

Companies Act, 1956 as over ridding preferential claims and the dues of the secured creditors.

11. In his further report dated 16.6.2000 it was stated that after filing the aforesaid report dated 28.8.1998 plant and machinery were sold by Sale

Committee and realized Rs. 1,90,00,000/- out of which an amount of Rs. 77,32,000/- was disbursed to Secured Creditors namely Central Bank

of India, Panigate, Baroda and Rs. 95,19,000/- was disbursed towards workers dues. At present Official Liquidator has Rs. 22,27,971/- lying

with him from which regular payment of Rs. 18,875/- will have to be made to the security staff for preservation of land and building. On verification

of the statements of affairs filed by the Ex.directors has shown and stated that the outstanding balance of ESI amounting to Rs. 2,94,607/- as

preferential creditors in the said statement of affairs.

12. Before I consider the rival submissions made by the learned advocates for the parties in detail, the statutory provisions may be required to be

considered in this behalf. The Employees State Insurance Act, 1948 (ESI Act) is a act to provide for certain benefits to employees in case of

sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. Section 2(4) provides the definition

of ""contribution"" means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any

amount payable by or on behalf of the employee in accordance with the provisions of this Act. Section 2(6) provides the definition of

Corporation"" means the employees' State Insurance Corporation set up under this Act. Section 2(9) provides the definition ""employee"" means

any person employed for wages in or to connection with the work of a factory or establishment to which this Act applies. Section 2(22) provides

the definition of ""wages"" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or

implied, were fulfilled and includes [any payment to an employee in respect of any period of authorized leave, lock-out, strike which is not illegal or

lay-off and] other additional remuneration, if any paid at intervals not exceeding two months] but does not include (a) any contribution paid by the

employer to any pension fund or provident fund, or under this Act; (b) any travelling allowance or the value of any travelling concession; (c) any

sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or (d) any gratuity payable on

discharge. Section 40 : Principal employer to pay contribution in the first Instance

(1) ....

(2) ....

(3) ....

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for

the purpose of paying the contribution in respect of which it was deducted.

12.1 The learned counsel further relied on Section 94 of the Employees State Insurance Act, 1948 which provides contributions etc. due to

Corporation to have priority over other debts. The said section reads as under:-

There shall be deemed to be included among the debts which, u/s 49 of the Presidency-towns Insolvency Act, 1909 (3 of 1909) or u/s 61 of the

Provincial Insolvency Act, 1920 (5 of 1920) (or under any law relating to insolvency in force in the territories which immediately before the 1st

November, 1956, were comprised in a Part B State or u/s 530 of the Companies Act, 1956 (1 of 1956) are, in the distribution of the property of

the insolvent or in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount due in respect of

any contribution or any other amount payable under this Act the liability wherefor accrued before the date of the order of adjudication of the

insolvent or the date of the winding up, as the case may be.

12.2 The learned counsel further submitted that in exercise of power conferred u/s 95 of the Employees' State Insurance Act, 1948 the Central

Government has power to make rules.

13. Learned advocate for the applicant has relied upon the provisions of Trust Act, particularly, Section 66 of the Trust Act which provides the

rights in case of blended priority which reads as under :

Section : 66.

Right in case of blended property :

Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to

him.

14. Learned advocate for the applicant has also relied upon the provisions of the Companies Act, particularly, Section 529, 529(A) and 530 of the

Companies Act which reads as follows :

Section : 529 :

Application of insolvency rules in winding up of insolvent companies :- (1) In the winding up of an insolvent company, the same rules shall prevail

and be observed with regard to -

(a) debts provable;

(b) the valuation of annuities and future and contingent liabilities; and

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the

estates of persons adjudged insolvent;

[Provided that the security of every secured creditors shall be deemed to be

subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditors, instead of relinquishing his security and proving his debt, opts to realize his security -

(a) the liquidator shall be entitled to represent the workmen and enforce such charge ;

(b) any amount realized by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditors as should not be realized by him by virtue of the foregoing provisions of this proviso or the

amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purpose of section

529A].

2. All persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the

winding up, and make such claims against the company as they respectively are entitled to make by virtue of this section.

[Provided that if a secured creditor instead of relinquishing his security and proving for his debt proceeds to realize his security, he shall be liable to

[pay his portion of the expenses] incurred by the liquidator ( including a provisional liquidator, if any)\_ for the preservation of the security before its

realization by the secured creditor.]

[Explanation - For the purpose of this proviso, the portion of expenses incurred by the liquidator for the preservation of a security which the

secured creditor shall be liable to pay shall be the whole of the expenses less an amount which bears to such expenses the same proportion as the

workmen's portion in relation to the security bears to the value of the security.]

[(3) For the purpose of this section, section 529A and section 530 -

(a) ""workmen"", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act,

1947 (14 of 1947) ;

(b) ""workmen"", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely :-

(i) all wages or salary including wages payable for time or piecework and salary

earned wholly or in part by way of commission of any workman,  
in respect of services rendered to the company and any compensation payable to  
any workman under any of the provisions of the Industrial

Disputes Act, 1947 (14 of 1947);

(ii) all accrued holiday remuneration becoming payable to any workman, or in  
the case of his death to any other person in his right, on the

termination of his employment before, or by the effect of, the winding up order  
or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of  
reconstruction or of amalgamation with another company, or

unless the company has, at the commencement of the winding up, under such a  
contract with insurers as is mentioned in section 14 of the

Workmen's Compensation Act, 1923 (8 of 1923), rights capable of being  
transferred to and vested in the workman, all amounts due in respect of

any compensation or liability for compensation under the said Act in respect of  
the death or disablement of any workman of the company;

(iv) all sums due to any workman from a provident fund, a pension fund, a  
gratuity fund or any other fund for the welfare of the workmen,

maintained by the company;

(c) "'workmen's portion'", in relation to the security of any secured creditor of a  
company, means the amount which bears to the value of the

security the same proportion as the amount of the workmen's dues bears to the  
aggregate of -

(i) the amount of workmen's dues; and (ii) the amounts of the debts due to the  
secured creditors. Illustration. - The value of the security of a

secured creditor of a company is Rs. 1,00,000/-. The total amount of the  
workmen's dues is Rs. 1,00,000/-. The amount of the debts due from

the company to its secured creditors is Rs. 3,00,000/-. The aggregate of the  
amount of workmen's dues and of the amounts of debts due to

secured creditors is Rs. 4,00,000/-. The workmen's portion of the security is,  
therefore, one-fourth of the value of the security, that is Rs.

25,000/-.""]

15. Learned advocate for the applicant has also relied upon the provisions of  
Transfer of Property Act, particularly, Section 58 and Section 100 of

the Act, which reads as follows :

Section 58 :

(a) 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 a pecuniary liability.

The transfer is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are

called the mortgage-money and the instrument(if any) by which the transfer is effected is called a mortgaged-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and

agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the

mortgaged property to be sold and the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be

applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple

mortgagee.

(c) Where the mortgagor ostensibly sells the mortgaged property - on condition that on default of payment of the mortgage-money on a certain

date the sale shall become absolute, or on condition that on such payment being made the buyer the sale shall become void. or on condition that on

such payment being made the buyer shall transfer the property to the seller. the transaction is called a mortgage by conditional sale and the

mortgage a mortgagee by conditional sale; Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in

the document which effects or purports to effect the sale.

(d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the

mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from

the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in

lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary

mortgagee.

(e) Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the

mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is

called an English mortgage.

(f) Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay. \*\*\* and in any other town which the State

Government concerned may, by notification in the official gazette, specify in this behalf, delivers to a creditor or his agent documents of title of

Immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by

deposit title-deeds within the meaning of this section is called an anomalous mortgage.

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 persons is said to have a charge on the property; and all the provisions hereinabove

contained which apply to a simple mortgage shall, so far as may be, apply to such 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, on 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.

16. Shri S.R.Shah learned advocate for the applicant has also handed over the extract of the accounts of Prasad Mills (in liquidation) in which

account of State Insurance Coroporation Fund amount which credited has also shown in the books of account of the company. The learned

advocate for the applicant has stated that in view of Section 40(4) of the ESI Act, 1948 any sum deducted by the principal employer from wages

under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was

deducted. According to him in view of the provisions of the Act alongwith the provisions of Section 66 of the Indian Evidence Act which provides

that whether the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount

due to him. According to him, an amount which was deducted by the company from the wages of the employee of the ESI contribution is held by

the company as a trust money and when the company has wrongfully mingled the amount in question trust money which is owned by the workers in

this case are entitled to charge whole fund for the amount due to them. He has also stated that in view of the provisions of Section 45-B of the Act

which provides any contribution payable under this Act may be recovered as an arrears of land revenue. He has also stated that in view of the

provisions of Section 94 which provides contribution etc. due to corporation to have priority over other debts.

17. In support of his contention learned advocate for the applicant has relied upon the judgement in case of Baroda Spg. & Wvg. Mills Co. Ltd.

(in Liquidation) Vs. Baroda Spg. Wvg. Mills Cooperative Credit Society reported in 46 Company Cases 1. In that case the question which was

reframed before the High Court is as under :

Whether the amount standing to the credit of the Baroda Spinning and Weaving Mills (Rajrathna Sheth Jhaverchand Laxmichand) Co-operative

Credit Society Ltd. in the books of account of the Baroda Spinning and Weaving Company Ltd. (in liquidation) is impressed with the character of

a trust and hence it does not form part of the assets of the company and that the liquidator is bound to pay the same in priority before any

distribution of the assets of the company is made by him.

After considering the provisions of ESI Act and the provisions of the Fund Act and the provisions of Payment of Wages Act, the learned judge on

page -21 was pleased to observe as under :

The test would, therefore, be : whether, on the facts and circumstances of the case and conduct of the parties, it could be said that the amount in

the hands of the company was impressed with some kind of a trust.

If, as stated earlier, the company had neither legal nor the beneficial ownership

in the property and it was merely a custodian till it remitted the amount to the society, and could not mix the amount with its own funds and had no liability to pay interest, undoubtedly, the amount in the hands of the company was impressed with a trust. No other conclusion in the facts and circumstances of this case is even possible.

If the amounts in the hands of a company is impressed with trust, undoubtedly, it did not form part of the assets of the company, and the liquidator has to pay it out over any other claim before he undertakes distribution of the assets of the company. Where property in the hands of the company is impressed with a trust, it is unquestionable that it can be followed and recovered from the liquidator.

17.1 The learned counsel stated that in the very judgement the learned judge has relied on a passage from Palmer's Company Law, 21st Edition, at page 775 which reads thus:

Following trust property - Property which can be identified as belonging to or held by a company in trust, for other persons, may be followed and recovered from the liquidator.

After referring the said passage, the learned judge on page 22 held as under:-

Applying the principles to which reference has been made in this judgement, it is crystal clear that the amount, in the hands of the company, which

came to it by way of deduction from the wages and salary payable to its employees, on the requisition of the society, of which the employees were

the members, for satisfying the demand or debt which they owed to the society, was impressed with the character of a trust in the hands of the

company, and the same can be recovered by the society from the liquidator before the liquidator proceeds to distribute the assets of the company.

It must be paid over in full before any distribution of the assets of the company takes place.

17.1(a) Learned counsel has also relied upon judgement of this Court in the Company Application No. 72 of 1991 in Company Application No.

52 of 1989 in the case of Central Bank of India Vs. Recovery Mamlatdar and others (Coram : S.D.Shah,J) on 13.4.1994 and reported in 87

Company Cases 284.

17.1(b) After referring to the judgement of this court in the case of Baroda Spinning and Weaving Mills Co. Ltd. (In Liquidation) Vs. Baroda

Spinning and Weaving Mills Co-operative Credit Society Ltd. (1976) (46 Com Cas 1) (Guj) the Court observed on page 287 as follows:-

The money which the company has deducted from the wages of the employees towards the employees' contribution shall have to be kept apart

by the company as the said amount was held by the company in trust and, therefore, the said amount is liable to be returned to the employees

and/or the seventh respondent corporation.

The Court on page 288 further observed as under:

However, it is clarified that as and when sale of the assets and properties of the company is effected, the petitioner-bank as well as the official

liquidator, whoever shall sell the properties and assets, shall keep apart the sum equivalent to the amount of Rs. 16,78,851/towards the claim of

the Employees' State Insurance Corporation and shall also send intimation to the said corporation as and when the properties are sold, about the

realisation received by it.

17.2 The learned counsel has also relied on the judgement of this Court in the case of NUTAN MILLS EMPLOYEES CO-OP. CREDIT

SOCIETY LTD. VS. OFFICIAL LIQUIDATOR OF NUTAN MILLS LIMITED AND OTHERS reported in (2000) 3 Comp L.J. 121 (Guj)

where identical question arose before this Court and the court has also referred to earlier two judgements namely, Baroda Spg. and Wvg. Mills

Co. Ltd. (in Liquidation) Vs. baroda Spg. & Wvg. Mills Co-operative Credit Society Ltd. (1976) 46 Com Cas 1 (Guj) and Central Bank of India

Vs. Recovery Mamlatdar and other (1996) 2 CompLJ 322 (Guj)/ 87 Comp Cas 284 (Guj). In paragraph 25 on page 127 the Court observed as

under:-

This decision puts the controversy to an end and, therefore, question No. 1 shall have to be answered accordingly by saying that, the money in the

hand of the company had been impressed with the character of a trust money and that the credit society can make a preferential claim.

17.3 As regards the second contention raised by the Secured Creditors that the assets of the mills company in liquidation were mortgaged to the

secured creditors and that, therefore, the mills company had the equity of redemption with them and on the appointment of the liquidator for the

company in question after the orders of winding up, the liquidator was having

that equity alone and that, though he has significant amounts in his hand, the entire amount would be required to be paid to the secured creditors and no money as urged by the applicant credit society should be either set apart or paid. On page 128 at paragraphs 27, 28 and 29, this contention has been negated by the court. Paragraphs 27, 28 and 29 read thus:

Para 27 - This contention coming from learned counsel in this respect, requires to be repelled on the reasonings which has governed the answer

for the first question. Undoubtedly, the money lying with the mills company on the date of the order of liquidation and/or winding up were the

money belonging to the credit society - the applicant before me, and that, the mills company in liquidation was holding the money in the capacity of

a trustee. The mills company in liquidation was obviously not the owner of the money and in the same way, not the beneficiary. The money were

being held by the mills company in liquidation in trust which were required to be transmitted to the credit society, so that it could be adjusted by the

said society against the dues of the members, who incidentally would be the workers" of the mills company in question.

Para 28 - It is indeed true that when the properties were mortgaged with secured creditors having the first charge over the same, the mills company

in liquidation had the equity of redemption with them. On the passing of the orders of winding up, the said equity of redemption gets transferred in

favour of the liquidator who can exercise the right of redemption as per the contract of mortgage or hypothecation. But it should not be overlooked

that the money in question were never the assets of the mills company in liquidation and that the said money were impressed with the character of

the trust. This money could not have been mixed up by the mills company with other assets belonging to them. Though accounts duly manifest that

the above said amount was lying with the mills company (in liquidation), when the mills company had gone in liquidation and has ceased to be a

viable going concern, naturally, no money could be found which could have been set apart as the trust money. But that would not mean that this

money loses the character and significance of a trust money.

Para 29 - This trust money lying with the mills company, has not been set apart and has mingled with the assets of the mills company. But his

intermingling of trust money held by the mills company in trust, with the assets of the mills company, cannot take away the element of trust from the transaction and would not convert trust money into the assets of the mills company. The intermingling of these two different properties can never be taken as the passing of the property in the trust money in the hands of a trustee, in favour of a trustee, or else, the trustees in many such cases would also enjoy position of a creator of a trust and the only beneficiaries. This would militate against the very basics of the doctrine of 'trust' not only implied, but express also.

17.4 Learned advocate Mr. S.R.Shah has cited a judgment in the case of State Bank of Bikaner & Jaipur Vs. National Iron & Steel Rolling

Corpn. and others, reported in 1995 AIR Swc 214, para nos. 7,8 and 9 of the said judgement reads as under :

Para : 7.

It is, therefore, necessary to consider the effect of Section 11-A of the Rajasthan Sales Tax Act, 1954 on an existing mortgage in respect of

the property of the dealer or the person liable to pay sales tax or other sums under the Rajasthan Sales Tax Act, 1954. Section 100 of the Transfer

of Property Act deals with Charges on an immovable property which can be created either by an act of parties or by operation of law. It provides

that where immovable property of one person is made security for the payment of money to another, and the transaction does not amount to a

mortgage, a charge is created on the property and all the provisions in the Transfer of Property Act which apply to a simple mortgage shall, so far

may be, apply to such charge. A mortgage on the other hand, is defined u/s 58 of the Transfer of Property Act as a transfer of an interest in specific

immovable property for the purpose of securing the payment of money advanced or to be advanced as set out therein. The distinction between a

mortgage and a charge was considered by this Court in the case of Dattatreya Shanker Moti and Others Vs. Anand Chintaman Datar and Others,

. The Court has observed (at page 806-807) that a charge is a wider term as it includes also a mortgage, in that, every mortgage is charge, but every

charge is not a mortgage. The Court has then considered the application of the second part of Section 100 of the Transfer of Property Act which

inter alia deals with a charge not being enforceable against bona fide transferee of

the property for value without notice of the charge. It has held that the phrase "transfer of entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage.

Para : 8

Where a mortgage is created in respect of any property, undoubtedly, an interest in the property is carved out in favour of the mortgagee. The

mortgagor is entitled to redeem his property on payment of the mortgage dues. This does not, however, mean that the property ceases to be the

property of the mortgagor. The title to the property remains with the mortgagor. Therefore, when a statutory first charge is created on the property

of the debtor, the property subjected to the first charge is the entire property of the debtor. The interest of the mortgagee is not excluded from the

first charge. The first charge, therefore, which is created u/s 11-A of the Rajasthan Sales Tax Act will operate on the property as a whole and

not only on the equity of redemption as urged by Mr. Tarkunde.

Para :9.

We find support for this conclusion in the observations made in Fisher and Lightwood's Law of Mortgage, 10th Edn. at page 33 where the

statutory charges are discussed. In dealing with a statutory charge in favour of rating authorities in respect of rating surcharges for unsold

commercial buildings under the General Rate Act, 1967, it is stated that "a statutory charge has priority to the interest of the mortgagee under a

mortgage existing when the charge arose".

17.5 Mr. S.R. Shah, learned counsel for the applicant has also relied on Palmers Company Law, 24th Edition on page 1472 in para 88-86 which

reads thus:-

Following trust property - Property which can be identified belonging to or held by the company in trust for other persons may be followed and

recovered from the liquidator. Purchase money paid for property which is not delivered may sometimes be recovered.

Money fraudulently obtained may be followed into the banking account of a person who receives it without consideration.

17.6 He has also relied on judgement in the case of CHASE MANHATTAN BANK NA V. ISRAEL-BRITISH BANK (LONDON) LTD.

reported in All England Law Reports Volume 3, 1979 page 1025. This case shows that plaintiff, a New York bank, was instructed to pay huge

amount to another New York bank for the account of the defendant. The plaintiff duly made the payment through the New York clearing house

system. Later that day by mistake because of a clerical error it made a second payment of the same amount through the clearing house system to

another New York bank for the account of the defendant. The defendant petitioned the English High Court to be wound up compulsorily. On 2nd

December a winding up order was made. The defendant was insolvent and the plaintiff could not hope to recover the whole of the amount paid by

mistake on 3rd July if it proved as a creditor in the winding up. The plaintiff brought an action in England against the defendant claiming inter alia, a

declaration that on 3rd July 1974 the defendant became a trustee for the plaintiff of the huge amount, namely \$US 2,000,687.50. In these facts

and circumstances of the case the plaintiff was entitled to trace and recover that sum. On page 1039 the court has observed as under:

I have on the other hand heard a good deal of argument, and I have been referred to a number of authorities, regarding the characterisation of the

same provisions of New York law by an English court. It is unnecessary, and therefore undesirable, for me to express any opinion on that

question. I have held, after examining *Re Diplock's Estate* (1948) 2 All ER 318 that under English municipal law a party who pays money under a

mistake of fact may claim to trace it in equity, and that this right depends on a continuing right of property recognised in equity. I have found, on the

evidence presented by the parties, that a similar right to trace is conferred by New York municipal law, and that there too the party paying by

mistake retains a beneficial interest in the assets. No doubt the two systems of law in this field are not in all respects identical, but if my conclusions

are right no conflict has arisen between them in the present case, and there is no occasion to draw a line, on either side of the Atlantic, between

provisions that belong to substantive law and provisions that belong to adjective law.

18. The learned counsel has also submitted that all these principles are succinctly set out by Ramaiya in his *Company Law* book (15th Edition) on

page page 3670; where similar principles have been stated and judgement of our Gujarat High Court has also been referred. The said passage

reads as follows :

Amounts in the nature of trust moneys held by the company do not form part of the company's assets in the hands of the liquidator and they are

payable in priority to the claims of the creditors. Property or moneys which can be identified as belonging to or held by the company in trust for

other persons may be followed and recovered from the liquidator (Palmer's Company Law 21st Ed. page 775); Dinshaw & Co. (Bankers) Ltd.

Vs. Mst. Krishna Piary, (1941) 11 ComCas 138: AIR 1941 Oudh 126; Manasuba & Co. P. Ltd., Re (1973) 43 Com Cas 244 (Mad). The

Court also explained in this case the principles for determining the fiduciary character of a deposit. The character as a deposit in trust is not

destroyed by the fact that the deposit is entitled to interest. D.V. Narain Vs. Aaron Spg. & Wvg. Mills Ltd., (1961) 31 Com Cas 261 (Ker);

Mysore Spun Silk Mills Ltd., Re, (1964) 34 Com Cas 1005 (Mys). The principle applies even where there is no specific trust but the company is

in possession as constructive trustee without having any beneficial interest. Cf. Baroda Spinning and Weaving Mills Ltd. Vs. Its Co-op. Society

(1976) 46 Com Cases 1 (Guj)"".

19. On the other hand Mr. Roshan Desai, learned counsel for the secured creditors, has relied on the recent judgement of the Hon'ble Supreme

Court in the case of DENA BANK VS. BHIKHABHAI PRABHUDAS PAREKH & CO. & ORS. reported in 2000(4) Supreme Today 500.

In this case, in para 8 the Supreme Court has held as under:-

The principle of priority of Government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for

priority of state debts rests on the well recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is

received by the State, it would not be able to function as a sovereign government at all. It is essential that as a sovereign, the State should be able

to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary

funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues

(See Builders Supply Corporation Vs. The Union of India (UOI) Represented by the Commissioner of Income Tax, West Bengal and Others, . In

the same case, the Constitution Bench has noticed a consensus of judicial opinion that the arrears of tax due to the State can claim priority over

private debts and that this rule of common law amounts to law in force in the territory of British India at the relevant time within the meaning of

Article 372(1) of the Constitution of India and therefore continues to be in force thereafter. On the very principle on which the rule is found, the

priority would be available only to such debts as are incurred by the subjects of the Crown by reference to the State's sovereign power of

compulsory exaction and would not extend to charges for commercial services or obligation incurred by the subjects to the State pursuant to

commercial transactions. Having reviewed the available judicial pronouncements Their Lordships have summed up the law as under:-

1. There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.

2. The common law doctrine about priority of crown debts which was recognised by Indian High Courts prior to 1950 constitutes 'law in force'

within the meaning of Article 372(1) and continues to be in force.

3. The basic justification for claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim

priority in respect of its tax dues.

4. The doctrine may not apply in respect of debts due to the State if they are contracted by citizen in relation to commercial activities which may be

undertaken by the State for achieving socio-economic good. In other words, where welfare State enters into commercial fields which cannot be

regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of

such commercial activities the applicability of the doctrine of priority shall be open for consideration.

Further in para 10 of the judgement the Supreme Court has observed as under:-

However, the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common

Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery

of its debts over a mortgagee or pledgee of goods or a secured creditor. It is only in cases where the Crown's right and that of the subject meet at

one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King

commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two

ought to prevail in a case where one that of the subject, has prevailed already. In GILES VS. GROVER (183) 131 ER 563 it has been held that

the Crown has no precedence over a pledgee of goods. In The Bank of Bihar Vs. The State of Bihar and Others, , the principle has been

recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods

cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the

pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.L.L. Seventh Edition, p. 386) `It seems a Government debt in

India is not entitled to precedence over a prior secured debt."

In para 15 of the judgement, the Supreme Court further observed as follows:-

We have seen that the common law doctrine of priority of crown debts would not extend to providing preference to crown debts over secured

private debts. It was submitted by the learned counsel for the appellant that under the Karnataka Land Revenue Act as also under the Karnataka

Sales Tax Act the arrears of sales tax do not become arrears of land revenue; they have been declared merely to be recoverable as arrears of land

revenue. Relying on the observations of this Court in Builders Supply Corporation case (supra) vide para 28, the learned counsel for the appellant

submitted that the appellant being a secured creditor the arrears of sales tax could not have preference over the rights of the appellant. It is true that

the Constitution Bench has in Builders Supply Corporation case (supra) observed by reference to Section 46(2) of the Income Tax Act, 1922,

that that provision does not deal with the doctrine of the priority of crown debts at all; it merely provides for the recovery of the arrears of tax due

from an assessee as if it were an arrear of land revenue which provision cannot be said to convert arrears of tax into arrears of land revenue either.

The submission so made by the learned counsel omits to take into consideration the impact of Section 158(1) of the Karnataka Land Revenue Act

which specifically provides that the claim of the State Government to any

moneys recoverable under the provisions of Chapter XVI shall have precedence over any other debt, demand or claim whatsoever including in respect of mortgage. Section 158 of the Karnataka Land Revenue Act not only gives a statutory recognition to the doctrine of State's priority for recovery of debts but also extends its applicability over private debts forming subject matter of mortgage, judgement decree, execution or attachment and the like. In Collector of Aurangabad Vs. Central Bank of India (supra) the provisions of Hyderabad Land Revenue Act and Hyderabad General Sales Tax Act had come up for consideration of this Court. This Court had refused to grant primacy to the dues on account sales tax over secured debt in favour of the Bank. A perusal of the relevant statutory provisions quoted in the judgement goes to show that any provision pari materia with the one contained in Section 158 of Karnataka Land Revenue Act was not to be found in any of the local acts under consideration of this Court in Collector of Aurangabad Vs. Central Bank of India. The effect of Section 190 is to make the procedure for recovery of arrears of land revenue applicable for recovery of sales tax arrears. The effect of Section 158 is to accord a primacy to all the moneys recoverable under Chapter XVI, which will include sales tax arrears.

19.2 The learned counsel has relied on judgement in the case of Ramabai Govind Vs. Raghunath Vasudeo, where the court has on page No. 110

in para 5(a) has observed as follows:

Unless and until the trustee succeeds in establishing before a Court of law that no part of the trust property formed part of the consideration for the purchase of that property and he had purchased it out of his own separate property or properties, he would not be able to claim the property as his own, and the beneficiary or the cestui que trust would be entitled to that property. This is the position which is clearly laid down in law and is well recognised in the text books and the authorities as above stated.

19.3 He has also relied on the Division Bench judgement of this court in the case of GUJARAT STATE FINANCIAL CORPORATION VS.

OFFICIAL LIQUIDATOR AND OTHERS reported in 87 Company Cases 658. On page 673 the Court has observed as under:-

If that be the correct position, and in our opinion it is, the conclusion is irresistible that a secured creditor, on option to exercise his right to realise

the security without intervention of the court still stands outside the winding up proceedings. Else the very provision of Section 529(1)(c) will be

rendered otiose and the words ""where a secured creditor instead of relinquishing his security and proving his debt, opts to realise his security....."" in

the proviso to Section 529(1) and (2) will be meaningless. So also the question of the ranking of the unrealised debt of secured creditor to the

extent it has remained unrealised on account of enforcement of the charge of workmen's dues, pari passu with the workmen's dues at the time of

distribution of dividends by the official liquidator shall be a mere surplusage. An interpretation bringing about such a result cannot be accepted.

Again on page 679 the Court further observed thus:

We are, therefore, of the opinion that the amendment of Section 529 and insertion of Section 529A by Amending Act No. 35 of 1985 in the

Companies Act has not altered the position of a secured creditor, as envisaged u/s 28(6) of the Insolvency Act read with Section 529(1)(c) of the

Companies Act to stand outside the winding up proceedings and realise the security without intervention of the Court.

19.4 He has also relied on another judgement of this court (Coram: Rajesh Balia, J) in Company Application No. 44 of 1998 in Company Petition

No. 85 of 1991 in which at para 6 on page No. 3 the Court has observed as under:

It is to be noticed that at best Corporation under the statute claims to have a charge created in its favour in the property in question which it can

enforce for the purpose of recovery of its dues by following it in the hands of transferee but the statute nowhere prohibits free transferability of the

property from one owner to the purchaser. On the contrary acceptance of a valid transfer is inherent in principle right to follow property in the

hands of transferee. Therefore, once the applicant has purchased the property at auction held by Official Liquidator which was confirmed by the

court, in the absence of any statutory prohibition against transfer, the Corporation cannot refuse to recognise the purchaser as a transferee and to

deal with it as transferee of the property in question. Therefore, I deem it necessary to clarify that the Corporation would not take any step which

results in directly or indirectly coercing the applicant to make the payment of arrears in question which are subjudice and in respect of which the

court after hearing the learned counsel for both the parties has ordered on 30th April, 1998 that applicant ought not to be disturbed and coercive

actions should not be taken against it. It is further clarified that any proposals put by the applicant as transferee of the property in question shall not

be refused and rejected solely on account of non-payment of the arrears of property tax in question in this application.

20. Mr. Mayank Buch, learned counsel for another secured creditor has relied on the judgement of Kerala High Court in the case of KERALA

FINANCIAL CORPORATION VS. RECOVERY OFFICER AND ASSISTANT PROVIDEND FUND COMMISSIONER AND

ANOTHER reported in (1994) Corporate Law Adviser Volume 15 page 343 in which on page 344 the court observed thus:

The nature of the rights claimed by the Corporation and the Recovery Officer may be considered in the light of the relevant provisions of law. The

right of the Corporation to take over the assets of its debtor is created by Section 29 of the Act.

The Corporation shall have the right to :

(i) take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale; and

(ii) realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

Again on page 345 the Court has further observed as follows:

Mortgage is the transfer of an interest in immovable property. This is clear from the use of the words "transfer of an interest" used in Section 58 of

the Transfer of Property Act. In a charge, there is no transfer of interest in the property but the creation of right of payment out of property

specified and as such it cannot be enforced against the bona fide purchaser for value without notice (please see: Mulla on the Transfer of Property

Act, 7th Edn., pp. 360 and 605). Mortgage creates a right in rem. Charge does not. While the mortgage is good against subsequent transferees,

charge is good only against transferees with notice of the charge.

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A charge can be enforced against the transferee for consideration without notice if it is "otherwise expressly provided by any law." (Section 100 of

the Transfer of Property Act). The provision of law which permits the enforcement

of charge against transferees for consideration without notice of the charge must be "express". In this case what sub-section (2) of Section 11 of the Provident Funds Act does is to declare that the amount of provident fund contribution shall "be paid in priority to all other debts". These words do not mean that a charge may be enforced against the property held by a transferee for consideration without notice. The legislature was aware of the provision of Sections 29 and 46B of the Act which invested the Corporation with the right to sell the mortgaged or hypothecated property. If it intended to make the charge enforceable against the property held by the Corporation, it would have so provided by express words. What provision of law can be said to be "express" may be understood from the judgement of the Supreme Court in *The Bank of Bihar Vs. The State of Bihar and Others*, . It is not enough to provide for enforceability of the charge against the property. The saving law must also provide that the charge shall be enforced against the property "in the hands of a transferee for consideration without notice of the charge". In my opinion, the words "shall be paid in priority to all other debts" employed in sub-section (2) of Section 11 of the Provident Funds Act do not constitute an express provision that the charge may be enforced against the property held by transferee for consideration without notice of the charge. The Court in *Sundaram Finance Ltd. Vs. Regional Transport Officer and Others*, , and the Allahabad High Court in *Suraj Prasad Gupta and Another Vs. Chartered Bank and Another*, , negated the State's claim of priority over the rights of secured creditors.

The declaration of priority granted to the payment of employer's contribution under sub-section (2) of Section 11 of the Provident Funds Act is not a provision of law expressly providing that the charge may be enforced against the property in the hands of a transferee for consideration without notice of the charge. Therefore, having regard to the provisions of Section 100 of the Provident Funds Act cannot be enforced against the property mortgaged or hypothecated to the Corporation.

21. Before this Court the question which arose before me which was urged by the secured creditors was also urged by the secured creditors before earlier matter also. Mr. Rosan Desai learned counsel contended that the same questions. However, the learned Judge (Coram :

S.D.Dave,J) has negated the said contention on the reasons of which the learned Judge as answered the first question and stated that

undoubtedly, the money lying with the mills company on the date of the order of liquidation and/or winding up where the money belonging to the

credit society - the applicant before me, and that, the mills company in liquidation was holding the money in the capacity of trustee, the mill

company in liquidation was obviously not the owner of the money and in the same way was not the beneficiary. The money was being held by the

mills company in liquidation in trust which were required to be transmitted to the credit society, so that it would be adjusted by the said society

against the dues of the members who incidentally would be the workers of the mills company in question.

22. The trust money lying with the Mills company have not been set apart and has been intermingled with the assets of the Mills company. but this

intermingling of trust money held by the Mills company in trust with the assets of the mills company, cannot take away the element of money into

the assets of the Mills company. The intermingling of these two different properties can never be taken as the passing of the property in the trust

money in the hands of a trustee, in favour of the trustee, or else the trustees in many such cases would also enjoy position of a creator of a trust

and the only beneficiaries. This would militate against the very basics of the Doctrine of "Trust" not only implied but express also.

23. As regards the contention of the secured creditors that these properties were already mortgaged prior to charge created by the Corporation and,

therefore, the Corporation has no right to claim the said amount.

23.1 Mr. S.R. Shah, learned advocate for the applicant, heavily relied on the judgement in the case of STATE BANK OF BIKANER & JAIPUR

VS. NATIONAL IRON & STEEL ROLLING CORPN. AND OTHERS (supra) which is delivered by three Judges Bench. He has submitted

that Mr. Roshan Desai has relied on the judgement of the Hon'ble Supreme Court in the case of DENA BANK VS. BHIKHABHAI

PRABHUDAS PAREKH & CO. & ORS. (supra) which has been delivered by two Judges Bench. He further submitted that the Hon'ble

Supreme Court in DENA BANK's case (supra) has not referred to three Judges Bench's judgement of the Hon'ble Supreme Court in the case of

STATE BANK OF BIKANER & JAIPUR (supra). He stated that the earlier judgement is delivered by three Judges Bench which is binding on

two Judges Bench and as such the later judgement of the Hon''ble Supreme Court has not referred to the earlier judgement. The subsequent

judgement of the Hon''ble Supreme Court is per curiam and is not binding on this Court. Mr. Roshan Desai, learned advocate for the Bank has

submitted that this court should not follow the judgement of this court in NUTAN MILLS" case (supra) delivered by Mr. Justice S.D. Dave, J. He

stated that the question which has been raised before this court was also raised before that court. However, the learned Single Judge has not

answered that question. However, being agrieved by teh said judgement, one of the secured creditors has filed O.J. Appeal against the said

judgement and the said O.J. Appeal is pending before this court (i.e Division Bench).

24. Shri M.D. Pandya, learned advocate for the Official Liquidator, stated that in view of rival contention raised by Mr. Shah and Mr. Desai,

learned counsel, wherein one of the question is to be considered as to whether which judgement of the Supreme Court is binding on this court and

when already O.J. Appeal is pending before this court against judgement of the Single Judge (Coram: S.D. Dave, J), it is better that this court may

refer this matter to Division Bench along with O.J. Appeal so that the litigants may save time, energy and cost of filing further appeal and the parties

may get authoritative pronouncement with this complicated question by Division Bench of this court.

25. I have considered the rival submissions and I am of the opinion that whether the judgement in STATE BANK OF BIKANER & JAIPUR

(supra) or the judgement in DENA BANK"s case (supra) is binding or not and whether the judgement in DENA BANK"s case (supra) is per

curiam or not, is a complicated and complex question which required to be decided by a Division Bench. Therefore, I refer this matter to the

Division Bench. Over and above when the judgement in the case of NUTAN MILL (supra) is already pending before the Division Bench, it is

better that the entire matter may be referred to the Division Bench. Before the Division Bench, the following questions of law will have to be

decided in this behalf.

1. Whether the judgement of the Hon''ble Supreme Court in STATE BANK OF BIKANER & JAIPUR Vs. NATIONAL IRON & STEEL

ROLLING CORPORATION reported in 1995 AIR SCW 214 is binding or whether the judgement of the Hon''ble Supreme Court in the case of

DENA BANK Vs. BHIKHABHAI PRABHUDAS PAREKH & CO., reported in 2000 (4) Supreme Today 5000 is binding to this case ?

(2) Whether amount standing to the credit of the workers regarding their contribution to Employees State Insurance Act in the books of the Mill

Company (In Liquidation) is impressed with the character of a Trust and hence, it does not form part of the assets of the company and the

Liquidator is bound to pass the same in priority before any distribution of the assets of the company is made by him ?

(3) Whether the property/assets of the Company which has already been mortgaged or earmarked by the secured creditors and when the

Company is in the liquidation whether the Liquidator was having that equity alone and whether the entire amount was required to be paid to the

secured creditors or the applicant is entitled to priority over the said dues in this behalf.?

26. In view of the aforesaid discussion in the matter, as the matter is required to be placed before the Hon''ble the Chief Justice for obtaining

suitable orders regarding placing this matter before appropriate Court.