

# M/S Suzuki Suitings Pvt Ltd vs Official Liquidator Of M/S Mahendra ... on 16 December, 2014

**Author: N.V.Anjaria**

**Bench: N.V.Anjaria**

0/COMA/346/2011

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION NO. 346 of 2011

In COMPANY PETITION NO. 150 of 1996  
With  
COMPANY APPLICATION NO. 238 of 2010  
In  
COMPANY PETITION NO. 150 of 1996

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE N.V.ANJARIA

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|---|---|-----|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?  | YES |
| 2 | To be referred to the Reporter or not ?   | YES |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?   | NO  |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? | NO  |
| 5 | Whether it is to be circulated to the civil judge ?   | NO  |

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M/S SUZUKI SUITINGS PVT LTD....Applicant(s)  
Versus  
OFFICIAL LIQUIDATOR OF M/S MAHENDRA PETROCHEMICALS LTD &  
1....Respondent(s)

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Appearance:

MR NAVIN K PAHWA WITH MR PRATIK Y JASANI, ADVOCATE for the  
Applicant(s) No. 1  
MR BHARAT T RAO, ADVOCATE for the Respondent(s) No. 2  
MR RM DESAI, ADVOCATE for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE N.V.ANJARIA

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O/COMA/346/2011

CAV JUDGMENT

Date : 16/12/2014

CAV JUDGMENT

Was it permissible in law that after final order of winding up of a company, the third party- private applicant companies continued in possession and custody of the assets and affairs of the company in liquidation? Was it not quite incongruous that the applicants even after the winding up of a company could run the business and earn? Whether the Memorandum of Understanding under the banner of which the applicants took shelter to justify the arrangement, was valid and enforceable document? Whether it was ingenuine and whether it was sham in the arrangement it brought out? Whether the arrangement and the Memorandum of Understanding operated as mask? Whether it defrauded the secured creditor in the process? These are some of the questions arising in the captioned cognate company applications.

2. Both the applications being interconnected and interactive in their factual compass, are dealt with and considered simultaneously by this common judgment.

2.1 Company Application No.238 of 2010 was filed by one M/s.Suzuki Parasrampur Private Limited on 16th August, 2010. Company Application No.346 of 2010 was filed on 29th April, 2011 by the applicant thereof M/s. Suzuki Suitings Private Limited. The one claims to be the sister concern of the other.

2.2 M/s.Suzuki Parasrampur Private Limited, the applicant of Company Application NO.238 of 2010, by taking out Judge's Summons prayed for direction against the official liquidator not to take possession of Mahendra Suitings Limited-the company in liquidation which was ordered to be wound up on 19 th April, 2010 and further to permit the applicant to carry on the production.

2.3 The applicant of another Company Application prayed that the transaction by the company in liquidation, of entering into a Memorandum of Understanding dated 01st January, 2004 with the applicant-M/s. Suzuki Suiting Private Limited be validated under the provisions of Section 536(2) of the Companies Act, 1956.

3. The background facts which are common may be set out.

3.1 In both the applications, the respective applicants rested their case on a Memorandum of Understanding dated 01st January, 2004. The said Memorandum of Understanding was between the company in liquidation-M/s.Mahendra Petrochemicals Limited and M/s.Suzuki Suitings Private Limited. The MoU was the main plank for their plea and the prayers. The same is adverted to in detail in the succeeding paragraphs.

3.2 By virtue of order dated 19th April, 2010 passed in Company Petition No.150 of 1996, which was filed by creditor-Canara Bank and five others, the company-M/s. Mahendra Suitings Limited was ordered to be wound up. The said order is reproduced hereinbelow, "1. Present petition has been preferred for an appropriate order of winding up of respondent Company - Mahendra Suitings Limited under the provisions of the Companies Act, 1956, more particularly, under secs.433 and 434 of the Companies Act, 1956.

2. Earlier it was reported that as the respondent Company was before the BIFR and thereafter AAIFR, the proceedings of the present Company Petition were stayed and as such, the Company Petition was admitted by order dtd.4/9/2000, however, order of publication of advertisement was deferred for a period of eight weeks thereafter. That thereafter when the Company Petition was taken up for hearing on 9/2/2010, Mr.Ashok L. Shah, learned advocate representing the respondent Company conveyed to the learned advocate appearing on behalf of the petitioner as well as to the Court that the respondent Company is not inclined to contest the petition. Therefore, admission and notifying date for final hearing of the petition was ordered to be advertised and published in the "Indian Express", English Daily and Lok- Satta - Jan Satta, Gujarati Daily, both Ahmedabad Editions and the publication in Government Gazette is dispensed with and the matter was fixed for final hearing on 9/3/2010. It is reported that the admission of the petition has been advertised/published as directed by this Court vide order dtd.9/2/2010.

3. Mr.Ashok L. Shah, learned advocate appearing on behalf of the respondent Company has fairly conceded that the respondent Company has no case on merits and that the respondent Company does not contest the petition. It is submitted that the respondent Company has failed before the BIFR and AAIFR.

4. Considering the above and even otherwise, considering the case on merits, it appears to the Court that the financial position of the respondent Company is such that it is not possible for the respondent Company to pay the debts to its creditors and the respondent Company is not viable Company and is required to be ordered to be wound up.

5. As the petition is not contested, this Court does not assign any further reasoned order and as such further reasoned order is not invited.

6. In view of the above and for the reasons stated above, present petition is allowed. The respondent Company - Mahendra Suitings Limited is hereby ordered directed and ordered to be wound up. The Official Liquidator attached with this Court is appointed as Official Liquidator for the respondent Company - Mahendra Suitings Limited. The Official Liquidator is hereby directed to take possession of the properties (movable and immovable) of the respondent company along with its bank

accounts, cash and accounts books, etc. immediately after preparing inventory and Panchnama. The inventory and the Panchnama of the properties of the respondent Company shall be made by the Official Liquidator immediately without wasting any further time. The Official Liquidator shall submit his report within a period of three months. If required, he can take services of the Official Valuer for the purpose of preparation of possession note, etc. No costs."

3.3 It is also not in dispute, and to be noted with reference, that the company was in the year 2000 before the Board of Industrial and Financial Reconstruction (B.I.F.R.) by filing Case No.385 of 2000 in which order dated 19th November, 2004 was passed. The company approached the Appellate Authority of Industrial and Financial Reconstruction (A.A.I.F.R.) by filing Appeal No.236 of 2004. In that Appeal, order dated 15th January, 2008 was passed which reads as under, "This appeal filed by M/s. Mahendra Petrochemicals Limited is directed against the impugned order dated 19.11.2004 passed by BIFR in case No. 385/2000. In the aforesaid order, BIFR had directed the OA to issue advertisement for change of management under Section 18 (2)(i) and 18() of SICA. The prayer of the appellant is to set aside the impugned order and remand the matter to BIFR with a direction to formulate a rehabilitation scheme for obtaining the consent of the secured creditors under Section 19(2) of SICA.

2. During the course of hearing, an affidavit was filed by IFC on 19.12.07 in which is stated that the company has been incurring losses since 31.12.2004 and registered an accumulated loss of Rs.116.20 crores during the year ended 30.9.06 as against its networth of Rs.32.98 crores. The appellant company was declared sick on 18.12.2003 and IDBI was appointed as OA under Section 17 (3) of SICA to prepare a rehabilitation scheme. IFCI states that even after a lapse of 4 years from the date of declaration of sickness, no fully tied-up rehabilitation scheme has been filed. Therefore, IFCI had issued notice under Section 13 (2) of the SARFAESI Act on 29.5.07 demanding its dues of Rs.99.77 crores outstanding as on 30.4.07. Thereafter, since the appellant company failed to pay the amount to IFCI which is having more than 75% of the outstanding secured loan, action was taken under 13 (4) of SARFAESI Act to take over the possession of both the movable and immovable assets of the company on 15.11.07.

3. Under the 3rd proviso to Section 15 (1) of SICA, the reference filed under SICA shall abate if the secured creditors representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures for recovery of their secured debts under section 13(4) of the SARFAESI Act. In the instant case, the IFCI has already taken possession of the company's assets on 15.11.07 under Section 13 (4) of the SARFAESI Act. We, therefore, order that abatement of the reference filed by the appellant company under Section 15 (1) of SICA under the 3rd Proviso to Section 15() of SICA."

3.4 The aforementioned order dated 19th April, 2010, directing winding up of a company was challenged by the applicant of Company Application No. 238 of 2010 by filing O. J. Appeal No.42 of 2010. In the Appeal, the case of the said appellant was inter alia that it was engaged in the business of weaving and processing cloths and took on rent the factory situation on plot No.2112-2113, GIDC Industrial Estate, Chhatral, Mehsana, belonging to the Company. It was the case that thereafter in the year 2003-2004, the appellant entered into a Memorandum of Understanding with the

Company, whereunder the Company leased out the land and building standing thereon to the appellant for a period of 20 years against the payment of refundable deposit of Rs.70 Lacs.

3.5 It was claimed that the appellant invested the money in the factory building and installed machinery etc. It was claimed that since 1994 and even after renewed arrangement in 2004, the appellant had been in possession. It was stated that an unsecured creditor-Canbank Mutual Fund through its trustees filed winding up petition in the year 1996. It was further stated that I.F.C.I.-a secured creditor had first charge over the properties of the company initiated action against under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2003. It was further stated that the proposal for settlement of the dues of I.F.C.I. and other two secured creditors was mooted, but settlement could not become final for want of consent of the owner/borrower Mr. Mahendra Arya of M/s. Mahendra Suiting Ltd.

3.6 In the said O. J. Appeal, the Division Bench of this Court on 14th March, 2010 issued notice, returnable on 05th July, 2010 and in the meanwhile, effect and operation of the order of learned Company Judge was stayed. Learned advocate for the official liquidator waived service of notice on behalf of the official liquidator.

3.7 In the hearing of the above O. J. Appeal, the appellant sought permission to withdraw the same, and on 12th August, 2010, the Division Bench of this Court recorded the following order "After the matter has been heard fully learned advocate for the appellant seeks permission to withdraw the appeal, under instructions, to enable the appellant to take appropriate remedial action in accordance with law. Permission granted. Appeal stands dismissed as withdrawn."

3.8 After the aforesaid order, the applicant M/s. Suzuki Parasrampuriah filed aforesaid Company Application NO. 238 of 2010 ON 16th August, 2010 and prayed as above that the official liquidator should not take possession. The said application was based on the same set of facts pleaded in the O.J. Appeal. In the affidavit in support of judge's summons affirmed by one Biharilal Parasrampuriah, the Director of the applicant company, it was stated that, "...that the Applicant Company was never informed about any proceedings pending before any forum. I further state that the applicant company was not aware about its previous name viz. Mahendra Suitings Limited. I further state that the Applicant Company knows the Company in liquidation as Mahendra Petrochemicals Limited and not even the name of Mahendra Suitings Limited. I further state that at the time of entering into MOU, the Company in liquidation never informed about pending proceedings before any Court as well as any charge of any financial institutions on said properties. I state that keeping trust and faith in the Company in liquidation, the applicant Company entered into MOU...."

3.9 Thus it was the case that the applicants were not aware about the winding up proceedings. The applicants relied on the Memorandum of Understanding dated 01st January, 2004 which is reproduced herein in its full text.

"MEMORANDUM OF UNDERSTANDING This memorandum of understanding entered in to between:

1. M/s Mahendra Petrochemical Ltd., a company incorporated under Companies Act, 1956 having registered office at Plot NO. 221, 222 at Village Sari, Taluka Sanand, Dist - Ahmedabad hereinafter referred to as the party of the First Part.

And

2. M/s. Suzuki Suitings Pvt. Ltd., a company incorporated under Companies Act, 1956 having registered office at 34, Shreeji Cloth Market, Nr. Meghdoot Hotel, O/s Sarangpur Gate, Ahmedabad - 380 001 and its factory at 2204, GIDC, Phase II, Chhatral-382 729 Dist. Mehsana hereinafter referred to as the party of the Second Part WHEREAS the party of the First Part is owner of a Land & Dilapidated Ruined Building located at 2112, 2113, GIDC, Phase II, Chhatrat-382729, Dist. Mehsana; and WHEREAS the party of the Second Part is engaged in the Business of Weaving having its factory at 2204, GIDC, Phase II, Chhatral-382729 Dist. Mehsana WHEREAS the party of the First Part is not running its factory and is willing to give Land & Dilapidated Ruined Building to the party of the Second Part to run the weaving unit at 2112, 2113, GIDC, Phase-II, Chhatral-382729, Dist. Mehsana in Land & Dilapidated Ruined Building after reconstructed at their cost and whereas the party of the Second Part is willing to run the weaving factory of the party at 2112, 2113, GIDC Dilapidated Ruined Building.

WHEREAS the parties have agreed on various terms and conditions and are willing to put them in writings for the purpose of avoiding future misunderstanding and dispute:

WITNESSTH AND IT IS HEREBY AGREED AS UNDER:

1. That the party of the Second Part will operate their own looms and plant & machinery installed at the party of the First Part situated at factory located at Plot No. 2112 & 2113 GIDC, Phase II, Chhatral.
2. That the Party of the Second Part & their sister concern will keep as refundable non interest bearing deposit of Rs. 70,00,000 (Rupees Seventy Lacs Only) with the party of the second part as a consideration for using the factory Land and reconstructed Building by the Second Part of the party.
3. That the party of the Second Part shall have all the liberty to use the Land of the party of the first part and all other facility of the factory of the party of the First Part for production and will not be required to pay any rent to the party of the First Part.
4. The party of the First Part will informed this arrangement to their bankers. The party of the First Part further confirms that they do not have any stock in trade or stores at the above factory and whatever stock in trade and store etc. are lying in the factory premises do belong to the party of the Second Part (i.e., M/S SUZUKI SUITINGS PVT. LTD.)

5. The agreement shall be effective for a minimum period of 20 years and after expiry of the period of 20 years, the parties may mutually agree to extend the duration of this agreement. This agreement can be terminated by giving 3 months notice in writing by any of the above party.

SIGNED, SEALED AND DELIVERED ON THIS 1st day of January, 2004.

Sd/-

For Mahendra Petrochemicals Ltd.

Party of the First Part Witness

1. Jagdish Prasad Sharma D2/126 Parsavanath Towers Krishnanagar, Ahmedabad Sd/-

For Suzuki Suitings Pvt. Ltd."

3.10 It appears that on 17th August, 2010, this court passed following order in the proceedings of the company application, "1. Leave to join Canara Bank, the original petitioner of Company Petition No.150 of 1996 in which the winding up order is passed by this Court on 19.04.2010, as party respondent.

2. Leave to join Mr. Mahendra K. Arya, the Ex-Chairman and/or Managing Director of the Company in liquidation, as party respondent.

3. Notice returnable on 06.09.2010. Mr. R.M. Desai, learned advocate appearing for the Official Liquidator waives service of notice on behalf of Official Liquidator.

4. Before filing the present application, the applicant has filed OJ Appeal No.42 of 2010 challenging the winding up order. In OJ Civil Application No.246 of 2010, the Court has granted stay whereby the operation of the winding up order was stayed. However, the said OJ Appeal was withdrawn on 12.08.2010 reserving liberty to the applicant to take appropriate remedial action in accordance with law. Hence, the present application is filed. The Court would consider the prayers made in the present application after all the relevant parties are before the Court. In the meantime, the Official Liquidator is restrained from taking the possession of the properties held and possessed by the applicant. The applicant is, however, allowed to run the business of the Company in liquidation as an Agent of the Official Liquidator and submit the accounts to the Court as well as to the Official Liquidator at every interval of one month. The applicant is also restrained from transferring, alienating or creating any charge or encumbrances on the properties held and possessed by the applicant.

5. Office is directed to place papers of Company Petition No.150 of 1996 (already disposed of) along with the present application."

4. In Company Application No.238 of 2010 the official liquidator filed its reply dated 02nd February, 2012, raising contention inter alia that (i) applicant had no locus standi to prefer the application, (ii) no transaction of any kind had been entered into by the company in liquidation, (iii) the alleged transaction of Memorandum of Understanding was with M/s. Suzuki Suitings Private Limited and not with the applicant, (iv) Order dated 17th August, 2010 was by misrepresentation and not disclosing correct facts,

(v) the applicant entering into possession and occupying the land of the company in liquidation was illegal and the applicant was trespasser and encroacher. It was further stated that the merits of the so called of Memorandum of Understanding would be dealt with in Company Application No.346 of 2011 above which was preferred by M/s. Suzuki Suitings Private Limited.

5. Coming to the facts of Company Application No.346 of 2011, as noted above, the prayer in the said Company Application was for validation of Memorandum of Understanding dated 01st January, 2004 under Section 536(2) of the Act. Affidavit in support of Judge's Summons and the prayers was affirmed by one Biharilal J. Parasrampur, describing him as Director of the applicant company who happened to be the very person and Director of the applicant-M/s.Suzuki Parasrampur Suitings Private Limited of Company Application No.238 of 2010. The very Memorandum of Understanding dated 01st January, 2014 was relied on. It was further stated that the applicant gave to the respondent company non- interest bearing deposit of total amount of Rs.70,00,000/- (Rupees Seventy Lakhs Only). The details of the cheques mentioned in paragraph 4 of the affidavit.

5.1 It was pleaded in the same veins as was pleaded in Company Application No.238 of 2010, that the applicant company was put in possession of the plant of the company at 2112-2113, GIDC, Phase II, Chhatral, and the applicant invested sizable amount in repair and installation of the machineries, etc. It was stated that the company enjoyed benefit of non- interest bearing funds of Rs.70,00,000/-. The said applicant also contended that it was not aware about winding up petition being Company Petition No.150 of 1996 before this Court and the Memorandum of Understanding was entered into by the respondent company with the applicant in usual course of business and in commercial prudence so as to plough working capital for running its business activity.

5.2 It was further stated and contended in the affidavit that, "the Company had filed its Reference before the Board for Industrial and Financial Reconstruction (BIFR) under provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) and the same was registered as Reference case No.385/2000. It is further submitted that when the said MoU dated 1-1-2004 was entered into by the Company with with the Applicant, the Company's said Reference No.385/2000 was pending before the BIFR. It is further submitted that under provisions of Section 22(1) of SICA when a Reference is pending before the BIFR, no proceeding of winding up of the Company shall lie or be proceeded with further. Thus, when the said MoU was entered into on 1-1-2004 the winding up proceeding by way of Company Petition No.150 of 1996 shall be deemed to be not in existence at all and any transaction entered into during the pendency of the said Reference before the BIFR would not be affected by provisions of Section 536(2) of the Companies Act, 1956 rendering the transaction as void. In this view of the matter also the said transaction cannot be treated as void."



5.3 It was on the same facts and the grounds the two Company Application being Company Application No.238 of 2010 by Suzuki Parasrampurua Suitings Private Limited and Company Application No.346 of 2011 by Suzuki Suitings Private Limited were filed in sequence and the respective prayers was sought to be supported. An undertaking dated 26th July, 2011 was filed that the applicant shall deposit with the Official Liquidator rent at the rate of Rs.06,00,000/- (Rupees Six Lakhs Only) for the period from 01 st June, 2010 to 31st May, 2011 and at the rate of Rs.06,50,000/- (Rupees Six Lakhs Fifty Thousand Only) for the period thereafter till further orders.

5.4 It was given out that the applicant did not deposit the aforesaid amount and it piled up as unpaid, which was in breach of the directions of this Court. Learned advocate for the Official Liquidator submitted that he has taken out contempt proceedings, taken out in the year 2014, in this regard and the contempt petition is pending before the Division Bench.

5.5 During the pendency of the Application orders came to be passed from time to time. In Company Application No.238 of 2010 in the order dated 08th December, 2010, grievance was raised on behalf of the Official Liquidator that rent was not being paid though the property of the company was being used. Against that a plea was raised on behalf of the applicant company, which was recorded by the Court in the order, that the accrued interest on the deposit of Rs.70,00,000/- may be treated as rent. The Court recorded that details about the said payment of Rs.70,00,000/- and its present status were not available on record. On 15th December, 2010 respondent No.3 was directed to file statement regarding the said amount stated to have been received from the applicant. It further appears that orders were also passed that the Official Liquidator should move appropriate application seeking permission to invite applications from interested parties for sale of the properties at the competitive rates for running the Unit. The applicant filed affidavit dated 01st December, 2011 putting-forth a proposal that it may be allowed to continue to remain in possession of the said property in capacity of auction purchaser. Undertaking on different aspects was offered and given. The applicants of both the Applications filed similar affidavits regarding their proposals in both the Applications. However no fructifying developments in the said regard resulted. The pendency of the Applications witnessed only passage of time. The applicants continued to be in possession of the properties and affairs of the company in liquidation.

5.6 In course of hearing in Company Application No.346 of 2011 order dated 05th September, 2014 was passed when learned advocate previously appearing for the applicant sought to retire, recording the contents of aforesaid order dated 17th August, 2010. It deserves to be noted further that since in the order dated 17 th August, 2010 aforesaid this Court had directed the applicant company to submit the accounts to the Court as well as to the Official Liquidator at every interval of one month and further directions were also issued, but no facts in that regard was on record, another order dated 26th September, 2014 was passed as under.

"The company named-M/s.Mahendra Petrochemicals Limited went into liquidation in the year 2010. The applicant herein, however, was allowed to run the business of the company in liquidation as per order dated 17th August, 2010 passed by this Court. It was the case of the applicant in support of its claim to run the business of the company already went into liquidation that its sister concern-M/s.Suzuki Suitings

Private Limited had entered into a Memorandum of Understanding (MoU) with the company in liquidation. In the afore-mentioned order dated 17th August, 2010 it was stated that the applicant is allowed to run the business of the company in liquidation as an agent of the Official Liquidator. The Court further specifically required that the applicant submit accounts to the Court as well as to the Official Liquidator at every internal of one month.

2. Company Application No.238 of 2010 is filed by the applicant wherein prayer is to restrain the Official Liquidator from taking possession of the property of the company in liquidation and permit the applicant to carry on the business. In the subsequently instituted Company Application No.346 of 2011 the very applicant has prayed for seeking ratification of this Court the MoU in question dated 01st January, 2004 and to validate the same under Section 536(2) of the Companies Act, 1956.

3. When both the above matters were together considered today, the record did not witness that the direction in the order dated 17th August, 2010 regarding producing of the accounts at the regular interval of one month is complied with. Learned advocate Mr.Pahwa, when pointingly queried on this aspect, had no answer; however he prayed that he wanted to submit and place on record certain materials in furtherance of the prayers made. Learned advocate Mr.Roshan Desai for the Official Liquidator opposed the adjournment and inter alia submitted that when the MoU being relied on by the applicant was with its sister concern, the applicant lacked locus standi to make any prayer before this Court in either of the applications. The tenor by submissions of learned advocate for the Official Liquidator was that the Official Liquidator was not approving the arrangement based on the aforesaid MoU and that the same was militative against the provisions of law applicable to the company in liquidation vis-a- vis the role, powers and duties of the Official Liquidator appointed and put in charge of the company in liquidation.

4. Having thus noted, before the further hearing in the matter takes place, the applicant is directed to file a specific affidavit as regards the compliance at its end about the production of the accounts required to be produced as per the aforesaid order dated 17 th August, 2010 at regular interval. The applicant shall in no uncertain terms state as to whether the said direction was complied with or not. Such affidavit shall be filed on or before 30th September, 2014."

5.7 At this stage it may be noted that in relation to subject matter in dispute, Official Liquidator Report No.04 of 2012 was filed wherein this Court passed order dated 29th February, 2012. The part of the order reads as under:

"9. Having regard to the aforesaid aspects, below mentioned order is passed:-

(a) The OL is permitted to appoint Government Approved Valuer from the panel maintained by the OL for the pur-

pose of valuation.

(b) Before appointing the valuer the OL shall, after intimating the date and time of visit in advance, to the concerned officer of the company depute duly and authorized representative to visit the premises of the factory,

(c) The said authorized representative of the OL shall with the help of the applicant in COMA No. 346 of 2011 and COMA No.238 of 2010, draw the inventory of the plant and machinery which shall be bifurcated in two parts, one being the plant and machinery in respect of which the said applicants do not claim ownership and second part being the plant and machinery over which the applicants of the said two applications claim title and ownership. The said list shall then to be signed by the representative of the OL and the applicants of the said two applications.

The valuer shall also submit separate report for valuation of land and building.

(d) A copy of the said list shall be forwarded to the valuer appointed by the OL and he shall be instructed to prepare separate valuation report (a) for land, (b) for building, and (c) for plant and machinery (which shall be divided in two parts as mentioned above) by suggesting valuation of the two sets of properties separately and copy of the said report dealing with the plant and machinery shall also be forwarded to the applicants of the said two applications.

(e) Besides this, OL shall also instruct the valuer to prepare valuation report separately for land, building and for super structure and for plant and machinery. The valuer shall also be instructed to prepare and submit said three separate reports to the OL within three weeks after receipt of the intimation from the OL.

(f) Thereafter OL shall place, by way of his separate report the said separate valuation reports before the Court for further consideration and appropriate orders."

5.8 Learned advocate for the applicant as well as learned advocate for the Official Liquidator made a statement that pursuant to the exercise undertaken in terms of 9(c) above, inventory was taken and the details of inventory was kept in a sealed cover and is lying in the sealed cover.

6. Learned advocate Mr.N.K. Pahwa for the applicants in both the Company Applications submitted that Memorandum of Understanding dated 01st January, 2004 was a valid arrangement and order dated 17th August, 2010 was passed whereby possession of the property was allowed to be held by the applicant- M/s.Suzuki Parasrampur Private Limited. According to his submission, the said Memorandum of Understanding was in the nature of Lease Agreement. He further submitted that the Memorandum of Understanding provided for consideration as well as payment of rent.

6.1 Learned advocate for the applicant submitted that in the proceedings, affidavit of undertaking dated 30th August, 2011 was filed agreeing to deposit rent. It was submitted that orders were also passed from time to time in that regard. He further submitted that there was also proposal given as per affidavit dated 02nd December, 2011 for auctioning the properties. It was submitted that the

applicants are running concern and have employed more than 50 workers. It was submitted that an opportunity may be given to the applicants since they have been running the business since several years.

6.2 Learned advocate Mr.R.M. Desai for the Official Liquidator submitted that applicant-M/s.Suzuki Parasrampur Private Limited has no locus standi to seek prayer on the basis of the Memorandum of Understanding which was between the company in liquidation and another company. In respect of Company Application No.346 of 2011, learned advocate for the Official Liquidator on the basis of affidavit-in-reply dated 02nd February, 2012 submitted and contended that-(i) the Memorandum of Understanding styled as Lease Deed was without compliance of Section 293(1)(a) of the Companies Act, 1956; (ii) the document was required to be properly stamped as prescribed under the provisions of the Bombay Stamp Act; (iii) the document was unregistered document and as per Section 17 of the Indian Registration Act, lease of immovable property was compulsorily registrable; (iv) Lease Deed was executed by Gujarat Industrial Development Corporation (GIDC) in favour of the company in liquidation which contained a clause providing that company would not transfer, assign or part with possession without prior permission of the lessor. It was submitted that no previous permission of GIDC was obtained; (v) in the statement of affairs filed by the Directors, it was not indicated that any property, freehold or leasehold, was owned by the company in liquidation. No immovable properties or plant and machineries was listed to be owned by the company in liquidation.

6.3 Learned advocate for the Official Liquidator relied on Apex decision in Akhilesh Kumar Chauhan [2009 AIR SCW 979] to submit that if the document is not duly stamped, it would not be admissible in evidence in terms of Section 135 nor it would be admissible for collateral purpose. He, therefore, submitted that no right could flow for the applicants under Memorandum of Understanding dated 01st January, 2004.

6.4 Learned advocate Mr.B.T. Rao appearing for secured creditor-Bank of Baroda relied on affidavit dated 15th April, 2013 filed on behalf of Bank of Baroda as well as further affidavit dated 08th November, 2014 filed for placing certain documents on record. He submitted that not only the Memorandum of Understanding was not valid in eye of law, but there was an attempt to defraud the Bank which was a secured creditor. The details of various loans sanctioned by Bank of Baroda in favour of the company in liquidation was set out in paragraph 8 of the affidavit and it was submitted that in that regard the outstanding amount payable by the company in liquidation was Rs.04,89,63,080.65 Ps. He submitted that application before the Debts Recoery Tribunal was filed. It was submitted that incorrect statement was made by the applicant before the Court and Court recorded in order dated 12th July, 2014 that claims of all the secured creditors have been settled.

6.5 Learned advocate took the Court through the correspondence and documents produced along with affidavit dated 08th November, 2014, on the basis of which, he submitted that in the entire gamut Bank of Baroda was kept away from its dues and was defrauded. It was contended that one sided settlement was attempted to be enforced with IFCI; the assignment document was executed. It was contended that the so- called Deed of Assignment after settling the matter by way of OTS was a systematic fraud committed by the applicant company with connivance of the Directors of the

company in liquidation. In paragraph 9 it was contended as under.

"9. .... the Company under Liquidation as well as the present applicant has not come with clean hands. I say that the story of this mortgage and assignment is got up by the present company because Bank of Baroda was approached by M/s.Suzuki Parasrampurua Suitings Pvt. Ltd. On 16-2-2010 for offering 10% amount which is outrightly rejected by the Bank of Baroda on February 22, 2010. It is further submitted that the Bank of Baroda has not wrote a letter to the IFCI on 22-2-2010 requesting to arrange Sale Committee meeting for sale of the property in question. On April 21, 2010, IFCI has written a letter to Bank of Baroda wherein IFCI has admitted that IFCI has entered into One Time Settlement with the promoter/company in July, 2008 for settlement of IFCI's dues in respect of MPCL's Chhatral Unit for payment of Rs.58 lakhs payable in five installments between July, 2008 to November, 2008 along with interest @ 13% p.a. as full and final settlement. It was further stated that the above settlement was modified in September, 2008 that on receipt of full OTS payment, the debt will be assigned in favour of M/s.Suzuki Suiting Pvt. Ltd. However, the promoter/company did not honor the above settlement, while M/s.Suzuki Suitings Pvt. Ltd. (SSPL) has come forward to pay the settlement amount."

6.6 The contentions in paragraph 15 are also relevant, which are as under.

"15. .... It is submitted that all the correspondence by M/s.Suzuki Parasrampurua Suitings Pvt. Ltd. with Bank of Baroda only speaks about the settlement with IFCI and the assignment of debt means bank failed to recover amount and therefore, debt has been assigned to the other financial institution. In the present case, the settlement was sanctioned by IFCI in July, 2008 for Rs.58 lakhs which is to be paid on November 8, 2008 and on payment of entire One Time Settlement amount, the debt will be assigned to M/s.Suzuki Parasrampurua Suitings Pvt. Ltd. When the IFCI is receiving full and final amount, there is no question of assignment of debt in favor of M/s.Suzuki Parasrampurua Suitings Pvt. Ltd. because the settlement was in respect of M/s.Mahendra Petrochemicals Ltd. Therefore, contentions of the applicant that they have acquired rights by virtue of document of 1-4-2004 and subsequent assignment is erroneous, illegal and nothing but an eye-wash. I say and submit that the other unit of the Company under Liquidation has been sold by IFCI under the SARFAESI Act.

It is submitted that therefore, proceeding under section 13 (4) has already commenced and therefore, question of assignment is nothing but a got up theory by the present applicant which cannot be accepted."

6.7 On the basis of above averments and contentions it was sought to be submitted that the applicant companies which are separate statutory entities conniving with the company in liquidation defrauded the Bank for its dues. On the said facts pleaded, it was further contended that

the transfer of properties effected in Memorandum of Understanding in question was vitiated and was invalid in law under Section 531 and 531-A of the Companies Act.

7. With the conspectus of facts and the aspects noted, referring to the statutory provisions, Section 536(2) of the Companies Act, 1956 provides that any disposition of the property of the company etc. shall be void, unless the court otherwise orders. Section 441 inter alia says that the winding up of a company shall be deemed to commence at the time of presentation of the petition for the winding up. Section 531 deals with fraudulent preferences stating that any transfer of property made, taken or done within six months before the commencement of winding up be deemed to be a fraudulent preference of the creditors of the company in liquidation and shall be invalid. Section 531-A is about evidence of voluntary transfer.

7.1 There are group of provisions which provides for consequence of winding up being Sections 444 to 457 of the Act. All the legal proceedings stands stayed during the winding up proceeding. Section 446-A pins responsibility on the Directors and Officers to submit the books of accounts. Section 447 deals with effect of winding up order and says that an order of winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if it has been made on the joint petition of a creditor and of a contributory. Sections 448 to 450 are about appointment of Liquidator. Sections 451 to 455 are deals with the duty and the task to be performed by the Liquidator upon winding up of a company. Custody of the properties and the control thereof shall be with the Official Liquidator, provides Section 456. Section 457 details the powers of the Official Liquidator. These are the mandatory provisions which would operate upon a winding up order for a company being passed.

7.2 Admittedly, in the present case the company- M/s.Mahendra Petrochemicals Limited was wound up pursuant to the winding up petition being Company Petition No.150 of 1996. The winding up process commenced in the year 1996. It may be clarified that M/s.Mahendra Petrochemicals Limited was formerly known as Mahendra Suitings Limited and name was changed subsequently. While the winding up is commenced in 1996, Memorandum of Understanding was afterwards in the year 2004. Thereunder transfer of properties under the company in liquidation was arranged. The said document was void in view of Section 536(2).

7.3 Looking at the Memorandum of Understanding in question which was entered into between the company in liquidation described as Party of the First Part and M/s.Suzuki Suitings Private Limited, Party of the Second Part, the document was not a stamped document. It is not a registered document. It is well settled that transfer of immovable property could be validly made only through a registered Deed.

7.4 In Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and another[(2012) 169 Company Cases 133(SC)] "Immovable property can be legally and lawfully transferred or conveyed only by a registered deed of conveyance. Transactions of the nature of general power of attorney sales or sale agreements/general powers of attorney/will transfers do not convey title and do not amount to transfer, nor can they be recognised as valid modes or transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers of as conveyance they neither

convey title nor create any interest in immovable property. They cannot be recognised as deeds of title, except to the limited extent of section 53A of the Transfer of Property Act, 1882. Such transactions cannot be relied upon or made the basis for mutations in municipal or revenue records. This will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered assignment of lease."

7.5 The contention of learned advocate for the applicant that document of Memorandum of Understanding dated 01st January, 2004 was a Lease Agreement was not acceptable. Section 105 of the Transfer of Property Act, 1882 defines lease. Section 107 provides as to how leases are made. The document dated 01st January, 2004 on its total reading and the attendant aspects could not be said to be satisfying the necessary ingredients of lease as defined in law. It was, therefore, difficult to accept the contention that the said Memorandum of Understanding was a Lease Agreement. In any view, the said document was not a registered document. A document creating lease of immovable property is compulsorily registrable.

7.6 The conditions mentioned included Condition No.2, providing that the party of Second Part named Suzuki Suiting Private Limited and their sister concerned will keep as refundable non interest bearing deposit of Rs.70 Lacs with the party of Second Part as a consideration for using factory, land and reconstructed building by the Second Part. Upon a close look on the said condition, it says that the said Rs.70 Lacs will be kept by the party of Second Part and that sister concerned (applicant of Company Application No. 238 of 2010-M/s. Suzuki Parasrampur Private Limited) and the same shall be remained with the party of Second Part. Therefore, though the said amount is mentioned as consideration for the transaction in question, it raises serious doubts.

7.7 At this stage, it may also be noted that though the details of cheques towards payment of said amount are mentioned in paragraph-4 in the affidavit in support of judge's summons filed in Company Application No.346 of 2011, in course of the hearing, neither the applicant, nor the side of the official liquidator could give any satisfactory details about the said amount. The said amount whether passed as consideration, any if passed, the whereabouts of its lying or its use are the aspects which have remained unanswered.

7.8 The whole Memorandum of Understanding and the genuineness of it has remained under cloud. The Memorandum of Understanding was for the first time produced in the year 2010. It was not disclosed when winding up order was passed. The sequence of events were significant in themselves and came as a pointer. While the said Memorandum of Understanding was dated 01st January, 2004, in the correspondence with the Bank of Baroda, the applicant claimed that it was running the company on lease since 1994. It was contended by learned advocate for the Bank of Baroda that document was a subsequent creation. The contention of learned advocate for the Bank of Baroda that the Bank was denied realisation of its dues by culpable attempt, was one of substance. His contention that the Memorandum of Understanding was invalid in view of Section 531 and 531-A could not be brushed aside lightly. Nor it was possible to accept the contention on part of the applicants that they were not aware about the winding up proceedings or any other proceedings and therefore the Memorandum of Understanding was executed in 2004. The proceedings before the

BIFR were not disclosed.

8. As already noted, during the proceedings of the Company Applications, proposals and counter-proposals were made for auctioning the property and/or for altering the arrangement obtained pursuant to the Memorandum of Understanding. Orders were passed from time to time, however no tangible development took place. It appeared that the said attempts were only on paper. All along the private applicants remained in possession of the properties in liquidation. They carried on the business. Surprisingly, disturbingly and deplorably the office of the Official Liquidator did not took any remedial action and remained thick skinned. Secured creditor-Bank of Baroda also remained indolent in that way. Therefore inaction was to the benefit of private applicants. The conduct on part of the Official Liquidator and/or the secured creditor, however would not lend any justification to the situation where the applicants remained in possession and conducted the affairs of the company in liquidation to the exclusion of Official Liquidator.

8.1 The entire arrangement resulted and the facts situation emerged whereunder private applicants were permitted to run and earn by remaining in possession of the assets, properties and affairs of the company in liquidation, was something militative against and inconsistent with the very concept of winding up. It was a situation which thwarted legal consequences which have to ensue after a company gets wind up by an order of the Court.

9. In view of above, prayer in Company Application No.238 of 2010 cannot be granted. Even prima facie, applicant thereof had no locus to maintain the prayer. Similarly, prayer in Company Application No.346 of 2011 to validate the Memorandum of Understanding has got to be rejected. It was a document bound to be treated as void in law and could not be viewed otherwise in any way.

10. For the composite reasons and discussion above, prayers in both the Company Applications are hereby rejected, and following further order is passed.

(i) The Official Liquidator shall proceed to take possession of the properties of M/s.Mahendra Petrochemicals Limited (company in liquidation) and assume the charge of the affairs and properties thereof without any delay;

(ii) The Official Liquidator shall take inventory of the assets and properties of the company in liquidation. He is allowed to open the sealed cover regarding inventory taken out pursuant to the order dated 29th February, 2012 passed in Official Liquidator Report NO.04 of 2012 mentioned hereinabove, and match the details thereof with the inventory of the assets and properties to be taken as per the present direction. It goes without saying that Official Liquidator shall take charge of the assets and properties which belonged to the company in liquidation only;

(iii) The Official Liquidator shall take necessary steps and proceed in accordance with law to exercise all powers available to him as Official Liquidator under the Companies Act, 1956;

(iv) The Official Liquidator shall file appropriate Report before this Court to proceed further to discharge his duties in relation to the assets and properties of the company in liquidation.



11. Both the Company Applications are dismissed with the directions issued to the Official Liquidator as aforesaid.

(N.V.ANJARIA, J.) FURTHER ORDER At this stage learned advocate Mr.Pratik Jasani for applicants in both the Company Applications that the present judgment and order may be suspended for a period of four weeks. The request was opposed by learned advocate Mr.R.M. Desai for the Official Liquidator.

In the facts and circumstances and in view of what is observed and held hereinabove, request of learned advocate for the applicants cannot be entertained and the same is rejected.

(N.V.ANJARIA, J.) Anup