

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

LAND ACQUISITION REFERENCE NO.4 OF 1990

The Special Land Acquisition Officer (7)	)	
Bombay and Bombay Suburban District,	)	
Shree Chhatrapati Shivaji Maharaj Market,	)	
2 nd Floor, Palatan Road, Bombay – 400 001	)	
And		
Majas Madhu Co-Operative Housing	)	
Society	)	
83, Jolly Maker Chamber II,	)	
Nariman Point, Bombay – 400 021.	)	...Claimant
And		
Bombay Electric Supply & Transport	)	
Undertaking	)	...Acquiring Body

**WITH
LAND ACQUISITION REFERENCE NO.5 OF 1990**

The Special Land Acquisition Officer (7)	)	
Bombay and Bombay Suburban District	)	
Shree Chhatrapati Shivaji Maharaj Market	)	
2 nd Floor, Bombay – 400 001	)	
And		
M/s.Tyabji Estates Pvt. Ltd.	)	...Claimant
1017/18, Dalmal Tower, 10 th Floor, 211	)	
Nariman Point, Bombay – 400 021.	)	
And		
Bombay Electric Supply & Transport	)	
Undertaking, Colaba, Mumbai – 5.	)	...Acquiring Body

Mr.C.M. Korde, Senior Advocate, with Mr.Pranav Nair i/b. Mr.Jal Daruwalla for Claimant in LAR No.4 of 1990.

Mt.C.M. Korde, Senior Advocate, with Mr.Rajesh Shah and Mr.Satish Joshi i/b. Mr.Rajeev Sharma for Claimant in LAR No.5 of 1990.

Mr.Girish Godbole with Mr.Arsh Misra i/b. M/s.M.V. Kini & Co. for Acquiring Body (BEST).

Ms.Uma Palsuledesai, AGP for State.

CORAM : G.S. KULKARNI, J.

DATE : 20 August 2020

JUDGMENT

1. These are two land acquisition references (LAR) under Section 18 of the Land Acquisition Act, 1894 (for short, “**the L.A.Act**”). For convenience the contents of this judgment parawise would be as under:-

Paragraph nos.	Contents
2 to 19	Relevant facts in regard to the Land Acquisition
20 to 21	Issues
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53 to 54	Submissions of Shri.Godbole, learned Counsel on behalf of Acquiring Body – BEST Undertaking.
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Relevant Facts in regard to the Land Acquisition

2. The claimant in L.A.R. No.4 of 1990 is Majas Madhu Co-operative Housing Society (for short, “**Majas CHS**”) and in L.A.R. No.5 of 1990, M/s.Tyabji Estates Pvt. Ltd. (for short, “**Tyabji**”). The details of the land under acquisition in each of these references is as under:-

Land of the ownership of Majas CHS:-

Sr. No.	C.T.S. No.	Area notified for acquisition (in Sq. Mtrs.)
1.	18 pt.	8879.4
2.	19 pt.	407.1
		Total:- 9286.5

Land of the ownership of M/s. Tyabji:-

Sr. No.	C.T.S. No.	Area notified for acquisition (in Sq. Mtrs.)
1.	14 pt. (S.No.33)	6879.1
2.	166 A(pt.) (S.No.55/A (pt))	11277.1
		Total:- 18156.2

3. There is no dispute in regard to the ownership of the claimants in respect of these lands.

4. A notification dated 15 June 1987 came to be issued by the Additional Collector, Bombay Suburban District, under Section 126 (4) of the Maharashtra Regional Town Planning Act (for short 'the MRTP Act') read with Section 6 of the L.A.Act notifying the proposed acquisition of the lands for the public purpose namely for "Bombay Electric Supply & Transport (for short, "**BEST**") Bus Station and Bus Depot, at Jogeshwari and Vikhroli Link Road". This notification was published in the M.G.G. Part-I on 20 August 1987. This notification in paragraph one clearly indicates that the land subject matter of the

notification (proposed to be acquired) was reserved for a public purpose as specified in the Schedule to the said notification namely for Bombay Electric Supply & Transport Undertaking for Bus-Station, Bus Depot on Jogeshwari-Vikroli Link Road at Jogeshwari (East). The extract of the notification reads thus:-

“By the Additional Collector, Bombay Suburban District, Bombay
No. C/DESK-IX/LAQ/(1987)/312 – Whereas, the Municipal Corporation of Greater Bombay (being the Planning Authority) has made an application to the State Government under sub-section (l) of section 126 of the Maharashtra Regional and Town Planning Act, 1966 (Mah. XXXVII of 1966) (hereinafter referred to as “the said Act”) for acquiring the lands specified in columns 1, 2 and 3 of the schedule appended hereto (hereinafter referred to as “the said lands”) which are reserved for the public purpose specified thereof (hereinafter referred to as, “the said public purpose”) in the ‘K’ Ward Development Plan sanctioned by the State Government under the Government Notification, Urban Development. Public Health and Housing Department (No.TPB.4366/W, dated 7th July 1966) for the said public purpose under the Land Acquisition Act, 1894:

And whereas, under Government Notification, Urban Development. Public Health and Housing Department No.TPS.2175/5106/UD-VII, dated 3rd March 1979. Issued under sub-section (l) of Section 151 of the said Maharashtra Act the powers exercisable by the State Government, under sub-section (4) of section 126 of that Act have been delegated to the Collector, Bombay Suburban District:

And whereas the Collector Bombay Suburban District is satisfied that the said lands are needed for the said public purpose:

And whereas the compensation to be awarded for the said lands is to be paid wholly by the Municipal Corporation of Greater Bombay:

Now, therefore, in exercise of the powers conferred by sub-section (4) of section 126 of the said Act read with section 6 of the Land Acquisition Act, 1894 (I of 1984) in its application to the State of Maharashtra and with Government Notification. Urban Development Public Health and Housing Department No.TPS. 2175/5106 UD-VII dated 3rd March 1979 the Collector, Bombay Suburban District hereby declares that the said lands are needed for said public purpose.

The Special Land Acquisition Officer (7), Bombay and Bombay Suburban District is hereby appointed under clause (c)

of section 3 of the Land Acquisition Act, 1804 to perform the functions of the Collector (not being the functions under section 7 of that Act) for all proceedings hereinafter to be taken in respect of the said lands.

The Plans of the said lands may be inspected to the office of the Special Land Acquisition Officer (7), Bombay and Bombay Suburban District. Shree Chhatrapati Shivaji Maharaj Market Building, 2nd Floor, Palton Road, Bombay 400 001.

Schedule

District Bombay Suburban Tahsil Andheri, Village Majas.

C.T.S. No.	Approximate Area of the lands needed.
	Sq. Mtrs.
18 pt.	8879.4
19 pt.	407.1
14 pt.	6879.1
166 pt.	11277.1

Public purpose for which the lands are reserved – For Bombay Electric Supply & Transport Undertaking for Bus-Station. Bus Depot on Jogeshwari-Vikroli Link Road at Jogeshwari (east).

A.P.Sinha,
Collector,
Bombay Suburban District

Bombay, 15th June 1987.”

Though it may not be so relevant, however, it needs to be noted that earlier this land was reserved in the development plan for the purpose of a garden which came to be later on deleted and reserved for another public purpose namely for the BEST Bus Station and Bus Depot. This is also clear from the letter dated 9 June 2000 being No.AGM(C)/Dy.Supdt (Est)/3558/3/25786/2000, addressed to the Director (Engineering Services and Project), confirming the said reservation for BEST.

5. The substance of the above notification was published on the notice board of the Tahsildar, Andheri on 29 September 1987. A notice under Sub-sections (3) and (4) of Section 9 of the L.A.Act being a notice to the interested persons came to be issued to the claimants on 21 September 1987.

6. On 4 November 1987 claims came to be submitted by the claimants before the Special Land Acquisition Officer (for short '**the SLAO**'). Sale instances came to be cited and referred by the claimants as also by the acquiring body before the SLAO. Also there were sale instances which were discovered and recorded by the SLAO as listed in Annexure-B to the reference. It would be appropriate to note the sale instances cited by the claimants, the acquiring body and as gathered by the SLAO as set out in Annexure-B to the reference which read thus:-

"ANNEXURE - 'B'

Statement showing the instances of sale of village Majas, District B.S.D., Sale Instances cited by Owner, acquiring Body i.e. B.E.S.T. Undertaking and collected by the Special Land Acquisition Officer (7),Bombay and Bombay Suburban District.

S r. n o. .	Amount of considerin g	S.No./ N.No.	C.T.S. No.	Area in Sq.mtrs.	Name of the Vendor	Name of the Purchaser	Rate per sq.mtrs	Date of execution	Date of registra- tion	Registra- tion no.
1	2	3	4	5	6	7	8	9	10	11
A) Sale Instances cited by the Land Owner										
1		34/1	776 pt.	As per agreement	Poonam Investment Co. Private Limited.	Oil & Natural Gas Commissio n	305/- per sq.ft.	9-1-86	Not	Agreeme nt is not registere d.

2		34/1 Building No. 'C'		425.0 sq.ft.		Air India Staff Co-op. Housing Society	376/- per sq.ft.		7-8-87	
B) Sale Instance cited by A.B. i.e. B.E.S.T.										
3	30,00,000/-	34/1pt. 35pt., 40/4pt. 42/3 pt.		143875.23	1)M/s.Madhu Builders 2. Majas Madhu Co-op.Hsg. Society. 3) Manilal K.Lalan 4) K.G.Lalan	Majas Madhu Co-op.Housing Society	21.00	2-2-82	20-3-82	<u>S/363</u> B2
C) Sale Instances cited by S.L.A.O.										
4	46,000/-	Plot No.5, S.No.68 A H.No.1 (pt).	169	508.0 Sq.mtrs.	1) Dr. S.N.Shetty 2) Smt.Hema S.Shetty	Dr.Vasant K.	110/- per sq mtrs.	4-3-81	30-8-85	<u>F-470</u> 81
5	65,000/-	Flat No.2 & 33pt.	126 & 128	528.0 sq.mtrs.	M/s.Geeta Construction Company	Shri.N.D. Bhora	123/- per sq mtrs.	7-3-81	17-9-85	<u>P-862/81</u>
6	33,000/-	47	132pt.	300.0 sq.yds. i.e. 250.83 sq.mtrs.	Shri.Raghunath S.Kedari	Shri.N.K. Patil	138/- per sq mtrs.	16-6-82	7-6-83	<u>S-3392</u> 82
7	1,05,875/-	68pt. Plot no.26	130	605.0 sq.mtrs.	M/s.Vishal Construction Company	Shri.Atul Shankar Joshi	175/- per sq mtrs.	28-6-82	1-7-85	<u>1827</u> <u>82</u>
8	10,000/-	72	68	90.0 sq.mtrs.	Baheti B. Kurmi	Ragana N.Chaudhari	110/- per sq mtrs.	10-1-83	3-9-85	<u>70</u> 83
9	9,500/-	11/5 (pt)	191/1	87.0 sq.mtrs	Minakshi P.Krishna	K.V. Velavudhan	109/- Sq. mtrs.	27-4-84	13-3-85	<u>S-1634</u> 84

Special Land Acquisition Officer(7),
Bombay and B.S.D."

7. It is thus seen that the claimants referred to two sale instances the price of land whereunder was Rs.305/- per square feet and Rs.307/- per square feet, whereas the sale instance as referred by the acquiring body, the price as per square meter was referred as Rs.21/- per square meter. There were about 6 sale instances as referred by the SLAO under which the price of the land according to him varied between Rs.109/- per sq. mtrs to Rs.175/- per sq. mtrs. Out of these,

instances at Sr. Nos.6 and 7 (supra) were considered by the SLAO to be relevant and others were discarded. The land in relation to the transaction at serial No.6 was sold at Rs.131.56 per square meter and the land at serial No.7 was sold at Rs.75/- per square metre.

8. Before the SLAO claimant-Majas CHS submitted a valuation report dated 16 December 1987 of valuers M/s. S.S. Joshi & Associates (Architects and Engineers), who valued the land under acquisition at Rs.1,400/- per square metre. These valuers valued the land including 30% solatium interalia at an amount of Rs.3,54,65,066/-.

9. Claimant- Tyabji also submitted a valuation report dated 11th January 1988 of Valuers “Kranti Karamsay & Company” Chartered Architect Engineer and Estate Valuers who valued their land at Rs.1500/- per sq.mtr. thereby claiming total compensation of Rs.2,72,34,300/-. Additionally there was a claim for solatium at 30% at market value of the land.

10. The acquiring body-BEST also filed its valuation report through its Chief Engineer (Civil) on 5th January 1988. In the said valuation report, BEST valued the land under acquisition at the rate of Rs.62/- per sq.mtr.

11. The SLAO on 25 October 1989 published a common award interalia valuing the land at Rs.130/- per square meter. The SLAO rejected the sale instances as cited by the claimants as also by the acquiring body and primarily relying on the agreements at serial Nos.6 and 7 (supra) as gathered by him on the following reasoning, valued the land at Rs.130/- per square meter:-

“ Out of the sale instances cited out by the undersigned at Sr. No. 4 to 9, the sale instances at Sr.No.4 and 5 are of the year 1981. The notification under Section 6 of the Act has been published in October 1987 and therefore, it would not be fair to consider the sales of March 1981 which are more than 6 ½ years prior to the material date. I, therefore discard them for consideration. Similarly the sale instances at Sr. No.8 and 9 though recent the plots are very small in area which are not independently buildable and therefore, they cannot be considered to be showing real trend of prices in the vicinity. I, therefore, discard these sales also from consideration. Excluding these 4, 5, 8 & 9 the only sales remain for consideration are of S. No.6 and 7. The land in transaction at Sr. No.6 appears to have been sold at Rs.132/- per sq. mtrs. while the land in transaction at Sr. No.7 appears to have been sold at Rs.175/- per sq.mtrs.

The lands in instance No.6 have been sold on 16-6-82 at the rate of Rs.131.56 per sq. mtrs. The area of this plot is only 250 sq. mtrs. This land is at the east side of the Western Express Highway at a very interior location, and at south side about one km. away from the land under acquisition. In this transaction it is not known whether the conveyance has actually taken place. In instance at Sr. No.7 above, lands admeasuring 605.0 sq.mtrs. appears to have been sold by conveyance on 28-6-82 @ Rs. 75/- per sq. mtr. This land is at east side on the Western Express Highway on an existing road. It is about 2 k.m. away from the lands under acquisition. The developments on the Eastern side of the Western Express Highway are very rare. It would therefore, be proper to take this fact into consideration while deciding the proper value of a small plot (605 sq.mtrs.) near the land under acquisition. Considering the average rates worked out in the instances at Sr. No.6 and 7 and by giving due rise to the time gap

and taking into consideration that the land under acquisition is on the existing road the rate of small plot of land at this location can fairly be fixed at Rs.256/- per sq. mtrs. on the material date i.e. the date of publication of the notification.

However, the proper rate worked out above is in respect of small plot, while working out such rate for a big area of about 27442.7 s. mtrs. due consideration will have to be given to the following factors.

- (a) The space required to be kept open as per D.C. Rule.
- (b) The area consumed in constructing internal roads.
- (c) The expenditure incurred in constructing such roads.
- (d) Cost of developments of infra structures.
- (e) Expenditure incurred either for filing or for cutting and its levelling.
- (f) Professional fees to be paid to the Architects Engineers and layers.
- (g) time consumed in selling the Plots.

Due deductions for each of the above item will have to be made from the rate arrived at in respect of small plot. After considering all these aspects, I am of the opinion that a rate of Rs.130/- per sq.mtrs. would be a proper market value for the land admeasuring 27442.7 sq.mtrs. to be acquired in this proceeding.

... ..

Damages on account of Severance and injurious affection:-

In their earlier letter, the owners of C.T.S.No.18(pt) and 19(pt) have pointed out that as a result of present acquisition, the area remains with them is 10199.8 sq.mtrs. and it cannot be developed independently as it is severed by the acquisition; and have therefore, claimed charges at the rate of Rs.1400/- per sq.mtrs. The land left unacquired is as big as more than a hectare and it is beyond imagination that it cannot be developed. The claim for severance charges is therefore, not at all tenable and therefore, rejected.

Besides this, the owners of C.T.S.No.14 and 166 pt. have claimed Rs.80,000/- per annum on account of loss of income and Rs.30,00,000/- on account of dismuntion of profit. In support of their claim, the owners have not produced any documentary evidence. In fact the lands are lying vacant for years together and the question of deriving any income or profit does not arise. I, therefore, totally reject this claim, which is not justified either by documentary or by circumstantial evidence.”

12. Thus the SLAO also considered damages on account of severance and injurious affection and rejected the claim as made by the claimant in this regard. 30% solatium at the market value of land was granted, as also 12% increase per annum was allowed as per provisions of Section 23(1A) of the Act. The operative part of the common award qua the lands of both the claimants and subject matter of the present references reads thus:-

(I) **MAJAS CHS**

“Details of Valuation :-

a)	The land value for the land bearing C.T.S. Nos.18 & 19 pt. Area admeasuring 9286.50 sq. mtrs. at the rate of Rs.130/- per sq.mtrs.	Rs.12,07,245-00
b)	30% solatium on Rs.12,07,245.00	Rs.3,62,173-50
c)	12% increase as per Section 23(1)(A) of L.A. Act (from 26-10-97 to 25-10-89 i.e. 2 years)	Rs.2,89,738-80
Total of (a) + (b) + (c) i.e.		Rs.18,59,157-30 Rs.18,59,157-00

(II) **TYABJI**

a)	Land at value at Rs.130/- per sq.mtrs. for area admeasuring 18156-2 sq.mtrs. of C.T.S.No.14 pt. and 166 pt.	Rs.23,60,306-00
b)	30% Solatium on market value of Rs.23,60,306-00	Rs. 7,08,091-80
c)	12% increased on compensation of Rs.23,60,306-00 for a period from 26-10-87 to 25-10-89 i.e. 2 years	Rs. 5,66,473-44
Total of (a) + (b) + (c) i.e.		Rs.36,34,871-24 Rs.36,34,871-00

Grand Total of Part I & II

Rs.54,94,028-00

=====

(Rs. Fifty four lakhs ninety four thousand twenty eight only).

AWARD:-

I hereby declare that :-

- | | | |
|----|---|-----------------|
| a) | The true area of the land under acquisition is 27,442-7 sq. mtrs. | |
| b) | Total amount of compensation payable is | Rs.54,94,028-00 |
| c) | It is payable to | |
| | i) Majas Madhu Co-Op. Housing Society Limited. | Rs.18,59,157-00 |
| | ii) M/s.Tayyabji Estate Private | Rs.36,34,871-00 |

Grand Total

Rs.54,94,028-00

=====

(Total Rs. Fifty four lakhs ninety four thousand twenty eight only).

The previous approval of the Government of Maharashtra in Revenue and Forest Department, Mantralaya has been obtained for this award as required under Section 11(1) of the Land Acquisition Act 1894 (Amended) Section 8(A) of the Land Acquisition (Amendment) Act 1984.

Award declared in this office by me under my signature and seal on this day 25th day of the month of October 1989.

Sd/-

Special Land Acquisition Officer (7),
Bombay and B.S.D.”

13. On 29 November 1989 (in L.A.R. No.4 of 1990) and on 4 December 1989 (in L.A.R. No.5 of 1990) the claimants Majas CHS and Tyabhji filed their respective applications for a reference under Section 18 of the L.A.Act seeking enhancement of the land acquisition compensation. Majas CHS made a claim for enhanced compensation, interalia claiming a rate of Rs.1,500/- per square metre. The claimant - Tyabhji made a claim seeking enhancement asserting market value of the

land at Rs.1500/- per square metre. Tyabji also made a claim for damages at the rate of Rs.1500/- per metre qua the remaining land. The prayers as made in these respective reference applications can be noted:-

As in MAJAS CHS

6. The Claimants claim in this Reference additional amount of Rs.3,36,05,909/- and have paid the Court Fee of Rs.7,500/-. The Claimants submit that, if it is found that the Court Fee paid is in deficit, the Claimants undertake to make good the same.

As in TYABJI

m. The Claimants therefore claim additional market value at Rs.870/- per square meter (Rs.1000.00 less Rs.130/- awarded). The additional Value of land claimed is $18,156.2 \times 870 = 1,57,95,894.00$ (Rupees One Crore Fifty Seven lacs, ninety five thousand eight hundred ninety four only)

5. The Claimants therefore claim additional compensation on account of market Value of land at the rate of Rs.1,57,95,894/- and damages at Rs.6,56,43,400.00 and have paid the court fees of Rs.7,500/-. The Claimants submit that if it is found that the court fee paid is deficit, the Claimants undertake to make good the same.

14. After the award was published, the SLAO by following the procedure and as the period of two years as prescribed under Section 11-A of the L.A.Act would expire, completed the formalities of taking over and handing over possession of the land under acquisition, to the acquiring body-BEST on 21 November 1989.

15. The SLAO accordingly made both these references before this Court under Section 18 of the Act.

16. In these references common evidence was led. Shri.Korde, learned Senior Counsel for the claimants has argued LAR no.5 of 1990 filed by claimant-Tyabji as the lead matter. On behalf of claimant-Tyabji, three witnesses were examined namely (I) Haresh K. Nanwani, Director of Claimant, (ii) Atul M. Gulati, Architect and (iii) Harshad S. Maniar, valuer who had submitted his valuation report dated 9 August 2007.

17. In addition to the evidence of the above three witnesses, claimant-Tyabji is also relying on evidence led in the LAR no.4 of 1990 of Shri.Madhusudan Vakharia. Also reliance is placed on the documents produced by Shri.Madhusudan Vakharia in LAR No. 4 of 1990 namely Exhibits D2, D4 and D5 in Land Acquisition Reference no.4 of 1990.

18. The acquiring body has led evidence of two witnesses namely (i) Shri.M.M.Sumant, Estate Manager, BEST Undertaking and (ii) Shri.P.L.Ajgaonkar, erstwhile Chief Engineer (Civil) of BEST Undertaking. Shri.Ajgaonkar had also submitted a valuation report before the SLAO.

19. On behalf of claimant-Majas CHS, three witnesses were examined namely (i) PW-1 P.M. Salian, Secretary of Majas CHS, (ii) PW-

2 Madhusudan Vakharia, Director of Majas CHS and(iii) PW-3 Harshad S. Maniar, valuer who prepared valuation report dated 24 July 2007.

Issues

20. The following common issue would arise for determination in both these references:

(I) What was the fair market value of the acquired lands under acquisition on the relevant date that is on 20 August 1987 ?

21. In Land Acquisition Reference No.5 of 1990 the following additional issue arises for determination:-

(I) Whether the claimant Tyabji is entitled to any damages for injurious affection under Section 23(1), Clauses “Thirdly” and “Fourthly”?

Submissions of Shri.Korde, learned Senior Counsel on behalf of the Claimants:-

22. Shri.Korde has made the following broad propositions:-

(i) The sale instances (1) and (2) relied upon by Harshad S.Maniar in his valuation report, are the most comparable instances to value the land under acquisition. The genuineness of these instances have been proved beyond any shadow of doubt by the evidence of Shri.Madhusudan Vakharia.

(ii) The consideration mentioned in the said instances reflect the market value of the land in the Second Schedule of these documents (Exhibit D2 and D3) as on 10 April 1985, being the date of the transactions.

(iii) While comparing the said two instances with the acquired land allowances made by Shri.Harshad S.Maniar in respect of size, time factor and frontage on the Jogeshwari-Vikhroli Link Road, are correct.

(iv) Even assuming that these two instances cannot be taken into consideration, there is other evidence which is available namely instance no.4 -Indicator nos.1 and 2 as observed in the valuation report of Shri.Harshad S. Maniar.

(v) The evidence of Shri. Haresh K. Nanwani, Director of Claimant, Shri. Atul M. Gulati, Architech and Shri.Harshad S.Maniar, Valuer also deserves to be accepted as these witnesses have stood the test of cross examination.

(vi) The evidence of the witnesses examined on behalf of the acquiring body of Shri.M.M.Sumant and (ii) Shri.PL.Ajgaonkar ought not to be considered and deserves to be rejected in totality. The sole instance relied upon by Shri.PL.Ajgaonkar has to be discarded for the reason that it is too remote from the point of time that is from the relevant date of valuation.

(vii) The claim for injurious affection as made by Tyabji stands proved as consequent to acquisition an area 33541.96 square meters out of Tyabji's remaining land lost its access and became land-locked. Thus, damages at the rate of 5% of the market value of the said land admeasuring 33541.96 sq.meters are reasonably entitled to Tyabji.

(viii) The correct market value of the land under acquisition on the basis of Instances nos.1 and 2 as relied upon by Shri.Harshad S.Maniar-Valuer is Rs.455/- per sq.meter on the relevant date.

(ix) If for any reason Instance nos.1 and 2 if cannot be taken into consideration then the acquired land will have to be valued at Rs.850 per sq.meter on the basis of Instance no.4 Indicator 1 and 2.

23. Shri.Korde's submissions on the evidence of the witnesses is as under:-

(I) Submissions on the evidence of Shri.Haresh K.Nanwani, Director of the Claimant-Tyabji :

The evidence of this witness comprises of his affidavit of evidence dated 6 July 2004 and his cross examination. According to Shri.Korde, Shri.Haresh K.Nanwani's evidence would prove the following facts:-

(i) That Shri.Nanwani has been in construction business for quite some time that is since 1974-75. By conveyance dated 13 June 1931 (Exhibit C-1) Tyabji purchased large area of land admeasuring 74 acres

and 19 $\frac{3}{4}$ gunthas comprised in various Survey numbers including Survey no.33 and 55. The land under acquisition was the part of land purchased under the said conveyance.

(ii) The land under acquisition was not affected by the Urban Land (Ceiling and Regulation) Act, 1976, as this witness has produced an order dated 14 December 1999 passed by the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976 (Exhibit C-2). This witness is also personally familiar with the condition of the land under acquisition and the surrounding areas at the relevant time that is August 1987 and even before and after the relevant time.

(iii) That the land under acquisition had a gradual slope, the land was higher on eastern side and lower towards western side. On the eastern side it was practically in level with Jogeshwari-Vikhroli Link Road as existing. Jogeshwari-Vikhroli Link Road was also having slope in front of the land under acquisition from East to West.

(iv) If any construction was to be undertaken on the acquired land, no filling was required to be done. No cutting was also required to be done and the construction could be designed without involving any cutting on any portion of the land and taking into consideration the gradual slope of the land. The land under acquisition was completely vacant as there were no structures on the land under acquisition.

(v) From 1982 to 1983 considerable development had commenced in the vicinity of the land under acquisition. These were colonies known as Raheja Nagar, Poonam Nagar, Air India Colony etc. which had already come up, which were at the distance of 200 to 300 meters from the acquired land. Also a colony known as Greenfields (RNA Developers) was coming up which was adjoining to the claimant's land about 80 meters from the acquired land.

(vi) Further St.Xavier School as well as Swami Samarth High School were at walking distance of five minutes from the land under acquisition. There were already shops nearby and the market was even 15 minutes walking distance.

(vii) The acquired land was in I-2 Zone. When it was well-known that by August,1987 the I-2 zone which was to be converted into residential zone which was in fact done in the revised development plan. The Greefields Colony was located on the plan under I-2 Zone under the old development plan. It was also well-known that applications for conversion of the land in I-2 Zone for residential use would be granted as a matter of course.

(viii) ONGC Quarters were constructed well before August 1987 which was at the distance of 300 meters from the acquired land. Thus, the locality was a fast developing area in the year 1987.

(II) **Submissions on the evidence of Shri.Atul Madan Gulati:**

(i) Shri.Gulati prepared a plan (Exhibit C-3) showing the relevant portion of larger holdings of the claimant, also the portion of the claimant's land which was earlier acquired for the Maharashtra Housing Board under Notification dated 15 January 1969, portion of the claimant's land which was acquired for the purpose of Jogeshwari-Vikhroli Link Road and further portion of the claimant's land which was still to be acquired for the purpose of Jogeshwari-Vikhroli Link Road and also the portion of the claimant's land acquired for the acquiring body (BEST Undertaking) under the present land acquisition.

(ii) It is submitted that from the plan prepared by Shri.Atul Madan Gulati, it was clearly seen how a portion of the claimant's land admeasuring about 33541.96 sq.meters lost its access on account of the present land acquisition. The plan also indicated the proposed DP road and how the injuriously affected portion of the claimant's land later on acquired access as and when the said proposed DP road was constructed. It further showed that the portion of the DP road between the letters "BC" "DE" did not belong to the claimant and belonged to the other owners.

(iii) It is submitted that Shri.Gulati stood the test of cross examination and therefore, his evidence should be accepted as correct.

(iv) It is submitted that in Question no.39 a case was put up to Shri.Gulati that he had filed his affidavit only to prolong the present proceedings and no other purpose. It is submitted that this case put up to Shri.Gulati was totally incorrect.

(v) It is submitted that apart from the fact that no specific case was put up to Shri.Gulati in respect of any specific portion of the plan prepared by him alleging that there was any specific error in the plan, no plan had been produced by the acquiring or by the SLAO showing as to what according to them was the correct position.

III) **Submission on evidence of Shri.Harshad S.Maniar-Valuer:-**

(i) It is submitted that the instances (1) and (2) as relied upon by Shri.Maniar (Exhibti D2 and D3 marked in LAR 4 of 1990) are the most relevant instances for valuing the land under acquisition in the present case.

Sale Instance no.1	Sale Instance no.2
Agreement dated 10 April 1985 under which M/s. Majas Land Development Company Pvt.Ltd. sold FSI of land bearing Survey No.34, Hissa No.1 (pt) of Village Majas, admeasuring 165140 sq.feet (including area balcony, staircase and lift) to Mrs.Manju N.Gupta, Sole Proprietor of M/s.East and West Builders at the rate of Rs.30/- per sq.ft.	Agreement dated 10 April 1985 whereby M/s.Majas Land Development Company Pvt.Ltd. sold FSI of the land bearing Survey No.34, Hissa No.1(pt) of Village Majas admeasuring 165140 sq.feet (including area of balcony, staircase and lift) to Mrs.Sarang A.Agrawal, Proprietor of M/s.Skyline Construction and Company.
The area of the land as per the	The area of the land as per the

agreement is 7032.50 sq.meters.	agreement is 6697.00 sq.meters.
The land is situated along Jogeshwari-Vikhroli Link Road and about 100 to 200 meters away from the acquired land.	The land is situated along Jogeshwari-Vikhroli Link Road and about 100 to 200 meters away from the acquired land.

(ii) It is submitted that the genuineness of these two instances is proved beyond any doubt by the evidence of Shri.Madhusudan Brijlal Vakharia, Director of M/s.Majas Land Development Company Pvt.Ltd. for the reason that Shri.Vakharia is one of the signatory to these two agreements (Exhibits D2 and D3 in LAR no.4 of 1990). He was personally present in the office of Mahimtura & Co., Solicitors at the time of the said two agreements and all the signatories and attesting witnesses have signed the agreements in his presence. He was personally associated with the transactions reflected in the said agreements. He had also carried out negotiations on behalf of M/s. Majas Land Development Company Pvt.Ltd. who are referred as the original developers in the said two agreements.

(iii) It is submitted that these agreements are arrived at by calculating the market price of the land at Rs.30/- per sq.foot of saleable FSI (which included balconies, staircases and lift pit) was in accordance with the prevailing prices at that time. The price as arrived was after full negotiations and bargain between the parties to the said agreement. The parties were not related or associated with each other in any

manner. The transactions were purely commercial transactions entered at arms length, between parties who were not connected with each other. It is submitted that Shri.Vakharia was also personally associated with the prior agreements dated 12 January 1976, tripartite agreement dated 4 January 1982 and agreement dated 4 March 1984 which were referred to in the recitals to the said agreement dated 10 April 1985.

(iv) The two balance installments of Rs.16,51,400/- each were duly paid before the due dates.

(v) It is submitted that within short time after execution of the said agreement, the new developers started construction of apartments on the said lands and the property was fully developed. It is submitted that the agreements qua Instance Nos.1 and 2 were identical in all material aspects. The following submissions are made in regard to Instance no.1 (supra) which are stated to be equally applicable to Instance no.2.

a) The consideration of Rs.49,54,200/- mentioned in the agreement cannot be doubted and reflects the market price of the land which is the subject matter of the said transaction, being land admeasuring 7032.50 sq. mtrs. mentioned in the Second Schedule to the said agreement.

b) Considering the agreement from the perspective of a prudent man having a common sense approach, it is clear that the new developer, namely, Smt. Manju Gupta, sole proprietor of M/s. East and West

Builders was getting everything which otherwise she could have got under a conveyance of the land for the purpose of developing the land for construction of flats and selling them.

c) The above position is clear from the recital in Clause 4 of the said agreement which goes to show that the new developer received quiet, vacant and peaceful possession of the said land simultaneously with the execution of the agreement. This was coupled with a right to develop the said land and construct or complete buildings and allot or sell flats or premises to any person or parties and to recover in his own right appropriate consideration as received from the sale or allotment of the premises in the said building. Under Clause 7, the new developer also received a right to get executed the Deed of Transfer and all other deeds, documents, writing and assurances as may be required for the transfer of the said property in favour of the new promoter and/or any Society or body.

d) In short, Smt. Manju Gupta was getting the same benefits which she would have got if she was to take conveyance of the said land. De facto, all rights were being passed on to the new developer and no rights were remaining with the owner. Possession was given to the new developer with all the rights to create third party rights in respect of flats to be constructed. Thus from a common sense, practical standpoint of a businessman, the transaction in a practical sense was a sale of the

land mentioned in the Second Schedule although it was not a sale in a legal sense.

e) Further the new developer was paying the full market value of the land mentioned in the second schedule of the said agreement. This was nothing short of a sale in a commercial, practical sense. In such a transaction, the seller would take nothing short of market value of the land and the buyer would pay the full market value of the land.

f) The consideration of Rs.49,54,200/- being arrived between the parties was also fully explained in the agreement. This consideration was on the basis of the saleable FSI (including balconies, staircases and lift pits) which was available in respect of the said land mentioned in the second schedule multiplied by the rate of Rs.30/- per square foot of saleable FSI.

g) It was set out in the agreement that the saleable FSI including balconies, staircases and lift pits which was available on the basis of sanctioned plans was 1,65,140 sq.ft. The consideration was worked out in the basis of the rate of Rs.30/- per square foot of saleable FSI which was available on the agreement land in question. Shri Vakharia has stated in his affidavit in lieu of examination-in-chief that the rate of Rs.30/- per sq.ft. of saleable FSI was in accordance with the prevailing prices at that time. The available FSI reflected the building potential of the agreement land at the time of execution of the agreement.

- h) Even the sale instance relied upon by the acquiring body, namely, the conveyance dated 2nd February 1982, the consideration for the land which was conveyed thereunder was worked out on the basis of sanctioned FSI which was available and by applying the rate of Rs.1.50 per square foot to the sanctioned FSI as available in respect of the land in question under the said conveyance.
- i) It needs to be considered that in the city of Mumbai, the available FSI reflects the building potential of the land and becomes a crucial factor on the basis of which the market value of the land is determined in land transactions.
- j) A reference is made to the Stamp Duty Ready Reckoner for the years 1990 to 2000 under which the rate of land in question was expressed in terms of the rate of FSI of the undeveloped land and the rate of FSI of developed land. This would indicate that the market value of the land was being determined solely on the basis of FSI which was available for the land. The FSI reflected the building potential of the land.
- k) Further from the year 2006, the Stamp Duty Ready Reckoner's expressed the rate of land on the basis of FSI of one. This rate is required to be applied taking into account the FSI of the land under consideration. Illustratively, if the FSI of the land under valuation is 2,

then the rate mentioned in the Ready Reckoner on the basis of FSI of 1 is required to be multiplied by 2.

l) The said agreement did not involve payment of any part of the consideration in the form of constructed flats to the party. So the somewhat difficult question of estimating the price of constructed flats does not arise while analyzing the said agreement.

m) Thus, instance no. 1 is a simple agreement which clearly shows the market value of the land as on the date of the agreement, namely, 10th April, 1985.

n) There is no need of any complex calculations or estimates for the purpose of arriving at the market value of the lands of instance nos. 1 and 2. Not only is the market value expressed in terms of money as evident from the agreement, the basis of how the said value has been arrived at, i.e., on the basis of Rs.30/- per square foot of saleable FSI (including balconies, staircases and lift pits) is also disclosed in the said agreement. Plans in respect of land were already sanctioned and hence there was no ambiguity about how much saleable FSI was available.

o) The evidence of Shri Vakharia was led only for the purpose of proving the transactions of instances nos. 1 and 2 (Exhibits D-2 and D-3) in LAR 4/1990. Shri Vakharia has hardly been cross-examined with regard to his evidence on these sale instances. His statement in the evidence that the rate of Rs.30/- per sq.ft. of saleable FSI of 1,65,140

sq.ft., which included balconies, staircases and lift pits, was in accordance with the prevailing prices at that time has remained unassailed in the cross-examination. His cross-examination was nothing but few formal questions in regard to execution of the said agreements. Thus, instances no. 1 and 2 have been fully proved.

(vi) Instances no. 1 and 2 are the most comparable instances for the purpose of determining the market value of the land under acquisition also for the reason that the land in relation to these instances was proximate to the land under acquisition in terms of location. These lands are abutting Jogeshwari Vikhroli Link Road and were at the distance of 100-200 mtrs. From the acquired land.

(vii) Instances no. 1 and 2 are also proximate in terms of time. They were 2 years 4 months prior to the relevant date (20 August 1986) for the purpose of valuation in the present case. The size of the lands in these instances is also about 7000 sq. mtrs. which is comparable to the size of the land under acquisition. It is, therefore, submitted that the land under acquisition should be valued on the basis of these two instances.

24. Also there is an agreement dated 21st December, 1987 (in LAR 4/1990) in respect of a sale of a flat which was in a building being

constructed by M/s. East and West Builders subsequent to the agreement of instance no. 1 dated 10th April 1985. There are recitals in the said agreement dated 21st December 1987 which narrate what had happened subsequent to the agreement dated 10th April 1985 and more particularly recitals (ix), (xi), (xii), (xiii), (xiv), (xv) which would go to show the sanctity attached to instance no. 1 dated 10th April, 1985.

Submission on Shri Maniar's valuation on the basis of Instances 1 & and 2:-

25. Shri.Korde, learned Senior Counsel for the claimants submitted that Shri Maniar in making the comparison of the different instances has followed the method laid down in **Chimanlal Harigovinda vs. Special Land Acquisition Officer**¹. Shri Maniar has compared the land under acquisition and the lands which are the subject matter of instances no. 1 and 2 on all the relevant features. The allowances as made by Shri Maniar are in respect of size, frontage on the Jogeshwari Vikhroli Link Road and the time factor. A deduction of (-) 15% on the aspect of size of the land has been made by Shri Maniar. For the reason that under the agreements dated 10th April, 1985 (instances no. 1 and 2), the purchaser was getting a right to develop the land mentioned in the Second Schedule which had a net saleable FSI of 165140 sq. feet. However, the land under acquisition suffered from a disability. Under Rule 39(1) of the Development Control Rules for Greater Bombay, it was

¹ AIR 1988 SC 1652

necessary to leave out 15% of the entire area for a recreational space. The said Rule further provided that for the purpose of F.S.I. the said 15% area left out for a recreation space would not be taken into account. It is for this reason that negative allowance was made by Shri Maniar of (-) 15% which was a correct approach.

26. Another allowance made by Shri Maniar was in regard to the frontage on the road. The land under acquisition had a frontage of 210 metres on the Jogeshwari Vikhroli Link Road whereas the land of instance no. 1 had a frontage of only 7.3 metres and the land of instance no. 2 had a frontage of 50 metres along the Jogeshwari Vikhroli Link Road. According to him this aspect of frontage on the said road was very valuable qua claimant-Tyabji's land under acquisition. Shri Maniar was cross-examined in this regard as contained in questions 59 to 64. Also considering this cross-examination, according to Shri.Korde the allowance as made by Shri Maniar is required to be accepted.

27. The next allowance made by Shri Maniar was with regard to the relevant date, namely, the time factor. Instances 1 and 2 were of 10th April 1985. The relevant date for valuation in the present case was the date of the notification under section 126 of the M.R.T.P Act read

with Section 6 of the Land Acquisition Act being 20th August, 1987. It was thus necessary to make an allowance to bring the date of the sale instances on par with the relevant date. The period between 10.04.1985 (date of instances 1 and 2) and 20.08.1987 (relevant date) was two years, four months and 10 days. It was therefore necessary to make such allowance for the fact that prices were rising during April, 1985, and August 1987 which therefore needs to be accepted.

28. Shri Maniar has also taken the rate of price rise at a rate of 15% per annum. It is submitted this is a rate which is very reasonable and in fact to be on the conservative side. It is submitted that there was sufficient evidence on record that considerable development had started in the vicinity of the land under acquisition from 1982-83. Colonies known as Raheja Nagar, Poonam Nagar and Air India Colony had already come up, which were at a distance of 200 to 300 metres from the land under acquisition. Also a colony known as Greenfield of the RNA Developers was coming up which was adjoining to the claimant's larger plot of land and was about 80 metres from the acquired land. It was not the case of the acquiring body that the prices were not rising and/or it was in the admitted position that the land prices in the area were rising. Thus, the price rise at the rate of 15% per annum taken by Shri Maniar was correct. The cross-examination of Shri Maniar in

questions 54 to 57 would justify the price rise. Further judicial notice was also be taken of the fact that the Western Suburbs of Mumbai including the locality of the land under acquisition were developing were fast in the 1980's and the land rates were rising.

29. In support of these contentions, reliance is placed on the judgment of learned Single Judge of this Court in LAR No. 15/1994 dated 8th August 2006.

30. It is thus submitted that the net result of the said three allowances made by Shri Maniar is a positive allowance of 40.83% in favour of the land under acquisition. This allowance being applied to the rate of Rs.30/- per square foot would bring the rate of the land to Rs.322.92 per square metre. Shri Maniar by adding the positive allowances as calculated, has arrived at market value at the rate of Rs.455/- per square metre for the land under acquisition.

31. It is submitted that the total consideration under the first Development Agreement (1st instance) is Rs.49,54,200/-. The area of the land is 7032.50 square metres, i.e., 75,698 square feet. If the total consideration is divided by the area of the land, it gives the land rate of Rs.704.47 per square metre, which comes to a rate of Rs.565.44 per

square foot. Shri Maniar's valuation proceeds on the basis that the said agreement discloses a land rate of Rs.30/- per square foot because the permissible FSI was one in the Western Suburbs. It is submitted that this approach of Maniar was not correct and has resulted in a significantly lower valuation. The said two instances disclosed a rate of Rs.30/- per square foot of saleable FSI which included balconies, staircases and lift pit. Saleable FSI includes items which were to be excluded in FSI calculation in the suburbs. Saleable FSI was much more than the permissible FSI of one for Western Suburbs. Hence, the land rate disclosed by the Agreement of Assignment of Development Rights should have been taken at about Rs.65/- per square foot, i.e., Rs.700/- per square metre and not as Rs.30/- per square foot, i.e., Rs.322.92 per square metre as has been taken by Maniar. The F.S.I. under the D.C. Rules was 7032.50 square metres, i.e., 75698 square feet. The saleable F.S.I. which included balconies, staircases and lift pits was 165140 square feet. Hence, while making his comparison between the instance land and the acquired land, Maniar overlooked the fact that the instance land was part of a sanctioned layout and the IOD and Commencement Certificate had already been issued whereas in the case of the acquired land, no such exercise was undertaken. Therefore, some negative allowance should have been provided for.

32. The contention is that the land rate disclosed by the Agreement of Assignment of Development Rights should have been taken at Rs.65/- per square foot, i.e., Rs.700/- per square metre and not as Rs.30/- per square foot, i.e., Rs.322.92 per square metre. However, it would far outweighs Shri Maniar overlooking the comparison between instance land and acquired land. As submitted above, for instance land was part of sanctioned layout and IOD and Commencement Certificate had already been issued which was not the case in respect of the acquired land and no allowance has been given therefor.

33. It is submitted that instances 1 and 2 are most comparable and relevant instances for valuing the land under acquisition and on the basis of the said two instances, Maniar's valuation of land under acquisition at Rs.455/- per square metre ought to be accepted. The valuation should have been on a much higher rate, however, the claimant is restricting its claim to the market value of Rs.455/- per square metre.

34. In regard to the other instances apart from instances no. 1 and 2, Shri.Korde has made submissions without prejudice to the claimant's submissions on instances 1 & 2. In regard to instance no. 3 referred by Shri Maniar, being a registered agreement dated 20 June 1983 in respect of plot no. 208 of Shere Punjab Cooperative Housing

Society Ltd. admeasuring about 432.27 square metres, it is submitted that the transaction is too remote in point of time from the relevant date and therefore, he fairly submits that this instance ought to be discarded.

35. In regard to sale instance no. 4, being a registered agreement dated 17 April 1986 between Jaspal Singh Mela Singh Kapur selling plot no. 236 of Sher-E Punjab Cooperative Housing Society Ltd. admeasuring 418.05 sq. mtrs. At Rs.3,50,000/- to M/s.Saibaba Constructions, it is submitted that this plot is located at a distance of about 1200 metres from the acquired land and both the acquired land as also the said plot was located in a developing area. It is submitted that Shri Maniar has made an allowance for the time difference of one year 4 months 3 days on the basis of rise in land values at the rate of 15% per annum. He has made a positive allowance of 19.80% while valuing the land under acquisition at Rs. 877/- per square metre. It is submitted that as the land under acquisition is 18,156.20 square metres whereas the land under this sale instance is 418.05 square metres on the aspect of size, Shri Maniar has given a negative allowance of -35%. It is submitted that whereas on the features of location, situation and encumbrance, Shri Maniar has not made any allowance. Also it is submitted that on this aspect of frontage, Shri Maniar has made a positive allowed of +20%. The net effect of all the allowance made by Maniar is +4.8%.

36. In regard to Shri Maniar's reliance on sale instance referred as 'Indicator No. 1', it is submitted that a certified copy of Index-II of the sale instance has been produced in LAR 5 of 1990 and original certified copy of Index-II in LAR 4 of 1990, as Maniar has stated in his valuation report that a certified copy of the document is not available with the Sub-Registrar's office and therefore certified copy of Index-II was produced. This instance pertains to registered agreement for sale in respect of Plot No. 232, CTS No. 368/79 of village Mogra, admeasuring 418.10 sq. mtrs. The land under Index-II is also situated very close to the sale instance no. 4.

37. It is submitted that certified copy of Index-II would be admissible in evidence by virtue of Section 51A of the Land Acquisition Act read with Sections 51 and 55 of the Indian Registration Act, 1908. It is submitted that even in regard to this plot of land, this land being very close to the plot of sale instance no. 4, Shri Maniar has valued the land under acquisition at the rate of Rs.856/- per square metre.

38. In regard to two sale instances referred as 'Indicator no. 2', it is submitted that certified copies of these agreements for sale have been produced by Shri Maniar in LAR 4/1990 (Exhibits 'G' and 'H'). In this the first agreement pertains to sale of flat on the land which was subject

matter of instance no. 1. The seller described as 'Promotor' is East and West Builders i.e., the party which was the new developer in the agreement of instance no. 1. Shri Maniar has undertaken a valuation exercise as set out considering various factors whereby he has come to a rate of Rs.848/- per sq.metre.

39. Shri.Korde has submitted that the following position has emerged from Maniar's valuation on the basis of the various sale instances are:

Maniar's valuation on the basis of	Land under acquisition valued at
Instances 1 and 2	Rs.455/- per sq. mtr.
Instance no.3	Rs.532/- per sq.mtr.
Instance no. 4	Rs.877/- per sq. mtr.
Indicator no. 1	Rs.856/- per sq. mtr.
Indicator no. 2 (Instances of sales of flats)	Rs.848/- per sq. mtr.

Submissions on Claim for severance and injurious affection:-

40. Shri.Korde has submitted that Shri Maniar in his report has set out that as a result of present acquisition an area of 33,541.96 sq. mtrs. shown bounded red on the Plan (Exhibit C-9) lost its access and became land locked. It is submitted that on the date on which possession of the land was taken, i.e, 21 November 1989, land belonging to the claimant admeasuring 33,541.96 sq. mtrs. lost its access and diminished in value.

41. Shri Maniar relying on the decision of the Supreme Court in **Tribeni Devi vs. Collector of Ranchi**², quantified the loss on the basis of 5% of the market value of the land admeasuring 33541.96 sq. mtrs. by taking the market value at the rate of Rs.500/- per square mtr. and on that basis, 5% compensation comes to Rs.8,38,549/-. It is submitted that the claim for injurious affection should be computed on the basis of 5% of such market value as the Court may determine in the present case for the land under acquisition.

42. Shri.Korde would contend that illustratively if the market value of the land as asserted by the claimant at Rs.455/- per sq. mtr. is accepted by the Court, in that event, considering the area of land injuriously affected being 33541.96 sq. mtrs., the injurious affection should be calculated at 5% of the total cost of land (Rs.455 X 33541.96 sq. mtrs. = Rs.1,52,61,591.80), which comes to Rs.7,63,079.59. It is submitted that the figure of compensation/damages for injurious affection should not be clubbed with market value but should be kept separate as an amount of which the claimants are entitled by way of damages under clauses 'thirdly' and 'fourthly' of Section 23(1) of the Act.

43. It is submitted that Shri Maniar's evidence with regard to the claim for injurious affection has not been challenged in cross-examination at all, hence it deserves to be accepted in totality. In supporting this submission, it is submitted that in regard to Maniar's assessment of damages for injurious affection, Maniar was asked only one question in cross-examination, namely, question no. 111 as under:

“Q.111. I put it to you Mr. Maniar that the compensation claimed by you as injurious affection, is false and incorrect?
Ans. Not true.”

It is submitted that on the amount of injurious affection so calculated, the claimants will not be entitled to the compensation component under section 23(1)(A) and Solatium under Section 23(2).

Submissions on evidence as led on behalf of Acquiring Body (BEST)

Shri.P.L.Ajgaonkar's evidence:-

44. As regards the evidence of Shri P.L.Ajgaonkar, who led evidence to support the valuation made by the SLAO at the rate of Rs.130/- per square metre, it is submitted that earlier Shri Ajgaonkar had also submitted a valuation report dated 5 January 1988 before the SLAO. It is submitted that this valuation report was totally incorrect, as the sole basis of the valuation as made by Shri Ajgaonkar was on a Conveyance dated 2 February 1982, for him to opine that this instance

establishes a rate for FSI at Rs.1.50 per square foot as on 2 February 1982. It is submitted that the perusal of the said conveyance relied upon by Ajgaonkar shows that FSI at Rs.1.50 per square foot of built up area was in fact fixed by the parties as far back as 12 January 1976, however, the transaction could not be completed because of coming into force of the ULC Act, hence the conveyance was finally executed on 2 February 1982. It is submitted that the relevant date for valuation in the present case would be the date of notification namely 20 August 1987, hence the transaction of 12 January 1976 was required to be discarded in totality for the purpose of valuation with reference to the notified date, the same being too remote in point of time from the relevant date. Even otherwise, the date of the transaction on the face of the document, was 2 February 1982 which was also too remote. Referring to question nos. 15 to 17 of Shri Ajgaonkar's cross-examination, it is submitted that Ajgaonkar has committed several palpable errors and his testimony deserves to be totally discarded while valuing the land under acquisition in the present reference.

45. It is submitted that Shri Ajgaonkar had led evidence on the basis of recollections of events which took place more than 30 years ago. He had also not refreshed his memory before preparing his affidavit and/or deposing in cross-examination. He submitted that he had not

even made an attempt to read a copy of the award or a copy of his own valuation report dated 5 January 1988. Also he had not read the evidences of Shri Haresh Nanwani, Shri.Atul Madan Gulati and of Shri.Harshad Maniar in LAR 5 of 1990. It is submitted that he had also not read the evidence of Shri.PM. Salian, Shri.M.B. Vakharia and Shri.H.S. Maniar as recorded in LAR 4 of 1990 as clear from his answer to question nos. 46, 47 and 48 in the cross-examination. The submissions made by him are totally contradictory to his own report dated 5 January 1988 in regard to the development of the land, as earlier at one place he stated that the land was slowly developing and at another place, he has stated that the Western Suburbs were developing very fast.

46. Also contrary to the other evidence on record, he tried to state that no housing complexes have come up in the vicinity of the lands under acquisition by August 1987. Shri.Ajgaonkar's answer in his cross examination to question no.36 that the Jogeshwari-Vikhroli Link Road had not come into existence a few years before August 1987 was also false considering his answer to question nos. 37 to 40. It is thus submitted that evidence of Shri Ajgaonkar is totally unreliable and unsatisfactory and would not be of any assistance in valuing the land under acquisition.

Shri.M.M.Sumant's evidence:-

47. In regard to the evidence of Shri.M.M. Sumant, Estate Manager of the BEST undertaking, it is submitted that his evidence does not carry the case of the BEST Undertaking any further. It is submitted that Shri.Sumant had produced a copy of the letter dated 5 May 1984 addressed by Majas CHS and another letter dated 5 May 1984 addressed by Pearl Cosmetics & Chemicals Pvt. Ltd. to contend that the said Cooperative Housing Society had proposed to the BEST Undertaking a rate of Rs.75/- per square metre as compensation for acquiring their land for the BEST depot.

48. It is Shri.Korde's submission that the said letter of Majas CHS would in fact show that it had not proposed to the BEST Undertaking a rate of Rs.75/- per sq. mtr. as compensation for acquiring their land for the BEST Depot. It is submitted that this letter was only in the context of giving an advance possession to the BEST the land proposed to be acquired for the bus depot. The letter clearly stated that the Society had agreed to accept two-third amount of compensation of Rs.75/- per sq. mtr. on the date of handing over the possession of the land implying thereby that the rate of 75/- per sq. mtr. was a tentative rate for payment of advance compensation at the time of taking advance

possession. The letter itself made it clear that the balance amount payable was to be decided in the award by the SLAO. If it was to be the intention that final compensation in the award was to be paid at the rate of Rs.75/- per square metre, then there would be no question of the SLAO deciding in the award how much would be the balance amount payable. It is therefore submitted that Sumant has completely misinterpreted the said letter of the Majas CHS. It is submitted that in any event, the said letter was never acted upon by either party and in fact no advance possession of the land was taken in the present case. Also the letter is dated 5 May 1984 whereas the relevant date for valuation was 20 August 1987. There was also no cross-examination of Shri Vakharia with respect to this letter. Even the BEST Undertaking had never made any submission on the basis of this letter when the matter was before the SLAO. Hence, the said letter cannot be taken as an instance which is relevant for valuing the land under acquisition. The letter cannot be binding on the claimant. In any case, the claimant/Tayabji is not a signatory to the said letter. It is submitted that the case as put up by Shri Sumant in the affidavit in lieu of examination-in-chief on the basis of the said letter of the Society was purely an afterthought and based on a misreading of the letter dated 5 May 1984. Even Shri Ajgaonkar in his evidence has not relied upon the said letter or also his evidence, in his valuation report dated 5 January 1988. It is

submitted that even otherwise there is no estoppel against law, hence, even assuming that Shri Sumant's interpretation of the said letter was correct by writing such a letter a party can never be precluded from asserting its claim for compensation before SLAO. In this context, a reference is made to the provisions of Section 25 of the L.A. Act before the 1984 Amendment which would go to show that if the claimants need not make a claim before the Collector, he was not entitled to be awarded an amount higher than the amount awarded by the Collector, unless he satisfied the Court that there was sufficient reason for the omission to make a claim before the Collector. If he had made a claim before the Collector, he was not entitled to be awarded a higher amount than the amount claimed by him before the Collector unless he satisfied the Court that there was sufficient reason for his failure to claim the higher amount before the Collector.

49. Shri.Korde has submitted that the bar as contained in the old section 25 has been removed by the 1984 Amendment to the L.A. Act. The 1984 amendment has replaced the old Section 25 by a new Section 25 which provide that the amount of compensation awarded by the Court shall not be less than the amount awarded by the Collector under section 11. This legislative change according to Shri.Korde is significant as after 1984 amendment, the position is that in an

application for a Reference under Section 18 of the L.A.Act, it is permissible for the claimant to claim a higher amount than the amount claimed by him before the Collector/SLAO. The earlier bar contained in the old Section 25 stood removed by this amendment. In support of this submission, reliance is placed on the decision of Supreme Court in **Bhag Singh vs. Union Territory of Chandigarh**³.

50. Shri.Korde would submit that the evidence led by the Acquiring body hence is of no assistance in determining the market value of the land under acquisition whereas the claimant had led cogent evidence on the question of market value as well as damages for injurious affection, being evidence of Haresh Nanwani, Atul Gulati and Harshad Maniar who have also stood the test of cross-examination and hence this evidence deserves to be accepted. It is submitted that thus instances 1 and 2 (supra) are the most comparable and market value of the land under acquisition in LAR 5/1990 should be determined at Rs.455/- per square mtr.

51. Shri.Korde in the alternative has submitted that even assuming that instances no. 1 and 2 cannot be taken into consideration, in that event the market value will have to be determined on the basis of Maniar's Instance no. 4, Indicator no. 1 and Indicator no. 2, in which

event, the market value will have to be fixed at a rate higher than Rs.850/- per sq. mtr.

52. In supporting the above submissions, Shri.Korde would submit that the principles with regard to the determination of the market value under Land Acquisition Act as laid down in the decisions in (i) **Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona & Anr. (supra)**; (ii) **The Special Land Acquisition Officer (7) and Laxman Bhaskar Pathare & Ors and the Commissioner, B.M.C.⁴**; (iii) **The Wallace Flour Mills Company Ltd. vs. Special Land Acquisition Officer (3)⁵**; (iv) **The General Secretary, Deccan Gymkhana, Pune vs. The Special Land Acquisition Officer-16 & Ors.⁶**; (v) **Anil Ganesh vs. Special Land Acquisition Officer & Ors.⁷**; (vi) **Commissioner of Income-tax, Bombay etc. vs. M/s. Podar Cement Pvt. Ltd.⁸**; (vii) **Raghubans Narain Singh vs. The Uttar Pradesh Govt. through Collector of Bijnor⁹**; (viii) **Viluben Jhalejar Contractor (Dead) by LRs vs. State of Gujarat¹⁰**; (ix) **Trishala Jain & Anr. Vs. State of Uttaranchal & Anr.¹¹**; (x) **Spl. Land Acquisition Officer (3) vs. Godrej & Boyce Manufacturing Co. Ltd.¹²**; (xi) **M/s. Mysore Minerals Ltd. vs. Commissioner of Income-tax, Bangalore¹³**; (xii)

4 High Court, Bombay LAR 15/1994

5 High Court, Bombay Appeal No. 213/2000 from LAR/94/1987

6 High Court, Bombay First Appeal 1218/2010

7 High Court, Bombay First Appeal 1655/2008

8 AIR 1997 SC 2523

9 AIR 1967 SC 465

10 (2005) 4 SCC 789

11 (2011) 6 SCC 47

12 High Court, Bombay LAR/7/2000

13 AIR 1999 SC 3185

General Manager, ONGC vs. Rameshbhai Patel¹⁴; (xiii) Chheda Housing Development Corporation vs. Bibijan S. Farid¹⁵.

Submissions on behalf of Acquiring Body – BEST Undertaking:-

53. Shri.Godbole, learned counsel for the acquiring body has made the following submissions:

(i) Shri.Godbole at the outset would submit that the claimants in both the reference applications have claimed enhancement of compensation at the rate of Rs.1500/- per square meter. It is submitted that a bare reading of these two applications would show that Tyabji has prayed for enhancement from Rs.2,14,55,650/- to Rs.8,14,39,294/-, which is more than four times the amount claimed in the claim application filed in the year 1987 that is only two years before the application under Section 18 of the Land Acquisition Act. It is submitted that Tyabji has also claimed other amounts of compensation in his applications. The submission is that these are apparent contradictions and the unreasonable enhancement of the claim clearly indicates an attempt to grab compensation.

(ii) In regard to the case of Majas CHS, it is submitted that the claimant's witness no.1 Shri.P.M.Salian has made false and incorrect

14 (2008) 14 SCC 745

15 Manu/MH/0070/2007

statements in the affidavit in lieu of examination in chief with regard to frontage of the suit land to the Jogeshwari-Vikhroli Link Road. It is submitted that comparison of paragraph 12 of the affidavit in lieu of examination in chief and question no.65 of his cross examination show completely different versions of this witness. In the affidavit in lieu of examination in chief it is stated that the acquired land has frontage on Jogeshwari-Vikhroli Link Road and on Badrudin Tayyabji Road and there were shops nearby to the acquired land on both these roads. However, when asked in cross examination, he stated that the acquired land had no frontage on the said road. It is submitted that therefore, he is not a reliable and credible witness and considering the provisions of Section 155(3) of the Indian Evidence Act and the decision of the Supreme Court in “**Sunilkumar Gupta vs. State of Maharashtra**”¹⁶. It is hence submitted that the evidence of Shri.Salian-C.W.1 be discarded in totality.

(iii) In regard to the evidence of second witness of the claimant namely Shri.M.D.Vakharia (C.W.2) as examined on behalf of Majas CHS, it is submitted that the two agreements/sale instances dated 10 April 1985 between Majas Land Development Co.Pvt.Ltd and East-West Builders Ltd. (Exhibit “D-2”) and the agreement between Majas Land Development Co.Pvt.Ltd. and Skylines (Exhibit “D-3”), are executed on the stamp paper purchased in the name of a third party namely

Mahimtura & Co. It is submitted that this witness has also admitted in his evidence that the said company had no relation with him as stated in question no.25 of the cross examination. Referring to Section 34 of the Maharashtra Stamps Act,1958, it is submitted that both these agreements are inadmissible in evidence. It is submitted that both the sale instances were presented in evidence by an affidavit in lieu of examination in chief of Shri.Harshad Maniar dated 16 August 2007. Hence, the admissibility of these sale instances are required to be decided as on 16 August 2007 that is the date on which they are presented in evidence, referring to paragraph (9) of the judgment of this Court in **“Krishna Sheena Shetty vs Suresh Anant Sawant And Anr.”**¹⁷ wherein it is held that the document could be admitted in evidence only on payment of stamp duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up the deficit duty and the penalty at the rate provided for under Section 34(a)(ii) of the Act is required to be paid. Section 34 would be applicable even in regard to the documents which are executed prior to the Amendment of 2001 to the Maharashtra Stamps Act. Hence, both these agreements are inadmissible in evidence even on this count.

(iv) In regard to the evidence Shri.H.S.Maniyar, the valuer PW-3 in LAR No.5 of 1990 and the reliance of the claimants on the valuation

report of Shri.H.S.Maniyar, it is submitted that the valuation report of Shri.Maniyar was based on sale instances as well as the evidence of Shri Vakharia, in the reference application of claimant-Majas CHS. It is submitted that it is quite clear from his answer to question No.24 in the cross-examination of Shri.H.S. Maniyar when he states that instance Nos.1 and 2 are based on the affidavit of Shri M.B. Vakharia filed in LAR No.4 of 1990. He also stated that sale instance Nos. 3 and 4 are indicators collected by him by taking a search in the Sub-Registrar offices at Mumbai and Bandra. It is therefore submitted that the valuation report as prepared by the valuer in LAR No.5 of 1990 is based on the valuation report of the claimants in LAR No.4 of 1990. Hence the said report is inadmissible in evidence for various reasons.

(iv) It is submitted that the acquiring body-BEST had led evidence of Estate Manager Shri. M.M. Sumant. The valuation report dated 5 January 1988 (Exhibit E-1) was proved by the affidavit of evidence of Shri.P.L. Ajgaonkar, which was marked as Exhibit E-20. It is submitted that the contents of the valuation report were proved on 20 October 2018. Also in the cross-examination of Shri Ajgaonkar, no admissions/shortcomings were found with regard to the valuation of the suit land at the rate of Rs.62 per sq. mtr.

(v) It is submitted that during the cross-examination of Shri.Ajgaonkar, it was specifically stated that Jogeshwari-Vikhroli Link Road was not in existence in August 1987. A reference is made to question No.36 of the notes of evidence of Shri.Ajgaonkar who in answering the question as to whether Jogeshwari-Vikhroli Link Road had come into existence a few years before August 1987 and whether he would agree with this. He had answered in the negative stating that this road was planned and acquisition was going on and there was hardly motorable road directly from Western Express Highway. It is therefore submitted that Jogeshwari-Vikhroli Link Road was not completed in August 1987 hence valuation of the said property cannot be enhanced in view of lack of infrastructure surrounding the suit land.

(vi) In regard to the reliance on behalf of the claimants, on instance No.1 namely the articles of agreement dated 10 April 1985, it is submitted that a development agreement is different from the sale agreement. It is submitted that apart from the fact that the document is not duly proved and cannot be read in evidence, even otherwise the development agreement dated 10 April 1985 as relied by the claimants and the valuer of the claimant cannot be considered as a sale instance. The reason is that the agreement reveals that the same is executed between Majas Land Development Company and Manju Gupta of

M/s.East West Builders Pvt. Ltd. only for transfer of development rights in favour of M/s.East West Developers. This is clear from clause No.3 of the said development agreement which reveals that the development rights of fully developed NA plot of land in a sanctioned layout were transferred in favour of the new developer for a sum of Rs.30/- per sq.ft. of salable FSI. Clause 3 makes it apparent that the development agreement pertained to a fully developed plot and the same cannot be considered as a sale instance showing actual valuation of undeveloped land existing at the time i.e. in 1985. It is submitted that the primary requirement for seeking enhancement of compensation under Section 18 of the Act as clear from the judgment of the Supreme Court in **Chimanlal Hargovinddas Vs. SLAO** (supra) is that while computing the market value of the land, the Court has to co-relate the market value reflected in the most comparable instance which provides index of market value. It is thus submitted that the development agreement dated 10 April 1985 cannot be considered as a sale instance and in any case a comparable sale instance since the same is not transfer of ownership of land at all. It is submitted that the price is fixed for transfer of right to consume FSI by the original developers to the new developers, hence, the development agreement dated 10 April 1985 is neither a valid sale instance nor can it be considered for showing potential value of the land.

(vii) Referring to clause 7 of Instance no.1, it is submitted that the original developer had agreed to execute a deed of transfer and all other deeds necessary for the purpose of transfer of property in favour of the new developer. Hence clause 7 clearly indicates that this agreement cannot be considered as a sale instance for the purpose of arriving at the market value of the land. It was therefore apparent that execution of the said document has not resulted in transfer/sale of the suit property in favour of the new developer, hence it cannot be considered as a valid sale instance. It is submitted that neither of the said deeds/documents and/or conveyance as contemplated in clause 7 of the said agreement have been placed on record to show that the said agreement is in fact a sale agreement. Shri.Godbole has submitted that this apart it is also unsafe to rely on the data as placed on record on behalf of the claimants for determination of the market value of the land for the following reasons:-

(a) Referring to the recitals of the articles of agreement of instance nos.1 and 2, it is submitted that the agreement dated 12 January 1976 as also tripartite agreement dated 4 January 1982 are neither produced nor proved. By the agreement dated 12 January 1976 M/s.Madhu Builders Pvt. Ltd. had agreed to transfer the development rights to Manilal Lalan and Khimji Lalan. The agreement dated 4 January 1982

(tripartite agreement) was executed between Madhu Builders, the Lalans and Vakharia Estate and Investment Pvt. Ltd. M/s.Madhu Builders had granted development rights to M/s.Vakharia Estate and Investment Pvt.Ltd. with respect to 1,65,140 sq. ft. of land described in the second schedule. Thus, the area under consideration was 15,341.88 sq. metres as against the area of acquired land being 27,442 sq. mtrs., which was completely un-developed land. It is next submitted that another agreement dated 4 March 1984 was made between M/s.Vakharia Estate and Investments Pvt. Ltd. and the original developer, Manilal Lalan and Khimji Lalan. On the same date, another agreement was executed by the original promoters and developers Manilal Lalan and Khimji Lalan in favour of Anilkumar Agarwal, as a Promoter of the proposed Majas Madhu CHS Ltd. Even this document is not on record. The chain of documents therefore is not produced, the consideration indicated therein is neither disclosed nor available for perusal of the Court. Also the said agreement indicates that M/s.Madhu Builders got building plans sanctioned, obtained IOD etc., as clear from clause 1(v) of the said agreement. It is submitted that all this would show that the subject matter of the agreement was thus of a fully developed plot from a layout duly converted into NA user and the property in the second schedule to the agreement was in fact the layout plot admeasuring only 7032.50 sq. metres bearing Survey No.34/1 (pt).

It is submitted that area of 7032.50 sq. metres is much smaller than the acquired land and thus not at all comparable.

(b) Under the articles of agreement (for instance no.1) what is granted, is only the right to exploit saleable FSI of 1,65,140 sq. ft. (which includes balcony, staircase and lift pit) for which plan was duly sanctioned and an IOD dated 8 December 1982 was issued as also a Commencement Certificate dated 26 April 1984 was also issued and the work of construction had already commenced by the original developer. The ratio of carpet area to saleable FSI is also not known as there is no evidence about the area of balcony, passage and of a lift pit. It is submitted that the sanctioned plans were also not produced. It is submitted that the very fact that the area was only 7032.50 sq. mtrs. which is equivalent to 75,697.83 sq. ft., but the saleable area is shown to be 1,65,140 sq. ft. would make it impossible to exactly guess the land cost. A fully developed plot of land in sanctioned layout with valid IOD and CC and converted into NA user as against the barren undeveloped land which was acquired, can never be the basis for determining the value of the acquired land. Also there is no evidence to find out the manner in which the parties to the agreement had struck to bargain with such huge anomaly in the area and FSI at the rate of Rs.30/- per sq. ft. was not of the land but of saleable FSI and it is obvious that it consists of

the profit earned by every party in each transaction namely profit of the original owner by executing the original agreement dated 12 January 1976, expenses incurred by him for obtaining order under Section 20 of the ULC Act, the profit of the original promoter-Manilal Lalan and Khimji Lalan when they entered into a tripartite agreement dated 4 January 1982 with M/s.Vakharia Estate and Investments Pvt. Ltd. and further profit of M/s.Vakharia Estate and Investments Pvt. Ltd. when they executed agreement dated 4 March 1984 in favour of the original developers, Manilal Lalan and Khimji Lalan.

(c) It is submitted that it is also seen from clause 8 of the said agreement dated 10 April 1985 refers to a sale executed by the original promoter in favour of Anil Agarwal as Promoter of Majas Madhu CHS, expenses for preparation of layout, appointing architects, structural engineers, advocates, etc. for getting IOD and Commencement Certificate, payment of NA conversion charges and scrutiny, development charges to the BMC and the profit margins of M/s.Majas Madhu Land Development Ltd. It is submitted that since the price of Rs.30/- per sq.ft is combination of profit margins and expenses, it is impossible and completely risky to arrive at any formula to find out the price of undeveloped land which was acquired. It is thus submitted that the first sale instance (dated 10 April 1985) should not be considered as

a valid comparable sale instance for fair market valuation of the property in reference.

(d) In so far as instance No.2 dated 10 April 1985 namely the articles of agreement executed between Majas Land Development Company Limited and M/s.Skyline Construction Company is concerned, it is submitted that this is also a development agreement and not a sale agreement. It is submitted that clause 3 of the said agreement clearly provides that the original developer is only transferring the rights of the developed property. Thus a submission as made in regard to sale instance No.1 is equally applicable as far as this sale instance is concerned.

(e) In regard to instance no.2, it is submitted that the basic agreement dated 2 February 1982 executed between Madhu Developers as vendor and Manilal Lalan and Khimji Lalan as the Chief Promoter and Trustees of Majas Madhu CHS called as Purchasers shows that the rate fixed under the original agreement dated 12 January 1976 was only Rs.1.50 per sq. ft. of built up available FSI (for the FSI, assumed computation of 20,00,000 sq. ft. or thereabout) there were sanctioned plans. It is submitted that even assuming without admitting that in January 1976 the particulars of total area of land described in second

schedule was of (firstly 1,43,875.23 sq. mtrs. and secondly 12,823.50 sq. mtrs.) being total 1,56,698.73 sq. mtrs. equivalent to 16,86,705 sq. fts. which was sold for Rs.30 Lakhs, which translates in the rate of Rs.1.78 per sq. ft. It is submitted that it is well settled that in case of a developing area the highest rate of increase in price which can be safely considered is 15% as seen from the decision of the learned Single Judge of this Court in **The Special Land Acquisition Officer (7) and Laxman Bhaskar Pathare & Ors and the Commissioner, B.M.C.** (LAR No.15 of 1994) (supra) wherein the Court has held that the contention of increase at 20% cannot be accepted considering the consistent practice of 15% rate of increase being usually granted. It is submitted that the rate of Rs.1.50 per sq. ft. was of January 1976 and the notification issued under Section 126(4) of the MRTP Act read with Section 6 of the L. A. Act was dated 15 June 1987 which is required to be taken as the relevant date. It is submitted that SLAO has awarded a rate of Rs.130/- per sq.mtr. which in fact on a much higher side as demonstrated by Shri Ajgaonkar on behalf of BEST. It is submitted that the following calculations made on the assumption that there will be 15% annual compounded increase in the rate from 1976 to August 1987 would show that in fact the rate on the relevant date would be Rs.8.3743 per sq. ft. equivalent to 90.14 sq. mtrs.:-

% increase compounded	15%	16%	17%	18%	19%

annually					
Price per sq. ft. in 1976	1.8	1.8	1.8	1.8	1.8
Price per sq. ft. in 1987	8.374	9.211	10.123	11.116	12.198
Price per sq. mtr. in 1987 (Price per sq. ft. in 1987 X 10.764)	90.14	99.147	108.966	119.659	131.299

(f) It is submitted that the rates in the above chart would clearly show that SLAO has fixed compensation on a higher side giving a product of 19% annual increment over the rate of Rs.1.80 per sq. ft. fixed in January 1976.

(g) As regards Sale instance No.3 being agreement dated 29 June 1982 is concerned, it is submitted that it is too remote in time. It is submitted that sale instance No.3 as relied upon by the claimants is the Deed of Confirmation dated 29 June 1982 executed between Ranjit Hiranandani and another for sale of 5 shares as well as for transfer of plot No.208 of Shere Punjab Co-operative Housing Society Limited. Agreement for sale dated 22 October 1981 was executed between the parties. It is submitted that the stamp paper of both the sale deeds as well as the agreement for sale are in the name of a third party. Further mere execution of the deed of confirmation 8 months beyond the agreement for sale does not have effect of registration of agreement for sale. It is

submitted that in any case this instance is too remote in time. It is required to be discarded as also contended on behalf of the claimants.

(h) In regard to sale instance No.4 being agreement dated 17 April 1986, it is submitted that area of land is only 500 sq. yards and hence it is not a comparable sale instance. This agreement executed between Jaspal Singh Mela and Anil Kumar Sethi of M/s.Sai Baba Constructions for sale of a plot of land admeasuring 500 sq. yards located in Mogra Village at Andheri (East) may not be relevant in the present context. It is submitted that the land under acquisition in the present references have a cumulative area of 27442 sq. mtrs. and the instance in question constitutes approximately 1.6% of the total area under acquisition. Thus on this count also it becomes a sale instance totally not comparable. It is submitted that in any case a fully developed plot in a layout of Shere Punjab Co-op. Housing Society Limited with all amenities can never be considered to be a comparable instance and it will be hazardous to rely on the same. It is submitted that Mogra Village was fully developed in 1986 and hence it is not a comparable sale instance, although the land in regard to this sale instance is located at the distance of 1200 meters away from the acquired land. It is submitted that the SLAO at the time of passing of the award has already considered sale instances in respect of land located at the distance between 200 meters to 2.5 kms in respect

of larger plots of land. Therefore this sale instance is not comparable. It is next submitted that there are several instruments constituting single transaction of sale in regard to instance Nos.1, 2 and 4 as relied upon by the claimants. Thus on their own these instances cannot be considered as constituting a sale instance under Section 54 of the Transfer of Property Act, 1882.

(i) Shri.Godbole has submitted that instance Nos.1 and 2 being the development agreements, in the absence of other documents namely Conveyance Deed, these articles of agreement do not constitute a sale as contemplated under Section 54 of the Transfer of Property Act, 1882. It is next submitted that a development agreement for consideration does not constitute sale in as much as the consideration amounts in instance Nos.1 and 2 of Rs.49,54,200/- respectively does not change the nature of the agreement and the same cannot be amount to an agreement for sale. This contention is supported relying on the decision of this Court in **M/s.Gandhi Builders and Developers v/s. Shyamlal S/o.Ramchandra Yadav** in AO No.102 of 2014 dated 23 April 2015. Shri.Godbole would submit that instance Nos.1 and 2 also cannot be construed as an agreement for sale only on the basis of the consideration amount as both the agreements only transfer the right to develop the property whereas the ownership rights have remained with the original owners. It is therefore submitted that both these instances are not admissible in

evidence and the same cannot be construed as an agreement for sale. The decision in **The Wallace Flour Mills Company Ltd. vs. Special Land Acquisition Officer (3)** (supra) dated 29 January 2009 as also the decision in **The General Secretary, Deccan Gymkhana, Pune vs. The Special Land Acquisition Officer-16 & Ors.** (supra) as relied upon by the claimants also record that the development agreements are completely different class of agreements and the same cannot be considered as a comparable sale instance. It is submitted that in any case in respect of instance Nos.1 and 2 except the evidence of Shri Maniar, no independent evidence is produced. The original sanctioned layout of the lands which could have been got produced from the society or the Municipal Corporation, was not produced. Particulars of the areas of balcony and lift pits are therefore not known and produced on record. The ratio of saleable FSI to built up/carpet area of the land then constructed by the developers under the said agreement has not been brought on record and there is absolutely no evidence in that regard as led by the claimants. Also these documents cannot be read in evidence due to bar of Section 34 of the Maharashtra Stamp Act 1958. Both these instances therefore do not constitute relevant facts and relevant evidence.

(j) It is submitted that in the valuation report of Shri.Ajgaonkar, dated 5 January 1988, Shri.Ajgaonkar had placed reliance on a registered Indenture of Sale dated 2 February 1982, the rate existing as on 20 August 1987 (as a relevant date) was arrived at Rs.62/- per sq. mtrs. It is submitted that this registered sale deed as relied by Shri.Ajgaonkar is for a large area admeasuring 1,43,875 sq. meters plus 12.923 sq. mtrs. located at Village Majas, Jogeshwari in close proximity of the acquired land. It is submitted that the consideration is of Rs.30 Lakhs under a genuine sale instance of an undeveloped land. The areas are also comparable. Considering this evidence, it is submitted that it is a well settled principles of law that for large areas, there is a substantial decrease in the price per square meter of land. This principle ought to be applied. In supporting this submission, reliance is placed on the decision of **Chimanlal Harigovinda vs. Special Land Acquisition Officer** (supra).

(k) Applying the above principles, it is submitted that the price per square metre under the said instance therefore works out Rs.1.78 per sq. ft. i.e. Rs.19.16 per sq. mtrs. The formula of 15% annual compounded increase will have to be applied as indicated in the chart (supra) as relied upon by the acquiring body. It is submitted that the SLAO has in fact computed 19% annual compounding increase and hence the

consideration awarded is absolutely more than adequate and more than the market price. It is submitted that the valuation of Shri.Ajgaonkar was valid. The rate as claimed by the claimants is exorbitant and unreasonable as the same could not have been arrived at in the calculation as set out on behalf of the acquiring body.

(1) Shri.Godbole would submit that the land admeasuring 5133 sq. mtrs. subject matter of LAR No.4 of 1990 had a pond. He submits that it is the case of the acquiring body that the said pond was used for immersion of Ganesh idols of individuals as also public Ganesh Mandals who normally have huge idols. The evidence in that regard is duly proved in Exhibit 3-E [paragraphs (i) to (vi)] and considering that idols of public Ganesh Mandals were immersed, hence it can be safely presumed that depth of the lake is more than 7 to 8 ft. Shri.Godbole submits that as per evidence of Shri. M.M. Sumant, the said pond was also shown as “reserved for garden” under development plan of MCGM and hence its development potential was quite reduced. It is submitted that due to the said pond forming part of the land which was acquired, the acquiring body was constrained to acquire the adjoining land of the same area. It is thus submitted that the claimants have not denied the existence of the pond and in fact, no steps were taken by the claimants for appointment of a Court Commissioner for measuring its depth and

hence there is no credible evidence to show that it was a shallow pond which could be filled up. It is therefore submitted that the valuation of the suit land under acquisition substantially reduces due to the existence of pond and the evidence of valuer Shri.Maniar to the contrary is required to be discarded.

(m) Mr.Godbole would next submit that the letter dated 5 May 1984 issued by claimant-Majas CHS (Exh.9) set out a valuation of Rs.75/- per sq.mtr. to be an acceptable and just compensation towards acquisition of the said land. Also similar letter dated 5 May 1984 (Exh.10) was issued by Pearl Cosmetics and Chemicals Pvt. Ltd. Therefore claimants were estopped from seeking enhancement of compensation awarded in the reference in question.

(n) It is next submitted that in the affidavit of evidence dated 17 August 2006 of Shri.Madhusudan Vakharia, Chairman of claimant in LAR No.4 of 1990, a specific admission has been made in paragraph 19 of the affidavit, that he is interested in the outcome of the present reference. Also Shri.Vakharia has specifically admitted in his cross-examination that he is Director of three companies as referred in paragraph 19 of his affidavit. In this context, it is submitted that question No.36 of cross-examination of Shri.Vakharia also is relevant

wherein he has answered in affirmative that he is Director of three entities companies mentioned in paragraph 19 of the affidavit. It is submitted that in sale instance Nos.1 and 2 specific references have been made to agreements entered by the companies/ subsidiaries wherein Shri.Vakharia is directly interested or involved i.e. tripartite agreement dated 4 January 1982 between Madhu Builders and Vakharia Estate & Investments Pvt. Ltd. and the original promoter. It is submitted that references also are made to agreement dated 4 March 1984 executed between M/s.Vakharia Investment and the original promoter. The submission of Shri.Godbole is that from these references it is clear that the valuer Shri Vakharia is not only an interested witness but also having executed several agreements in regard to instance Nos.1 and 2, the valuation report of Shri Vakharia as well as instance Nos.1 and 2 cannot be considered for enhancement of compensation, and the same should be discarded. In support of this submission Shri.Godbole has placed reliance on the decisions of the Supreme Court in (i) **State of Rajasthan v. Smt. Kalki & Anr.**¹⁸, and (ii) **Mahavir Singh v. State of Madhya Pradesh**¹⁹.

(o) It is submitted that no case is made out for enhancement of compensation in both these references and these references ought to be dismissed.

18 (1981) 2 SCC 752

19 (2016) 10 SCC 220

54. Learned AGP representing the SLAO has made submissions as also has filed written submissions making comments on the instances as relied on behalf of the claimants supporting the award as made by the SLAO. However, as the acquiring body is a party to the present proceedings and has contested these References, on behalf of the SLAO no independent evidence was led.

Discussion

55. The primary issue to be decided in these references is to as to what was the market value of the land on the date of publication of the notification under Section 126(4) of the MRTP Act read with Section 6 of the LA Act.

56. At the outset it needs to be observed that the principles of law on payment of compensation in land acquisition cases are too well settled. The jurisprudence in this regard is as old as 1894 Act. However, some of the decisions which crystalise these principles are required to be noted.

57. In *The Government of Bombay vs. Merwan Moondigar Aga*²⁰, Mulla, J. considering as to what would the principle of market value of the land under Section 23 of the LA Act , ‘first’ observed that the provisions would mean that the owner is to be compensated for his land, the measure of compensation being the market value of the land. The expression “market value” means the value which a parcel of land would realise if sold in the market. The test then is the test of a sale in the market. The seller must be a willing seller; a forced sale affords no criterion of market value. The purchaser must be a prudent purchaser, that is, one who makes his offer after making necessary inquiries as to the value of the land; an offer made by one who knows nothing of the value of the land in the locality and who makes no inquiries about it, affords no test of market value.

58. The principles in regard to the determination of the market value of the land are well settled. In **Raghubans Narain Singh vs The Uttar Pradesh Government**, AIR 1967 SC 465, the Supreme Court has held that market value on the basis of which compensation is payable under section 23 of the Land Acquisition Act means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all its existing advantages, and its potential possibilities when laid out in its most advantageous manner,

excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired. The value to be ascertained is the price to be paid for the land with all its potentialities, and with all the use made of it by the vendor.

59. In its celebrated decision **Chimanlal Hargovinddas vs Special Land Acquisition Officer, Pune** (*supra*), the Supreme Court held that the scope of Section 18 proceedings is not of an appeal against the award, hence the Court will not take into account the material relied upon by the Land Acquisition officer in his Award unless the same material is produced and proved before the Court. An award is an offer made by the Land Acquisition officer and hence the Court would not sit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition officer. The reference would be an original proceeding before the Court wherein the Court would determine the market value afresh on the basis of the material produced before it. The claimant would be in position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced before the Court and proof will be taken into account. It is held that the market value of land under acquisition has to be determined on the date of publication of the notification under sec. 4

of the Act. The determination has to be made standing on the date line of valuation (date of publication of notification under sec. 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It would be required to assume that the vendor is willing to sell the land at a reasonable price. In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value. Even post notification instances can be taken into account if they are very proximate, genuine and the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects. The Court would be required to identify the most comparable instances out of the genuine instances on the considerations, namely, (i) proximity from time angle, (ii) proximity from situation angle. It is held that after having identified the instances which provide the index of market value, the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition. A balance-sheet of plus and minus factors should be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do. The market value of the land under

acquisition has thereafter to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors. The plus factors would include smallness of size, proximity to a road, frontage on a road, nearness to developed area, regular shape, level vis-a-vis land under acquisition, special value for an owner of an adjoining property to whom it may have some very special advantage. This entire exercise is required to be undertaken in a common sense manner as a prudent man of the world of business would do. The evaluation of these factors depends on the facts of each case and there cannot be any hard and fast or rigid rule. It is held that common sense is the best and most reliable guide. For instance, A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say 10000 sq. yds. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. The factor can be discounted by making a deduction by way of an allowance at an appropriate rate ranging approx. between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will also depend on whether it is a rural area or urban area and whether building activity is picking up, and whether waiting period during which the capital of the

entrepreneur would be looked up. It is held that Minus factors would include largeness of area, situation in the interior at a distances from the road, narrow strip of land with very small frontage compared to death, lower level requiring the depressed portion to be filled up, remoteness from developed locality, some special disadvantageous factor which would deter a purchaser. It is held that every case must be dealt with on its own facts pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself. These are the guidelines to be applied with understanding informed with common sense as what is held.

60. In **Tribeni Devi & Ors. vs. Collector of Ranchi** (supra), the principles for determining compensation under sections 23 and 24 of the L.A.Act, 1894 were again reiterated. It was held that the compensation payable to the owner of the land is the market value which is determined by reference to the price which a seller might be reasonably expected to obtain from a willing purchaser and as it may not be possible, to ascertain the amount with precision, the authority charged with the duty to award compensation is bound to make an estimate, judged by an objective standard. The land under acquisition is, therefore, required to be valued not only with reference to its condition at the time of the declaration under s. 4 of the Act, but its potential value also must be

taken into account. It was held that the sale-deeds of the lands situated in the vicinity and the comparable benefits and advantages which they have, furnish a rough and ready method of computing the market value. Referring to an earlier decision in **Special Land Acquisition Officer, Bangalore vs. T. Adinarayan Setty, AIR 1959 SC 429**, it was held that the methods of valuation to be adopted in ascertaining the market value of the land on the date of the notification under s. 4, being: (i) opinion of experts (ii) the price paid within a reasonable time in bona fide transactions of the purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages and (iii) a number of years purchase of the actual or immediately prospective profits of the lands acquired. It was held that these methods, however, do not preclude the Court from taking any other special circumstance into consideration, the requirement being always to arrive as near as possible an estimate of the market value. It was held that in arriving at a reasonable correct market value, it may be necessary to take even two or all of these methods into account in as much as the exact valuation is not always possible as no two lands may be same either in respect of the situation or the extent or the potentiality, nor is it possible in all cases to have reliable material from which that valuation can be accurately determined.

61. In **Viluben Jhalejar Contractor (Dead) by LRs. vs State Of Gujarat**, it was held that the market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. It was held that where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as well as other evidences have to be considered. It was held that the amount of compensation cannot be ascertained with mathematical accuracy. A comparable instance has to be identified having regard to the proximity from time angle as well as proximity from situation angle. For determining the market value of the land under acquisition suitable adjustments have to be made having regard to various positive and negative factors vis-a-vis the land under acquisition by policy the two in juxtaposition. The Court laid down the following positive and negative factors:

Positive Factors	Negative Factors
(i) Smallness of size	(i) Largeness of area
(ii) Proximity to a road	(ii) Situation in the interior at a distance from the road
(iii) Frontage on a road	(iii) Narrow strip of land with very small frontage compared to depth
(iv) Nearness to developed area	(iv) Lower level requiring the depressed portion to be filled up
(v) Regular shape	(v) Remoteness from developed locality
(vi) Level vis-a-vis land under	(vi) Some special disadvantageous

acquisition

factors which would deter a purchaser

(vii) Special value for an owner of an adjoining property to whom it may have some very special advantage

Further in paragraph 21 the Court held that :

21. Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges may range between 20% and 50% of the total price.

62. In **Trishala Jain v. State of Uttaranchal, (2011) 6 SCC 47**(supra), the Supreme Court has recognized the principles of "guesstimate" as a principle for determination of compensation to be awarded under the Land Acquisition Act. In paragraph 65, the Court observed as thus:

"65. It will be appropriate for us to state certain principles controlling the application of 'guesstimate':

(a) Wherever the evidence produced by the parties is not sufficient to determine the compensation with exactitude, this principle can be resorted to.

(b) Discretion of the court in applying guesswork to the facts of a given case is not unfettered but has to be reasonable and should have a connection to the data on record produced by the parties by way of evidence. Further, this entire exercise has to be within the limitations specified under Sections 23 and 24 of the Act and cannot be made in detriment thereto."

63. Applying the above principles the market value of the land is required to be determined on the relevant date namely the date of

notification under Section 126(4) of the MRTP Act read with Section 6 of the Land Acquisition Act namely on 20 August 1987. The determination in the present case would be on the comparable instances method by applying the principle of what a prudent and willing purchaser would offer to purchase land from the open market at a fair price to a willing seller. Thus, the most comparable instances would be required to be identified on the touchstone of proximity from the time angle, proximity from the situation angle as held in **Chimanlal Hargovinddas** case (supra) and a balancesheet of plus and minus factors is required to be drawn for the relevant factors to be evaluated in terms of price variation as a prudent purchaser would do. On this backdrop the evidence on record is discussed hereafter.

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64. This LAR has been argued as the main matter, hence, would require a prior consideration.

65. As noted in the foregoing paragraphs, on behalf of the claimant-Tyabji, Shri.Haresh Khaimal Nanwani, Director of the claimant company was examined. In his evidence he stated about the ownership of the land in question saying that by an indenture of conveyance dated 13 June 1931 registered in the office of the Sub-Registrar, land admeasuring 74 acres and 19 ³/₄ gunthas in Survey no.34 and 55 was purchased by Tyabji. He

stated that the original holding is in village Majas, Taluka Andheri (East), Mumbai Suburban District. He stated that in the City Survey records CTS nos.14, 81, 166A and B, 167 and 171 are assigned to the original holding of the claimants. He stated that the present acquisition was of a part of the land purchased by this claimant-Tyabji under the said conveyance. He also stated that the claimant-Tyabji had filed a statement under Section 6 of the Urban Land Ceiling Act with the competent authority and that the competent authority had passed an order dated 14 December 1999 holding that the claimants do not hold any surplus vacant land. He also placed on record the said order passed by the ULC Authority. In regard to the land under acquisition he has stated in his evidence that this land was completely vacant and there was no structure. He states that he was personally familiar with the condition of the land under acquisition and the surrounding area at the relevant time that i.e. in August 1987 and even before and after that time. He has stated that the land under acquisition on the eastern side was practically levelled with the existing Jogeshwari-Vikhroli Link road. It is stated that if any construction was to be undertaken on the vacant land then no filling or cutting was required to be done and construction could be designed without involving any cutting on any portion of the land. He stated that considerable developments had commenced in the surrounding areas in the year 1982-83 and the colonies such as Raheja

Nagar, Poonam Nagar and Air India Colony etc. had already come up which were at the distance of 200 to 300 meters from the acquired land. He stated that a colony known as Greenfields (RNA Developers) was coming up which was adjoining to Tyabji's land and was about 80 meters from the acquired land. He also stated that St.Xavier School as well as Swami Samarth High School were at walking distance of five minutes from the land under acquisition. He also stated that there were shops nearby and the market was about 15 minutes walking distance. He also stated that ONGC quarters were constructed well before August 1987 which was also at a distance of 300 meters from the acquired land, while stating that the locality was fast developing in the year 1987. He stated that if any construction was to be undertaken on Tyabji's land, no filling was required to be done as also no cutting was required to be undertaken and the construction could be designed without involving any cutting on any portion of the land. He also stated that the acquired land was in I-2 zone and it was a common knowledge by August 1987 that IA-2 zone would be converted into residential zone which infact was done in the revised development plan. He also stated that Greenfields Colony was located on the land under I-2 Zone under the old development plan.

66. In the cross examination when Shri.Nanwani was asked as to when the Jogeshwari-Vikhroli Link Road had come into existence, he stated that the road was already in existence but was named as Jogeshwari-Vikhroli Link Road somewhere in the year 1978-79. Again in question no.28 when asked whether was it correct to say that the Jogeshwari-Vikhroli Link Road divides the property, he answered in the affirmative. Thereby again confirming that the Jogeshwari-Vikhroli Link Road was in existence. In question no.3 he clearly answered that the land abuts the main Jogeshwari-Vikhroli Link Road. In answering question no.34 and 35 he stated that the land was not marshy and all sides of the land were fully developed in the sense that there was road, there was electricity and there was water connection. He also stated that the land was having a gradual slope from east to west and the difference being only of one foot between higher and lower level.

67. From the evidence of Shri.Haresh Nanwani it is apparent that the land under acquisition was in a developing area. There was no cross examination to displace his evidence when he stated that considerable development had started in the surrounding area around 1982-83, as also the colonies such as Raheja Nagar, Poonam Nagar, Air India Colony etc. had already come up which were at the distance of 200 to 300 meters from the acquired land, as also a colony known as

Greenfields (RNA Developers) was coming up. It also proved from the evidence of Shri.Haresh Nanwani that St.Xavier School as well as Swami Samarth High School were at a walking distance of five minutes from the land under acquisition as also the market was within 15 minutes walking distance, as also ONGC quarters had been constructed well before August 1987 which was at the distance of 300 meters from the acquired land. Also the land had no embargo under the ULC Act. There is no cross examination on all these issues including the statement that the land fell in a locality which was a fast developing area in the year 1987.

68. The next witness examined on behalf of the claimant-Tyabji was Shri.Atul Madan Gulati (P.W.2) who is an Architect. In his affidavit in lieu of examination in chief he has stated that he is a qualified architect since 1986 holding a B.Arch degree from the University of Bombay as also he is registered with the Council of Architects. He stated that he was professionally associated with the claimant and was also a business associate of claimant-Tyabji over past few years. He was requested by Shri.Haresh Nanwani, Director of the claimant-Tyabji to prepare a plan showing various portions of land which was acquired for different public purposes prior to 20 August 1987 from and out of the larger holdings of the claimant-Tyabji. He

accordingly prepared a plan showing various lands including the adjoining lands, the portions of the land acquired for different public purposes prior to 20 August 1987 (relevant date) and stated that the contents of the plan were correct. He explained as to how he prepared the plan showing the boundaries of larger holdings of the claimant under the conveyance dated 13 June 1931. This plan was placed on record alongwith his affidavit of evidence. He identified the land which was earlier acquired for public purpose by the Maharashtra Housing Board (**MHB**) under notification dated 15 January 1969 and for this purpose he obtained and referred to a certified copy of the plan which showed the northern boundary of the MHB acquisition. He stated that once the said boundary was available, he could identify claimant-Tyabji's land acquired for the MHB out of Survey no.42/2 and 55/4. He stated that as far as Survey no.46/8 and 46/1 were concerned, as shown in the award, full Hissa numbers of the said survey numbers are acquired and he could mark the same on the basis of the boundaries of those hissa numbers. In regard to an earlier acquisition for Jogeshwari-Vikhroli Link Road, he stated that he had taken into account a certified copy of the plan and the award of the SLAO showing the land acquired for the said acquisition. For the purpose of the present land under acquisition for the BEST undertaking, he stated that, he has taken into account, the site survey undertaken on 23 April 1989 under his

supervision showing the claimant's total land acquired for the BEST depot under the Section 126(4) MRTP Act notification dated 15 June 1987. He also stated that 13.40 meters DP road is shown by him in the plan, as seen from the extract of the sanctioned development plan which came into force from 31 January 1994. He says that perusal of the said plan indicates that after the two portions of the claimant-Tyabji land (6879.1 and 11277.1) totalling to 18156.2, stood acquired for the acquiring body it is clearly seen that the balance 33541.96 sq.meters in S.No.55/4 (CTS No.166A) of the claimant's land was left without access. There is nothing significant in the cross examination which would displace Shri.Gulati's testimony, that the remaining land in S.No.55/4 (CTS No.166A) admeasuring 33541.96 sq.mtrs. had not lost its access on account of the present land acquisition. It can also be seen from his cross examination that his version in regard to correctness of the plan he had produced, remains undisturbed. Also there are no submissions on behalf of the acquiring body which would render the evidence of Shri.Gulati on the plan submitted by him, to be discarded.

69. The next witness as examined on behalf of the claimant Tyabji is of Shri.Harshad S. Maniar (PW.3) who is the valuer. Shri.Maniar has stated in his evidence that he is a civil engineer, surveyor, and a registered estate valuer. He has a qualification of a B.E.

(Civil), MIE, FIV, FIS. He has experience to attend many cases pertaining to the valuation of the property in Court and also that he has given evidence in judicial proceedings on matters involving valuation of land and immovable properties. He has stated in his evidence that on instructions of Mr. Haresh K. Nanwani, Director of claimant-Tyabji, he inspected and surveyed the land under acquisition (CTS no.166(pt) and 14(pt)) of village Majas for BEST Bus station and Bus depot for the purpose of ascertaining the market value of the same as on 20 August 1987. He stated that he prepared a valuation report dated 9 August 2007. He tendered the valuation report in evidence. He has also perused the evidence of Mr.Haresh K.Nanwani (PW.1) Director of claimant-Tyabji and his cross examination for the purpose of preparation of valuation report. He has also perused the award passed by the SLAO in the present case. Alongwith the valuation report he tendered part of the draft development plan of K-E Ward showing instances of sale, land acquired, zone of acquired land (Annexure A) and a certified copy of the sub-Registrar of Bombay under Bom-2506 of 1982 (Annexure B) by sub-registrar of Bombay under BBS-1806 of 1986 (Annexure C), copy of the Index II document from S-1184 (Annexure D) and a copy of the plan (Annexure E). He stated that he has valued the land under acquisition at the rate of Rs.546/- per square meter. In his valuation Shri.Maniar has stated that the land under

acquisition abutted the Jogeshwari-Vikhroli Link Road. He stated that the acquired land has frontage of 210 sq.meteres along the Jogeshwari-Vikhroli Link road. He stated that the land under acquisition is situated 1.5 meters away from Western Express Highway and 2.5 kilometer away from the Jogeshwari Station. He has also stated that on the east of the land under acquisition the area was being developed for residential multi-storey buildings namely Raheja Nagar, Poonam Nagar, Air India Colony, ONGC Colony and Greenfields Colony which are about 100 meters to 500 meteres distances from the land under acquisition. He has also stated that the land was sloping gradually from east to west and not levelled, but it was a vacant land and civil amenities were available at 20 to 30 minutes walkable distance. He stated that the land under acquisition was situated in the residential zone. He also stated that Swami Samarth High School was located at a walkable distance of ten minutes from the acquired land. He also stated that main shopping complex and market are available along the Sardar Vallabhbhai Patel Marg. He stated that on the relevant date the acquired land was situated in a rapidly developing locality. In describing the land under development plan, he stated that the land is situated in K-East ward of the municipal corporation and as per the sanctioned development plan for the said ward in the year 1966 the land was situated in I-2 zone and not reserved for any public purpose, however,

in the draft revised development plan of 1984 of K-East ward, the acquired land was shown reserved for BEST station and Bus depot for BEST. He has stated that the land falls in the residential zone as per the last revised development plan.

70. Shri.Maniar adopted the comparable method to value the land. In his Valuation Report (Exhibit 'C-4') he cited four sale instances and two other instances cited as Indicator no.1 and Indicator no.2. It would be relevant to note the details of these instances in the form of a chart as under:-

Instances	Details	Valued per sq.mt. at
Instance no.1	Agreement dated 10 April 1985 under which M/s. Majas Land Development Company Pvt.Ltd. sold FSI of land bearing Survey No.34, Hissa No.1 (pt) of Village Majas, admeasuring 165140 sq.feet (including area balcony, staircase and lift) to Mrs.Manju N.Gupta, Sole Proprietor of M/s.East and West Builders at the rate of Rs.30/- per sq.ft. The area of the land as per the agreement is 7032.50 sq.meters. The land is situated along Jogeshwari-Vikhroli Link Road and about 100 to 200 meters away from the acquired land.	Rs.455/- p.s.mt
Instance no.2	Agreement dated 10 April 1985 whereby M/s.Majas Land Development Company Pvt.Ltd. sold FSI of the land bearing Survey No.34, Hissa No.1(pt) of Village Majas admeasuring 165140 sq.feet (including area of balcony, staircase and lift) to Mrs.Saranga A.Agrawal,	Rs.455/- p.s.mt

	Proprietor of M/s.Skyline Construction and Company. The area of the land as per the agreement is 6697.00 sq.meters. The land is situated along Jogeshwari-Vikhroli Link Road and about 100 to 200 meters away from the acquired land.	
Sale Instance no.3	Agreement executed and registered on 29-6-1982 with the Sub-registrar of Mumbai under No.BOM/2506 of 1982 under which Mr.Ranjit A.Hiranandani sold the plot no.208 of Sher-A-Punjab Co-operative Housing Society Ltd., admeasuring about 432.27 sq.mt. at a total consideration of Rs.1,38,501/- to Mr.Gunvantari B.Mehta. The rate of land works out to Rs.320.40 p.sq.mt. as on 22-10-1981. Certified copy of document certified by sub-registrar of Mumbai is at Annexure-'B'.	Rs.532/- p.s.mt.
Sale Instance no.4	Agreement executed and registered on 17 April 1986 with the sub-registrar Bombay under No.BBJ/1628/1986, whereunder Mr.Jaspal Singh Mela Singh Kapoor sold plot No.236 of Sher-E-Punjab Co-operative Housing Society Ltd. admeasuring 418.05 sq.mtrs. At the total consideration of Rs.3,50,000 to M/s.Saibaba Constructions. Rate of land works out to Rs.837.22 p.sq.mt. Certified copy of document certified by Sub-registrar-Bombay is at Annexure-'C'.	Rs.877.00 p.s.mt.
Indicator 1	Deed of Conveyance registered with the sub-registrar of Bombay under No.S-1441/1985 dated 20-04-1985, between Mr.Harbhajan Singh Anand and another and M/s.Sudarshan Constructions, land bearing plot no.232 of Sher-E-Punjab Society, C.T.S. No.368/79 of village Mogra admeasuring 418.10 sq.mt. was sold at the total consideration of Rs.3,00,000/-. Rate of land works out to Rs.717/- p.s.mt. Xerox copy of Index II certified by sub-registrar,	Rs.856/- per s.mt.

	Bombay at Annexure D.	
Indicator 2		
(1)	Flat no.24 on 2 nd floor, 'D' Wing of 1 to 8 of Phase IV of building known as Rock-End of Gree Field Complex Area 395 sq.ft. Carpet area. From East and West Builders to Clementine Pereira Consideration:-Rs.1,33,000/- (Rs.337/- p.s.ft.) Date of E – 21-12-87 Date of R- 16-4-96 Doc.No.P- <u>2962</u> 1987	Rs.848/- per.sq.mt
(2)	Residential Flat no.201 on 2 nd floor in building No.C-6 in Poonam Nagar in Village Majas, Jogeshwari (East). Area 485 sq.ft. From Poonam Investment Co.Pvt.Ltd. To M/s.Sherbahadur Singh Ambika Prasad Singh. Consideration:-Rs.1,55,000/- Rs.319.58 p.s.ft. Date of E – 12-10-87 Doc.No.= <u>2107</u> 1987	--- do ---

71. Shri.Maniar in answer to Question no.32 of his cross examination stated that instances nos.1 and 2 are based on the affidavit of Shri.Vakharia filed in LAR no.4 of 1990 and Sale Instance nos.3 and 4 and the Indicators are collected by him by taking search in the office of Sub-Registrar, Collector, Bombay and his Bandra Offices. Mr.Maniar has stated that as per the development control regulation of the year 1967 for Greater Mumbai when a development of large size plot exceeding 2500 square meters in an area is to be undertaken, a lay out is required to be prepared and the deduction in the FSI calculation are required to

be made taking into consideration 15% for recreation ground and area falling in internal access road.

72. Now coming to Instance nos.1 and 2 as referred by Shri.Maniar and argued as most comparable instances on behalf of the claimants. These are both articles of agreement dated 10 April 1985 entered between the land owners Majas Land Development Company Pvt.Ltd. who are referred as original developers with the new developers namely in instance no.1 with Mrs.Manju N.Gupta, Sole proprietor of M/s.East and West Builders and in instance no.2 with Mrs.Saranga A.Agrawal, Proprietor of M/s.Skyline Construction and Company. He has stated that in case of both these agreement, no deduction for 15% compulsory recreation ground was made since layout was sanctioned with provisions of a recreation ground. He stated that moreover only one building on the land was proposed and as a result no deduction for access road was made since land abuts to Andheri-Jogeshwari Link Road. Accordingly Shri.Maniar in his valuation report under the head “**Technique of Valuation-Comparable**” has set out comparable merits and demerits of land under instance no.1 and instance no.2, in the following chart.:

Technique of Valuation – Comparables.

The comparable merits and demerits of land under acquisition and land under above sale instances are given below:-

Details	Land under acquisition	Land under sale Instance No.1	Land under sale instance no.2	Allowance made on comparison
Location	Situate along Jogeshwari-Vikroli Link Road	Situate along Jogeshwari-Vikroli Link Road.	Situate along Jogeshwari-Vikroli Link Road.	NIL
Encumbrance	Vacant	Vacant	Vacant	NIL
Size	18156.20 sq.mts.	7032.50 sq.mts.	6696.00 sq.mts	- 15%
Relevant date	20-8-1987	10-4-1985	10-4-1985	* + 35.83%
Situation	Does not require cutting or filling	Does not require cutting or filling	Done not require any cutting or filling	NIL
Zone	Residential	Residential	Residential	NIL
Permissible F.S.I.	1.00	1.00	1.00	Nil
Frontage	210 mts. Along Jogeshwari-Vikroli Link Road	73 mts. Along Jogeshwari-Vikroli Link Road	50 mts. Along Jogeshwari-Vikroli Link Road	+ 20%

By considering rise in value of land at 15% from 10-1-1985 to 20-8-1987, the rise works out to 35.83% (For 2 years, 4 months and 10 days).

Rate of Instance land = Rs.30 X 10.764 = Rs.322.92 p.s.mt.

To arrive at value of land = Rs.322.92 + 40.83% of 322.92

Rs.322.92 + 131.84 = Rs.454.76

Say Rs.455/- p.s.mt.”

73. The main thrust if Shri. Korde's submission is that instances 1 and 2 are the most comparable instances considering the proximity of the location of these lands as also the proximity to the time factor considering the relevant date of the present acquisition. He submitted that the genuineness of the transactions qua these two instances is proved beyond any doubt by the evidence of Shri.Vakharia,

Director of M/s. Majas Land Development Company Pvt. Ltd., who was one of the signatory to these two agreements. He submitted that it has clearly come in evidence that Shri Vakharia was personally associated with the transactions reflected in these two agreements of Instance No I and II and that he had carried out negotiations on behalf of M/s. Majas Land Development Company Pvt. Ltd., described as 'original developers' in these two agreements. As also in regard to the market price of the land at Rs.30/- per sq. foot of saleable FSI, which included balconies, staircases and lift pit, it is the claimant's submission that this is as per the prevailing prices at the relevant time. This price according to the claimant was arrived at full negotiations and bargain between the parties to these agreements. The transactions were purely commercial transactions entered at arms length and the parties were no manner connected with each other. The prices under these two agreements were also fully paid.

74. To consider as to whether instances 1 and 2 both of which are in the strict legal sense are not sale agreements, and which were entered on the same day by Majas Land Development Company Pvt. Ltd. with two different parties as noted above, whether are genuine transactions, to be considered as comparable instances, a reference would be required to be made to the evidence of Shri Madhusudan Brijlal Vakharia, Director of Majas Land Development Company Pvt. Ltd. as recorded in

LAR 4/1990. The discussion on this evidence would also be applied for the purposes of LAR No.4 of 1990. Shri.Vakharia's evidence is quite crucial considering the contentions as urged on behalf of the claimants. His evidence is thus discussed in some detail.

75. Shri M.B. Vakharia in his evidence in Land Acquisition Reference No. 4 of 1990, has stated that he was the Director of the company known as Majas Land Development Company Pvt. Ltd. on whose behalf he signed the agreement dated 10 April 1985 with Mrs. Manju N. Gupta, sole proprietor of East and West Builders. He initialed every page of the said agreement, which was also signed by Mrs. Manju Gupta. He has also signed the payment receipt at page no. 23 of the said agreement. The plan annexed to the agreement was also signed by him. He has said that the said agreement was executed in the office of Mahimtura & Co. Solicitors, when he was personally present at the time of execution of the said agreement. He also identified his signatures and other signatures. He stated that in Clause 16 of the said agreement relating to brokerage, the same is written in his handwriting and were initialed by both the parties. He tendered the said agreement dated 10 April 1985 in evidence. He stated that the said transaction as contained in the said agreement was arrived at on negotiations, which was carried out by him with the husband of Mrs. Manju N. Gupta, namely, Mr.

Narendra Gupta. He stated that Mrs. Manju Gupta and Mr. Narendra Gupta belonged to a group which is popularly known as R.N.A. Group. He also set out the names of other members who are part of R.N.A. Group and who controlled various firms and companies. He also stated that the price of Rs.30/-per sq. ft. of saleable F.S.I. of 1,65,140 sq.ft., which included balconies, staircases and lift pit, was in accordance with the prevailing prices at that time. He stated that the said price was arrived after full negotiations and bargaining between the parties. He also stated that Mrs. Manju N. Gupta and Agarwal family were not related or associated with Mrs. Manju Gupta or M/s. Majas Land Development Company Pvt. Ltd. of which she was a director. The transaction as contained in the agreement dated 10 April 1985 was an arms length transaction between two independent parties. He also stated that the recitals and statements as contained in the said agreements are true and correct. He stated that the said agreement has also referred to the earlier transactions, namely, agreement dated 12 January 1976 between M/s. Madhu Builders and Manilal Khimjee Lalan and Khimjee Ganpath Lalan, a Tripartite agreement dated 4 January 1982 between M/s. Madhu Builders of the first part, the original promoter – Manilal Khimjee Lalan and Khimjee Ganpath Lalan of the second part and Vakharia Estate Investment Pvt. Ltd. of the third part and the Agreement dated 4 March 1984 between M/s. Vakharia

Investment (Vakharia Estate and Investment Pvt. Ltd.) and the original developers, i.e., M/s. Majas Land Development Company Pvt. Ltd. He stated that he was personally associated with all these transactions as referred. He stated that he was also a director as well as shareholder of M/s. Madhu Builders Pvt. Ltd., Vakharia Estate and Investment Pvt. Ltd. and M/s. Majas Land Development Company Pvt. Ltd. He also stated that M/s. Majas Land Development Company Pvt. Ltd. was a wholly owned subsidiary of Vakharia Estate and Investment Pvt. Ltd. He stated that the entire consideration including the two balance payments of Rs.16,51,400/- each as mentioned in the agreement dated 10 April 1985 (sale instance no. 1) was paid by Mrs. Manju N. Gupta before the due date. He also stated that as referred to clause 4 of the said agreement on the execution of said agreement, quiet, vacant and peaceful possession of the land was handed over to Mrs. Manju Gupta. He also stated that within a short time after execution of the said agreement dated 10 April 1985 (sale instance no. 1) new developers Mrs. Manju Gupta started construction of apartments/building on the said land and the said land/property was fully developed. He has also confirmed that in paragraph 1(xi) at page 10 of the agreement dated 10 April 1985, there is a reference to the I.O.D. dated 8 December 1982 and the works commencement certificate dated 26 April 1984. He has also stated that the original developers had commenced the work of

construction of the proposed building, which was the construction of two columns with footings and the total sum expended was Rs.25,000/-. He also confirmed that as set out in Clause 5 of the agreement, the original developers were bound and liable to pay the fees of Architect Shri Bipin S. Barot upto and inclusive of the date of the agreement and further fees was payable by the new developers. He stated that upto the date of the agreement, an amount of Rs.2,00,000/- was paid to the Architect by Madhu Builders for the work done by the Architect in respect of the entire land covering F.S.I. of about 20 lakhs square feet and on a pro-rata basis the fees in respect of the land covered by the said agreement dated 10 April 1985 (instance no. 1) would come to Rs.16,500/-. Shri Vakharia in paragraph 17 of his evidence affidavit has set out similar details in respect of the second agreement (instance no. 2) which is also dated 10 April 1985 entered between Majas Land Development Company Pvt. Ltd. of which he is a director with Mrs. Saranga A. Aggarwal, proprietor of M/s. Skyline Construction Co. In paragraph 17 of the affidavit he has set out similar details in regard to the said agreement which are similar to what he has stated in regard to instance no. 1 on all the aspects as noted above.

76. Shri Vakharia in paragraph 18 of his affidavit of evidence has stated that the land subject matter of the agreements dated 10 April

1985 (instance nos. 1 and 2) are situated very close to the land under acquisition. He tendered a layout plan out of which the plans annexed to the agreements formed part, marking the land under acquisition. There is no dispute qua the proximity of these lands under instance no. 1 and 2 to the land under acquisition. In paragraph 19 of his affidavit of evidence, he also stated that he is interested in the outcome of the present reference. He stated that under certain arrangements between the claimant Majas CHS in LAR 4 of 1990 and three private limited companies, namely, M/s. Pearl Cosmetics and Chemicals Pvt. Ltd., M/s. Trupti Estate and Investment Pvt. Ltd. and M/s. Jayesh Estates and Investments Pvt. Ltd., in the event of the claimants-Majas CHS are awarded any enhancement or other amounts in the present reference, the claimants will pay the same to the said companies. In fairness he disclosed that he and his family members have share in the holdings in Pearl Cosmetics Pvt. Ltd. and he is a director in all the three companies. Shri Vakharia tendered his evidence along with the documents as set out in paragraphs 1, 2 and 3 of his further examination-in-chief. Shri Vakharia in his further examination-in-chief stated that he is not concerned with the acquired land and has no present right in the land and that he has filed affidavit of evidence only to claim certain money disclosed by him in paragraph 19 of the affidavit in evidence. He also

stated that he is himself a signatory and executor of the two agreements which justify the contents in paragraph 19 of the said affidavit.

77. Shri Vakharia was extensively cross-examined. In his cross-examination in answer to question no. 21 as to whether these agreements (instance nos. 1 and 2) have been registered with the statutory authorities, he stated that they are not registered. In regard to the plan tendered by him, he stated that it is the sanctioned layout plan by the BMC. In question no. 50 of his cross-examination when asked that in the year 1984 and even at the time of the acquisition in the year 1985 onwards whether the area in the vicinity of the acquired land was not developed with kachha roads and that there were hardly any buildings in the acquired land. He answered in the negative. In answer to question no. 62, he stated that the valuation as made by the Land Acquisition Officer was not correct and acceptable. In question no. 63 when he was asked that he had come to give evidence not for the purpose of making any claim for enhancement in the quantum of compensation but to establish some alleged right of Majas Madhu Coop. Housing Society Ltd. for enhancement, he replied in the negative.

78. Considering the evidence of Shri Vakharia, it is clear that the documents of these two instances (instances 1 and 2) are proved. It

cannot be said that the articles of agreements/ instance nos. 1 and 2 are not genuine agreements. The acquiring body has not brought any material contrary to what has been stated by Shri Vakharia proving these two agreements dated 10 April 1985 (instance nos. 1 and 2). It is quite apparent that Shri Vakharia had stepped into the witness box principally for the purpose of proving the transactions of instance nos. 1 and 2. There is no cross-examination on his evidence in regard to these instances. On a careful scrutiny of the agreements of instance nos.1 and 2, it is quite clear that these agreements create substantive rights qua the land and the benefits derived therefrom, in favour of the new developers for further development by undertaking construction and selling apartments in the new buildings to be constructed and subsequent sale. Admittedly under these agreements the possession of the respective lands was handed over to the new developers. The position as to the genuineness of the the agreements in instance no 1 and 2 also stands compounded as seen from a further agreement dated 21 December 1987. Shri Maniar in his evidence has referred to the said articles of agreement dated 21 December 1987 (Annexure 'G' to his affidavit) which is an agreement between M/s. East and West Builders executed by sole proprietor Mrs. Manju N. Gupta and Shri. Anilkumar Agarwal, promoter of Madhu Majas Co-op. Housing Society with Smt. Clementine Pereira described as purchaser of flat in the said agreement.

In the recital of the said agreement, Shri. Maniar has pointed out the reference not only to the agreement dated 10 April, 1985 (instance no. 1) but also to the 12 January 1976 agreement, tripartite agreement dated 4 January 1982, conveyance dated 2 February 1982 lodged for registration with Sub-Registrar of Assurance, Bombay as made between Madhu builders on the first part and Chief Promoter of Majas Madhu Coop. Housing Society and the agreement dated 4 March 1984 made between Vakharia Investments and Majas Land Development Company Pvt. Ltd. which also refer to the agreement dated 10 April 1985, which would go to show that the above agreement dated 10 April 1985 was the foundation agreement for Mrs. Manju Gupta of East and West Builders to develop and construct the buildings on these agreement lands, on the basis of which further transactions to sell the flats and to form a society namely the Majas Madhu Cooperative Housing Society were undertaken. In my opinion, all these facts which are proved by the claimants recognize the genuineness of the articles of agreements forming instance nos. 1 and 2.

79. Shri.Godbole, learned Counsel for the acquiring body had raised an objection to the evidence of Shri.Vakharia on the ground that he is an interested person and therefore, his evidence is unreliable. This contention is totally unacceptable. It is a well settled principle of law that a claimant is entitled to prove the documents of any comparable

instances in support of his claim for enhancement of compensation. In doing so he is entitled in law to examine a person who is a signatory to any such document or any other person so concerned with the document, which would prove the document of a comparable instance in evidence. The principles in law in this regard are well settled. The claimants were therefore entitled to examine Shri.Vakharia who was the signatory to the sale instances no. 1 and 2 and the other documents which are described in the recital of these articles of agreement forming instance nos.1 and 2. Shri.Godbole in support of his contention that Shri.Vakharia is an interested witness and hence, his evidence be discarded, has placed reliance on the decision of the Supreme Court in **State of Rajasthan V. Smt.Kalki & Anr.** (supra) and **Mahavir Singh V. State of Madhya Pradesh** (supra). In the facts and circumstances of the present case the reliance on these decisions is not well founded. In **State of Rajasthan V. Smt.Kalki & Anr.** (supra) the Supreme Court was considering an appeal by Special Leave arising from the decision of the High Court acquitting the respondents who were convicted by the trial Court under Section 302 read with Section 148 of Indian Penal Code and sentenced to imprisonment for life. It is in this context the Supreme Court examined the contention as to whether PW-1 in the criminal case was a interested witness. The second decision also arises from the conviction as awarded under Section 302 read with 148 of the IPC. The parameters of a

interested witness as applicable in criminal trials where the prime consideration before the Court is proof of an offence beyond reasonable doubt, can never be conceptually applicable in the situation as in the present case, where the witness has stepped into the witness box to prove the documents. These decisions are therefore squarely not applicable in the present circumstances. This apart very same objection was earlier raised before this Court at the interim stage when this Court by an order date 18 July 2018 rejected this contention as raised by Mr. Godbole observing as under:

“The second objection is that the witness himself is interested in the outcome of the reference based on this document. Every executor of a document is always interested in the outcome of litigation arising out of the document executed by him. This does not disqualify him as a witness. The objection is overruled.”

80. On the backdrop that the genuineness of Instances 1 and 2 is proved the next question which would arise for consideration as raised by Shri.Godbole on behalf of the acquiring body, is that these agreements are inadmissible in evidence, as they are not sufficiently stamped. Shri.Godbole in supporting this contention has referred to the provisions of Section 34 of Maharashtra Stamp Act, 1958 and the decision of this Court in “**Krishna Sheena Shetty vs Suresh Anant Sawant And Anr.** (*supra*). This contention of Shri.Godbole cannot be accepted. At the outset it needs to be observed that in the present case the articles of agreement qua instances and 1 and 2 are pressed into service on behalf

of the claimants by way of comparative instances for determination of the market value of the land, on the relevant date. The agreements dated 10 April 1985 (instance nos. 1 and 2) are not subject matter of consideration before this Court in the manner it so fell, in the case of Krishna Sheena Shetty (supra) where the parties to the agreement were asserting their rights under the said agreement. The decision in Krishna Sheena Shetty would thus not be applicable in the facts of the present case for more than one reason. In Krishna Sheena Shetty's case one of the parties sought to produce two documents to assert rights in respect of the suit property, namely, 'agreement for sale' and 'general power of attorney', which were neither registered nor sufficiently stamped. The trial Court had impounded these documents and directed the plaintiff to pay stamp duty with ten times penalty within 30 days from the date of the order. In the circumstances the question which had fell for consideration of the Court was whether a penalty leviable under section 34(a)(ii) of Bombay Stamp Act, 1958 in respect of insufficiently stamped document executed prior to 1 May 2005 being the date on which the amendment of Section 34(a)(ii) by Maharashtra Amendment Act (22 of 2001) came into force, whether would fall under section 34(a)(ii) of the Act prevailing before or after 2001 amendment. It is in this context the Court held that the "instrument executed after amendment of 2001 would only be leviable with a penalty under section 34(a)(ii) of the

Act”. On the face of it, the context is completely different so as to apply the said decision in the present facts.

81. The above contention of Shri.Godbole, in my opinion, is in fact contrary to the record. This for the reason that these documents (Instances no 1 and 2) were admitted in evidence. The record indicates that by an order dated 18 July 2018 passed by this Court (S.C.Gupte J) this very objection on these documents not being adequately stamped was raised on behalf of the acquiring body, which came to be overruled by this Court and the documents were admitted in evidence. It is thus surprising as to how this objection can still be raised in the teeth of the order dated 18 July 2018 passed by this Court and that too ignoring the said order passed by this Court. The relevant extract of the said order is required to be noted, which reads thus:

‘2. The document at Sr. No.8 is an original agreement executed between Majas Land Development Co. Pvt. Ltd. And M/s. East & West Builders. Witness No.2, who has deposed to this document, is a signatory and executor of this agreement which was executed in the office of M/s. Mahimtura & Co., Solicitors and identifies his own signature, and also testifies to the execution of the agreement by the other signatories thereof in his presence. Learned Counsel for the acquiring body objects to the marking of this document. Learned Counsel, firstly, submits that the document is inadequately stamped and unregistered. **The document is an agreement of assignment of development rights. Such agreement was required to be stamped with a stamp of Rs.10 at the relevant time and the document, in any event, does not require any registration. Hence, the objection is overruled.** The second objection is that the witness himself is interested in the outcome of the reference based on this document. Every executor of a document is always interested in the outcome of litigation arising out of the document executed by him. This does not disqualify him as a witness. The objection is

overruled. The document is, accordingly, admitted in evidence, marked as Exhibit D-2. The objection of the acquiring body that the stamp, on which this document is written, is not purchased by any of the parties, bears on the veracity, and factum of execution, of the document, and accordingly, will be heard at the trial.

3. For the same reasons, even the document at Sr. No.9, which is the original agreement of 10 April 1985 between Majas Land Development Co. Pvt. Ltd. and Skyline Construction Co., is admitted in evidence, marked as D-3. The objection of the acquiring body that the stamp on which this document is written is not purchased by any of the parties to the document, will be heard at the trial.”

(emphasis supplied)

82. Be it so, once the agreements were admitted in evidence, a legal consequence as Section 35 of the Maharashtra Stamp Act would postulate would operate. Section 35 provides that when an instrument has been admitted in evidence, such admission shall not except as provided in Section 58 be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. This would also cover the objection of Shri.Godbole in regard to the stamp on which the document is written, being not purchased by any of the parties. In this context, a useful reference can be made to the decision of the Supreme Court in **Javer Chand vs. Pukhraj Surana, AIR 1961 SC 1655** in which the Supreme Court has held that a document is once admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument has not been duly stamped. This position in law is squarely applicable qua these two documents as relied on behalf of the claimants.

83. Shri. Godbole's next contention is that Instances 1 and 2 although titled as 'Articles of Agreement' are merely 'development agreements' and not 'sale agreements', hence they need to be outrightly discarded as non-comparables. It is his submission that market value cannot be determined on the basis of the development agreement as the execution of the said documents has not resulted in transfer/sale of the property in favour of the new developer. It is difficult to accept this submission of Shri. Godbole as a rigid rule of law. The endeavour of the Court would be to consider any such genuine transaction/agreement which is proved, and which is cited as a comparable instance, and on examining the contents of such agreement to find out the intention of the parties and as to what the transaction achieves for the parties to refer it as a comparable instance. This will certainly depend on the name of nature of the transaction underlying such agreement. Having examined these documents of instances No.1 and 2, Shri.Godbole's contention cannot be accepted considering the various clauses of these two agreements which defacto has all the traits of a sale. This for the reason that it concerns specific pieces of land from which the FSI as set out in the agreement is generated and dealt qua the lands in question. The first and the second schedule of the agreement define the land subject matter of these agreements. There is a consideration as agreed between the parties coupled with handing over of the possession of the land with

all rights to develop the land. It cannot be overlooked that when such large land is dealt under such articles of agreement it is being dealt only for exploiting its development potential, that is by utilising the FSI to be used for construction of building residential or commercial depending the permissible parameters under the rules and for creation of further third party rights. These were lands in respect of which most of the development formalities were completed and partly the construction had commenced. It has come in evidence that the development was undertaken by the new developers by constructing a building and flats so constructed were sold as noted above as one of the agreement is placed on record and proved. It can be seen that these agreements are arrived at by calculating the market value of the land at Rs.30/- per sq. ft. of saleable FSI (which included balconies, staircases and lift pit), which was in accordance with the prevailing prices at that time. The price was also arrived on complete negotiations and a bargain between the parties. There is no evidence to show that the parties were related to each other. Hence it was a purely commercial transaction. Even the signatory to this agreement Shri.Vakharia was associated with the prior agreement dated 12 January 1976, tripartite agreement dated 4 January 1982 and agreement dated 4 March 1984 which were referred in the recitals to the said agreement dated 10 April 1985. The amounts/consideration as agreed between the parties was also fully paid. The rights of Majas Land

Development Company Pvt.Ltd. were unreservedly transferred in favour of the new developer for consideration. Further the agreements were acted upon and there is evidence that the developers constructed apartments on the said lands and the property was fully developed. There is nothing to show that any rights were kept reserved with the original developer, and in fact as clear from Clause 7, they agreed to execute Deed of Transfer and all other deeds, documents, writing and assurances for the transfer of the said property in favour of the new promoter and/or any Society or body and for that purpose lodge the same for registration and admit execution of any such document.

84. It is thus clearly seen from the terms and conditions of these agreements (instances no.1 and 2) that the new developer received quiet, vacant and peaceful possession of the land simultaneously with the execution of the agreement. This was coupled with a right to construct or complete buildings on the land and allot or sell flats in new building to the third parties which was the legal right as received by the new developer and that too for consideration. Hence the new developer was the beneficiary of all the benefits which she would have got as if she was to take conveyance of the said land as factually all rights qua the land of the original developer were passed on to the new developer. It is in these circumstances, instance Nos.1 and 2 would be required to be ac-

cepted as comparable instances by adopting a common sense approach and from a practical stand point of a businessman as rightly urged by Shri.Korde, learned Senior Counsel for the claimant. He would be correct in his contention that on a cumulative reading of all the clauses, the transactions in instance Nos.1 and 2 would be required to be taken as a transaction in a practical sense, of a sale mentioned in second schedule although not a sale in the legal sense. Thus these agreements cannot be labeled as mere development agreements as sought to be contended by Shri Godbole.

85. Shri Godbole's contention is that instance Nos.1 and 2 being development agreements, "in law" they cannot be considered as comparable instances for determination of the market value of the land. As discussed above these articles of agreement are not strictu sensu development agreements, however for completeness Shri Godbole's submission in law can be discussed. In support of his submission Shri.Godbole has referred to the decision of the Division Bench of this Court in **The Wallace Flour Mills Company Ltd. Vs. Special Land Acquisition Officer(3)**²¹. The Court in the said case was concerned with a development agreement whether it was a comparable instance for determination of the market value of the land. The Division Bench analysed the development agreement as cited on

21 Judgment dt.29/1/2009 in Appeal No.213 of 2000

its contents to examine whether it can be a comparable instance. In the facts of the said case and considering the terms and conditions of the development agreement the Division Bench was of the opinion that the development agreement in question in the said case, cannot be a comparable sale instance. The observation to that effect can be found in paragraphs 7 and 8 of the decision which read thus:-

“7. In the light of rival submissions, if the record is perused, it becomes clear that the only question we have to consider is whether the transaction in relation to plot No. 63 can be treated as a comparable transaction for the purpose of determining the market price of the suit plot. In our opinion, for that purpose, we have to see what is the nature of the transaction entered into in relation to plot No. 63. The development agreement dated 23rd December, 1981 entered into between Rama Krishna Mission, which was the lessee of the plot and the developer - Shree Laxmi Construction Company, is on record. Perusal of that agreement shows that the land is owned by the Bombay Municipal Corporation. It was given on lease to one Kavi Ranjan Prasad. Kavi Ranjan Prasad by deed of irrevocable nomination, dated 25th August, 1978, assigned his rights in the land to Rama Krishna Mission for charitable purpose. It is thus clear that there was obligation for the Rama Krishna Mission to use the land for charitable purpose only.

8. In the recital part of the development agreement, it is stated that "the said Mission is desirous of developing the aforesaid plot of land in consonance with the objective of the aforesaid irrevocable deed of nomination made for charitable purpose by the said Kavi Ranjan Prasad". Thus it is the purpose of the aforesaid deed of irrevocable nomination executed by said Kavi Ranjan Prasad can be better fulfilled by having the said land developed and thereby obtaining larger income and applying such income for those purposes. **Thus it is clear that there was restriction on the Rama Krishna Mission that it could not sell the land, however, it could develop the land and that too for charitable purpose.** Then in the recital part the purpose for development agreement is also specified. It says " the said Nominee, the Mission, is not in a position to devote its whole attention in itself developing the said plot of land for reason of its other activities and for that reason the said Mission is desirous of having the said land developed through a reliable agency to act as the Developer on the Mission's behalf in respect of the said land." It is thus clear that by this development agreement what the Mission was doing is that it was appointing the developer as its agent for developing the land. One reason why

development was entrusted by the Mission to Shree Laxmi Construction Company was that the mission found that party to be reliable for carrying out the work as agent of the Mission. Perusal of the agreement further shows that developer was to pay amount of Rs. 65 lac to the Mission and in consideration thereof, he was to get the right to sell constructed portion of the land excluding the area of 5000 sq.ft. Thus the consideration for permitting the developer to sell the constructed portion, excluding 5000 sq.ft. was the cost of construction that the developer was to incur. What is further to be seen is that the developer could not submit the building plan for sanction without getting it approved by the Mission. The Mission was also exempted from payment of ground rent after the building has been constructed. It was also provided that the building material that the developer will be using for construction should be of highest quality and it will be approved by the Mission. Perusal of these various clauses of the agreement thus show that the development was to be carried out by the developer as agent of the Mission and the construction activity including sanction, approval to the building plan, use of construction material were all under the control of the Mission. The developer was also under an obligation to complete the development within stipulated period, if the development is not completed within the stipulated period there was a provision made for termination of the agreement. Thus, till the construction of the building is complete, all the rights were to be with the Mission. Therefore, a transaction of such a nature is in totally different class than a simple sale transaction. When sale takes place, owner ceases to have any link with the land, any control over the land and it is for the purchaser to decide what he wants to do with the land. Sale is more akin to an instance where the land is compulsorily acquired. Therefore, what is found to be comparable with acquisition is an outright sale of the land. In our opinion, the submission of the learned Counsel that as the developer has paid the price considering all the restrictions, had it been an outright sale, it would have fetched more price, cannot be accepted. **Because, in our opinion when the transaction of the nature which we have described above in relation to plot No. 63 is totally a different class of transaction than a sale transaction.** In our opinion, it is not possible to compare it for the purpose of determination of compensation or market price with the land acquired. What can be compared is comparable instances. In both the instances, the transaction must be in the same class. Transactions which are in a two different classes, in our opinion, cannot be compared. In our opinion, the learned Counsel appearing for the Union of India was right in submitting that an attempt is made to convert an agreement to develop into sale agreement which will be in the realm of conjuncture and, therefore, the Court would not be justified in doing so. In any case, we find that the reason that has been given by the learned Single Judge for not accepting the transaction in relation to plot No.63 as a comparable transaction is a possible view and,

therefore, in our opinion no interference in the impugned order at the hands of this Court is called for.”

(emphasis supplied)

In the above decision the Division Bench has not laid down as a hard and fast and rigid rule or as a principle of law that such agreements cannot be comparable instances. Analysing and appreciating the development agreement in that case, the Division Bench opined that the transaction of the nature which was discussed in detail was totally a different class of transaction than a sale transaction, hence, it was not possible to compare it for the purpose of determination of compensation or market price with the land acquired. It was observed that what can be compared is a comparable instance wherein both the instances and the transaction must be in the same class. This decision infact supports the case of the claimants. Hence, it would be for the Court in the facts of a given case to examine any such agreement and reach a conclusion on comparability of the agreement in determination of the market value of the land.

86. In this context Shri.Korde has also referred to the decision of the Division Bench of this Court in **The General Secretary, Deccan Ghymkhana, Pune Vs. The Special Land Acquisition Officer-16 & Ors.**²².

In this case also the Court was concerned with a development agreement. In the facts of the said case, on examination of the terms

and conditions of the agreement, the Division Bench was of the opinion that the development agreement as relied on behalf of the claimants therein was not comparable. This for the reason that the developer in that case had agreed to provide other special amenities and therefore, the Division Bench refused to accept the development agreement as comparable instance for fixing market value of the acquired land. The observations in that regard are found in paragraph 44 which read thus:-

“44. It is to be noted that for determining the compensation in respect of the acquired land the Appellant claimant has placed on record development agreements and valuation report (Exhibit 37). Apart from that they have not placed any other document and/or sale instance of the similar land from the same locality. In any case, in development agreement the developer has agreed to provide other special amenities to the other side therefore, both the development agreements cannot be considered for fixing the market value of the acquired land. Not only that even the Valuer in his valuation report (Exhibit 37) failed to disclose any sale instance of the comparative land for determining the market value of the acquired land. Therefore, in view of the Government Resolution dated 31.10.1994, judgment in the matter of Shalini Vaman Godbole (supra) and the judgment in the matter of Municipal Corporation of City of Thane (supra), safely we can rely on the ready reckoner of the relevant year for determining the market value of the acquired land. In the Award the Special Land Acquisition Officer has considered the ready reckoner of the relevant year and stated that the market value of the acquired land comes to Rs.9440/- PSM on the material date of notification. If we deduct 1/3rd towards the development charges, then the market rate comes to Rs.6294/-(Rs.9440 – 3146 i.e. 1/3rd) PSM. Whereas the Reference Court has awarded @ Rs.9000/- PSM for 832.30 sq.mtr. and @ Rs.3600/- for 365.60 sq.mtr. i.e. average cost of Rs.7351.91 PSM which is higher than the ready reckoner rate.”

87. In my opinion when confronted with such transactions as contained in instances 1 and 2 when they deal in land the jurisprudential concept of ownership rights in relation to immovable property is re-

quired to be looked into and recognised to consider as to whether these transactions/instances are comparable for determination of the fair market value of the land under acquisition. In this context, Shri.Korde's reliance on the decision of the Supreme Court in **Commissioner of Income Tax, Bombay Vs. M/s.Podar Cement Pvt.Ltd.** (supra) is quite apposite. This more particularly when the Supreme Court as a settled principle of law has held that the determination of the value of the land should be by applying the common sense test and as to what a prudent man of the world of business would do in purchasing a land in open market.

88. In **Podar Cement Pvt Ltd.** (supra) the Supreme Court was considering the term "owner" in the context of Section 22 of the Income Tax Act. It was held that the term "owner" would be required to be appreciated in the practical sense leaving the husk of legal title beyond the domain of ownership for the purpose of statutory provision. The question posed in this case was as to who is the owner as referred to in Section 22 of the Income Tax Act. Is it a person with whom the property vest or is a person who is entitled to the beneficial interest in the property? The Supreme Court analysing the concept of ownership and considering the terms and conditions of the agreement which fell for consideration, held that the physical possession of the property had passed or is deemed to have passed to the assessee to be held forever

and absolutely with a power to use the same in whatsoever manner it thinks best. The consideration was paid in full, the assessee has been put in absolute possession of the property and he is empowered to deal with the income as he like. All this was in the agreement which was in writing. The Supreme Court referring to the provisions of Section 53A of the Transfer of Property Act which incorporates the doctrine of equity of 'part performance' held that Section 22 of the Income Tax Act was applicable to the cases where the transfer was not completed in a manner required by law. The relevant observation are required to be noted which read thus:-

"... . In the meantime, it would not be irrelevant to go into the concept of "ownership". What is ownership after all? Read from the Roman Law upto the English Law at the present stage, medieval stage having been interspersed with different formulae, the position that now juristically emerges is this. The full rights of an owner as now recognised are:

"(a) The power of enjoyment (e.g., the determination of the use to which the res is to be put, the power to deal with produce as he pleases, the power to destroy);

(b) Possession which includes the right to exclude others;

(c) Power to alienate inter vivos, or to charge as security;

(d) Power to leave the res by will.

One of the most important of these powers is the right to exclude others. The property right is essentially a guarantee of the exclusion of other persons from the use of handling of the thing....

...

.....But every owner does not possess all the rights set out above? --- a particular owner's powers may be restricted by law or by an agreement he has made with another." (refer to G.W. Paton on Jurisprudence, 4th Edn., pp.517-18).

While dealing with the concept of possession and enumerating the illustrative cases and rules in this respect, Paton says at p.577 in cl.(x):

"To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others:....."

Reference in this connection has been made to the case of *Tubantia*: *Young v. Hichens* and of *Pierson v. Post*, [1805] 3 Caines 175 (Supreme Court of New York).....

It would thus be seen that where the possession of a property is acquired, with a right to exercise such necessary control over the property acquired which it is capable of, it is the intention to exclude others which evinces an element of ownership.

To the same effect and with a more vigorous impact is the subject dealt with by *Dias on Jurisprudence*, (4th Edn., at p.400):

"The position, therefore, seems to be that the idea of ownership of land is essentially one of the 'better right' to be in possession and to obtain it, whereas with chattels the concept is a more absolute one. Actual possession implies a right to retain it until the contrary is proved, and to that extent a possessor is presumed to be owner."

"Again, at p.404, the learned author says:

"Special attention should also be drawn to the distinction between 'legal' ownership recognised at common law and 'equitable' ownership recognised at equity. This occurs principally when there is a trust, which is purely the result of the peculiar historical development of English Law. A trust implies the existence of two kinds of concurrent ownerships, that of the trustee at law and that of the beneficiary at equity."

We are not concerned in this case with any case of trust either under the equitable principles or under the law as engrafted in the Indian Trusts Act. Because, the "beneficiary might himself be a trustee of his interest for a third person, in which case his equitable ownership is as devoid of advantage to him as the legal ownership is to the trustee. So, when described in terms of ownership, the distinction between legal and equitable ownership lies in the historical factors that govern their creation and function; in terms of advantage, the distinction is between the bare right, whether legal or equitable, and the beneficial right" (vide pp.404-405 of *Dias on Jurisprudence*, 4th Edn.).

We, therefore, need not go into the questions involving trusts where a person holds the property and receives the income in trust for others who are the legal beneficiaries. The crux of the matter is as to whether, as already stated above, the actual possession in a given particular case gives a right to retain such a possession until the contrary is proved and so long as that is not done, to that extent a possessor is presumed to be the owner.

Incidentally, although the Supreme Court in the case of *Jodha Mal* (1971) 82 ITR 570 merely mentioned that *Stroud's Judicial Dictionary* had given several definitions and illustrations

of owner-ship, it refrained from going into the details on account of the practical approach that was made in that case, to which we shall hereinafter refer and dilate upon. We think it worthwhile, the matter having been canvassed at length at the Bar, to give a full illustration of the definitions of "ownership" as Stroud puts it. One such definition is that the "owner" or "proprietor" of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct, of it, e.g., a lessee is, during the term, the owner of the property demised. Yet another definition that has been given by Stroud is that :

"Owner' applies to every person in possession or receipt either of the whole, or of any part, of the rents or profits of any land or tenement; or in the occupation of such land or tenement, other than as a tenant from year to year or for any less term or as a tenant at will". (Stroud's Judicial Dictionary, 3rd Edn., Vol. 3, p.2060).

Thus the juristic principle from the view point of each one is to determine the true connotation of the term "owner" within the meaning of s.22 of the Act in its practical sense, leaving the husk of the legal title beyond the domain of ownership for the purpose of this statutory provision. The reason is obvious. After all, who is to be taxed or assessed to be taxed more accurately - a person in receipt of money having actual control over the property with no person having better right to defeat his claim of possession or a person in legal parlance who may remain a remainder man, say, at the end or extinction of the period of occupation after, again say, a thousand years? The answer to this question in favour of the assessee would not merely be doing palpable injustice but would cause absurd inconvenience and would make the Legislature to be dubbed as being a party to a nonsensical legislation. One cannot reasonably and logically visualise as to when a person in actual physical control of the property realising the entire income and usufructs of the property for his own use and not for the use of any other person, having the absolute power of disposal of the income so received, should be held not liable to tax merely because a vestige of legal ownership or a husk of title in the long run may yet clothe another person with the power of a residual ownership when such contingency arises which is not a case even here. A plain reading of clause 4 of the agreement, as extracted above, clearly goes to show that the physical possession of the properties has passed on or is deemed to have passed on to the assessee to have and to hold for ever and absolutely with the power to use the same in whatsoever manner it thinks best and the assessee shall derive all income and benefits together with full power of disposal of the properties as well as the income thereof. Can it then be said that the recipient of the income being the assessee only having an absolute and exclusive control over the property without any let or hindrance on the part of the so-called vendor which, indeed, under law it was not entitled to do, as we shall presently show, shall be immune from the taxing provision in Section 22 of the

Act? The answer in our view is clearly in the negative. The reason is simple. The consideration money has been paid in full. The assessee has been put in exclusive and absolute possession of the property. It has been empowered to deal with the income as it likes. It has been empowered to dispose of and even to alienate the property. Reference to s.54 or, for that matter, s.55 of the Transfer of Property Act by the Tribunal merely emphasises the fact that the legal title does not pass unless there is a deed of conveyance duly registered. The agreement is in writing and the value of the property is admittedly worth more than hundred rupees. Section 54 of the Transfer of Property Act would, therefore, exclude the conferment of absolute title by transfer to the assessee. That, however, would not take away the right of the assessee to remain in possession of the property, to realise and receive the rents and profits therefrom and to appropriate the entire income for its own use. The so-called vendor is not permitted in law to dispossess or to question the title of the assessee (the so-called vendee). It was for this very practical purpose that the doctrine of the equity of part performance was introduced in the Transfer of Property Act, 1882, by inserting s.53A therein. the Section specifically allows the doctrine of part performance to be applied to the agreements which, though required to be registered, are not registered and to transfers not completed in the manner prescribed therefor by any law. The section is, therefore, applicable to cases where the transfer] is not completed in a manner required by law unless such a non-compliance with the procedure results in the transfer being void.

.... ..

48. Under the Transfer of Property Act, the transfer of ownership can be effected only by means of a registered instrument. However, in the recent times various other devices are sought to be employed for transferring one's ownership in property. As a result, there are situations in which the actual owner, say, of an apartment in a multi-storeyed building, or a holder of a power of attorney is not the legal owner of a property.”

89. Applying the above principles and also applying the doctrine of part performance which Section 53A of the Transfer of Property Act postulates, if the agreements under instance nos.1 and 2 are examined, they would clearly go to show that the parties are placed in such a position that it is not possible for the original developers to reclaim any rights in respect of the land subject matter of these agree-

ments. The developers were not in a position to dispossess the new developers or contend that they had retained any corporeal rights in respect of the land subject matter of these agreements. It is in this situation the doctrine of part performance under Section 53A of the Transfer of Property Act would become applicable for such transactions. The reason being, that the original developers certainly on the terms and conditions of the agreements of these instances were prevented from taking possession from the new developers who had complied with all their obligations and the terms and conditions, principally of payment of consideration. The agreement between the parties is for consideration. It is in writing, signed on behalf of the original developers as if they are transferring the ownership rights (refer Clause 7). The terms are clearly ascertained from the written agreement. The new developers were put in possession who were willing to perform their obligation under the contract and which they actually performed. The parties clearly had bound themselves by the terms and conditions as contained in the said writing which terms were sufficient to constitute a transfer as apparent from the various clauses of these agreements. If these are the consequences which flow from the agreements in regard to Instance nos.1 and 2 then certainly the agreements would be required to be considered as comparable instances.

90. The decision in **M/s.Gandhi Builders and Developers v/s. Shyamlal S/o.Ramchandra Yadav** (supra) on which reliance is placed by Shri.Godbole, would also not assist the acquiring body inasmuch as in the said case, which arose from the refusal of a temporary injunction in favour of the appellant during the pendency of the suit, the Court having examined the development agreement in question, prima facie, found that merely because certain amounts were paid to the developer as consideration for developing property, the same would not make it as an agreement for sale.

91. In view of the above discussion, in the present facts and circumstances, Mr.Godbole's contention that instance Nos.1 and 2 being development agreements, they cannot be considered as comparable sale instances is not well founded and deserves to be rejected.

92. Once Instances 1 and 2 are held to be genuine agreements, sufficiently stamped as observed by this Court in the order dated 18 July 2018 and are admitted in evidence, having all traits of a sale of land, the Court can certainly consider the claimants case urged on the basis of these documents (instances 1 and 2) which is the further discussion.

93. Instance Nos.1 and 2 are now considered for the purposes of testing the claim as made by the claimants for determination of the market value of the lands under acquisition. In both these agreements, vendor-M/s.Majas Land Development Company Pvt. Ltd. sold FSI in respect of these lands to the respective parties to the agreements as noted above. The rate is a common rate namely Rs.30/- per sq.ft. The first agreement dated 10 April 1985 entered with Mrs.Manju Gupta, sole Proprietor of M/s.East and West Builders is in respect of land admeasuring 7032.50 sq. mtrs. whereas the agreement entered with Mrs.Saranga Agrawal, Proprietor of M/s.Skyline Construction Company, the area as per agreement is 6697.00 sq.meters. Shri.Maniar as noted above has not made adjustment considering 15% deduction in regard to recreation ground and area falling in internal access road stating that no deduction of 15% for compulsory recreation ground is required to be made since a layout was sanctioned with provision of recreation ground and as only one building on the said land was proposed no deduction for access road is made since the land abuts Jogeshwari-Andheri Link Road. Further comparing the size of the land under acquisition which being 18156 sq. mtrs. and size of the land under instance No.1 of 7032.50 sq. mtrs. and under instance No.2 of 6697.00 sq. mtrs. respectively, Shri.Maniar has made a negative allowance of -15% which is not unreasonable. Further Shri.Maniar

considering that sale instance Nos.1 and 2 are dated 10 April 1985 and the relevant date being 20 August 1987, has made a positive allowance of 35.83% being the rise in value of land at 15% from 10 April 1985 to 20 August 1987 (relevant date) the period being 2 years 4 months and 10 days. Accordingly, Shri.Maniar considering the rate of Rs.30/- per sq. ft. of FSI, has arrived at the basic agreement rate at Rs.322.92 per square metre and after making adjustment as noted above, namely by considering the positive and negative allowances, has arrived at the value of the land at 40.83% higher than the basic agreement value of Rs.322.92 per square metre which according to Shri.Maniar would be $\text{Rs.322.92} + \text{Rs.131.84} = \text{Rs.454.76}$ per square metre and rounding up at Rs.455 per square metre.

94. The objection of Shri.Godbole, learned Counsel for the acquiring body on the value of the land as determined by Shri. Maniar, is that the development agreement pertained to a fully developed plot and the same cannot be considered as a comparable instance showing actual valuation of undeveloped land existing at the relevant time i.e. in the year 1985 when the said agreements under instance Nos.1 and 2 came to be executed. His next submission is that the documents which are referred in the recital of these agreements (instance Nos.1 and 2) are also not part of the record and hence these documents are required

to be disbelieved for determination of the market value of the land under acquisition. His submission is that these agreements qua instance Nos.1 and 2 indicate that M/s.Madhu Builders got building plans sanctioned, obtained IOD etc., as clear from these agreements which go to show that the subject matter of the agreement was of a fully developed plot from a layout duly converted into NA user and the property in the second schedule to the agreement was in fact the layout plot admeasuring only 7032.50 sq. metres bearing Survey No.34/1 (pt) which is much smaller than the acquired land and thus not comparable sale instance. It is also his submission that what is granted under these agreements (sale instance Nos.1 and 2) is right to exploit saleable FSI of 1,65,140 sq. ft. (which includes balcony, staircase and lift pit) for which the plan was duly sanctioned as far as back in 1982. It is his submission that the sanctioned plans were not produced and thus it would be not possible to exactly guess the land cost although he agrees that the endeavour of the court would not be arrive at the exact value of the land. He has next submitted that there is no evidence to find out the manner in which the parties to the agreement had struck to bargain with such huge anomaly in the area and FSI at the rate of Rs.30/- per sq. ft. which would include profit earned by each party in such transactions which are referred to in the recitals of the said agreement. Mr.Godbole also submitted that since the price of Rs.30/- per sq.ft is a

combination of profit margins and expenses, it is impossible and completely risky to arrive at any formula to find out the price of undeveloped land which was acquired. It is therefore Mr.Godbole's submission that sale instance Nos.1 and 2 ought not be considered.

95. It is true that the land under acquisition being a open plot of land may not have identical traits of an instant development as compared to the lands subject matter of sale instances 1 and 2, in respect of which building permission was obtained after completion of prior formalities. The Court however cannot adopt an approach of a mathematical precision in comparing sale instance 1 and 2 to the land under acquisition. It is normally not possible that the comparative sale instances are so perfect that there is hardly anything required to be done by the Court to determine the market value of the land under acquisition as prevailing on the relevant dates. Some allowances and guesswork is required to be made on a careful comparison of the instances as relied upon by the parties so as to find out the market value of the land on the relevant date which can be fairly and reasonably offered as compensation for acquisition of the land.

96. On a perusal of Shri.Maniar's evidence qua the valuation report and more particularly from the extensive cross-examination, it is not

possible to fully accept the submissions of Mr.Godbole. It can be seen from Shri.Maniar's evidence that his method of valuation, by making the deductions/allowances adjustments is in no manner assailed to be defective or so unreasonable or unacceptable that the Court should come to a conclusion that the valuation as made by Shri Maniar is required to be totally discarded. In this context some answers of Shri.Maniar to the questions posed to him in the cross-examination are required to be noted:-

38	Q	(Mr.Maniar, please look at Sale Instance No.1 at page 2.) Have you ascertained if the value of the F.S.I. of land bearing Survey No.34, Hissa No.1 (part) mentioned in the sale instance at Rs.30/- per square feet, was the correct value ?
	Ans	As per the agreement executed by M/s.Majas Land Development Co.Pvt.Ltd. With Mrs.Manju N.Gupta, the rate of F.S.I. has been shown in the agreement at Rs.30/- per square feet.
39	Q	My question to you was have you ascertained the rate mentioned in the agreement ?
	Ans.	The payment has been received by the parties as per 30/- per square feet.
41	Q	Therefore, it is correct that you have presumed that the rate of Rs.30/- per square feet is the correct value and you proceeded with the sale instance on that basis?
	Ans.	Yes.
		
54	Q	(Shown horizontal column No.4 under the caption "Relevant Date".) Mr.Maniar, what is the basis of your holding that the rise in the value of the land was at 15%?
	Ans	(1) The rise in value of the land is based on the Award of the S.L.A.O. which states that the market value has gone up by 12.13% per annum; (2) the instances of sale in the locality clearly indicate that there was a rise in value of land right from 1981 to 1987. Even the rise in the value

	of land from 1986 to 1987, was 16.71%; and (3) based on the Supreme Court Judgment, I have adopted 15% rise in the value of the land.
	
56 Q	I put it to you that the allowance made by you to the extent of 40.83% is false and incorrect and it has been made on an hypothetical basis ?
Ans	Not true.
57. Q	Can you show us in your report, where you have indicated instances of rise in the value of the land,by way of sales of immovable property, to the extent of 16.71%?
Ans	Sale instance No.4 is at the rate of Rs.837.22 paise per square metre for the year 1986. Indicator No.1 for the year 1985 is at the rate of Rs.717 per square metre, which has been already mentioned in my report.
	
59 Q	(Please see horizontal last line under the caption “Frontage” on page 4.) In respect of the allowance made to the extent of + 20%, what is the basis of arriving at this figure of +20% ?
Ans	In the book written by Dr.Roshan Namavati at page 192, he has stated that the large frontage shall have to be given weightage. Even, Mr.Parks and Mr.Mitra have also opined in their books that the la4rge frontage has to be given more weightage.
60. Q	According to you, what is the large frontage ?
Ans.	The land under acquisition has got a frontage of 210 metres wide along Jogeshwari – Vikhroli Link Road. As compared to the other instances, having only 15 metres to 17 metres frontage.
61 Q	I put it to you that merely because the acquired land has a larger frontage, the benefit thereof cannot accrue to the instances referred by you?
Ans	Based on Chimanlal Hargovandas v/s. S.L.A.O., Pune, the plus and minus factors are to be considered while valuing the land under acquisition.
	
68	(Please see sale instance No.3) Could you explain in your Chart at page 5 in respect of horizontal column No.1, the relevant rate of valuation being at 86.01% despite the Award stating a rise in valuation at 12.13% ?
Ans	In the Award, the Special Land Acquisition Officer has

	adopted rise of 12.13% per annum. It is his opinion and as per my opinion, the rise in value of land is at 15% and that has been established by the documents.
70 Q	Is this figure of (-) 35% based on your own personal experience or on the basis of any reference to any books?
Ans.	Theory and practice of Valuation written by Dr.Roshan Namavati has incorporated number of Supreme Court judgments and based on them, I have allotted (-)35% as allowance.

97. It needs to be observed that the Court would be required to be conscious of the ground realities in cities like Mumbai in which it is difficult to have sale transaction of large lands which can be ideal exemplars, normally to be considered for determination of market value of the land in land acquisition cases. In a decision of the learned Single Judge of this Court in **“The Special Land Acquisition Officer (3) vs. Godrej & Boyce Manufacturing Co. Ltd. ... Claimants And Dy. Chief Engineer, Metropolitan Transport Project (Railway)... Respondent”²³** as relied upon by Shri.Korde, learned senior counsel for the claimants, this Court was concerned with a case where the land was situated in a fully developed area and hence not a single sale instance was available for determining the market value of the land and hence both the valuers, of the claimants as also the Government relied on the built up area of a flat. In the present case also there are sale instances pertaining to flats as referred by Shri.Maniar and thus even the transactions in flats can be a comparable sale instance in a given situation. It is quite settled

that sale transactions in respect of small plots of land would not be considered as comparable instances to determine the market value of large tracks of land under acquisition. The endeavor of the Court is thus to consider such sale instance and/or genuine transactions in land which can reasonably become comparable for determination of the fair market value of the land, by applying the test of what a willing buyer would offer and willing seller would accept.

98. The next question which was debated before the Court is in regard to the nature of the sale instance in as much as sale instance Nos.1 and 2 deal with FSI generated by the area of the lands 7032.50 sq. mtrs. (sale instance No.1) and 6697 sq. mtrs. (sale instance No.2) respectively. As observed above, certain allowances would be required to be made as the cost of land per sq. meter as derived by Shri. Maniar as it is, cannot be accepted, considering the different features, attributes and traits in the land under acquisition and the land under instances 1 and 2. For example the land under these instances is ready for development, with all necessary permissions being obtained for which an expenditure was incurred, there is an element of profit when the Original Developers are receiving the consideration, whereas the land under acquisition if it is to be brought at par with the land subject matter of instances 1 and 2 certainly negative allowance / deduction on

these considerations would be required to be made. At the same time there are positive elements in regard to the location of the land under acquisition, its frontage, as also the negative allowances like existence of a pond (in regard to land in LAR 4 / 1990) are other considerations to be borne in mind to work out the fair market value of the land. It needs to be observed that land in cities is commercially dealt on its development potential namely the FSI it would generate. This is not an unknown concept. Even on behalf of the acquiring body this is quite accepted as seen from the instances as referred on their behalf before the SLAO. It is well settled that similarly the building potentiality of the acquired land is required to be taken into consideration, namely what is the possibility of user of acquired land. (See **P. Ram Reddy & Ors. Vs. Land Acquisition Officer Hyderabad**²⁴. In my opinion thus it is possible in the present case to apply such test, however, by making such appropriate reasonable deductions, as discussed.

99. Shri. Maniar has arrived at the cost of the land per square metre at Rs.455/- per sq.meter. As pointed out by Shri. Godbole certain other factors were also required to be considered to determine with reasonable certainty the value per square meter. These factors would be required to be borne in mind as they would increase the value of the land under acquisition, without the land under acquisition possessing the traits as

applicable to the comparable instances. Hence some deduction from the rate of Rs.30/- per square feet qua the FSI as agreed between the parties in sale instance Nos.1 and 2 would be required to be made. Admittedly at the relevant time the ready reckoner rates as now available were not in vogue. Mr.Korde has pointed out that the ready reckoner rates came to be notified by the Government of Maharashtra sometime in the year 1990. If the ready reckoner rates were to be available on the relevant date it would have certainly assisted the Court, to consider the market value of the land along with the surrounding circumstances and other contemporary material. In the present case the situation is not so and therefore the instances as pressed into service on behalf of the parties would require a necessary consideration and more particularly sale instance Nos.1 and 2 as relied on behalf of the Claimants being the most comparable sale instances. Taking all these issues into consideration, in my opinion, it would be appropriate that some enhancement of compensation is required to be awarded in favour of the claimants.

100. In regard to sale instance no.3 as referred by Shri.Maniar in his valuation report as noted above, it is an agreement registered on 29 June 1982 with the Sub-Registrar of Bombay confirming the sale of the plot admeasuring about 432.27 sq.mt. at the

total consideration of Rs.1,38,501/-. According to Shri.Maniar the rate of land was Rs.320.40 p.s.mt. as on 22 October 1981 and on the basis of this instance Shri.Maniar has calculated the fair market value of the land at Rs.532/- per sq.mts. The land subject matter of this agreement is situated at the distance of about 1200 meters from the acquired land. The land is also situated in the developing locality. He has given comparative merits and demerits. He has made positive of allowance of 86.01% considering the sale instance to be dated 22 October 1981 on the relevant date that is 20 August 1987, considering the rise in the value at 15% for the differential period which was about 5 years and 9 months. In regard to the size of the land, the land in question is 18,156.20 square metres and the land under this agreement being only 418.05 square metres. He has made negative allowance of -35%. Further considering the location of the land away from Jogeshwari-Vikhroli Link Road, he has made a negative allowance of -5%. He has given positive allowance of 20% by considering the frontage of 210 meters to the land under acquisition, whereas the land under agreement is 22.5 meters away from the 30 meters wide road. Accordingly, Shri.Maniar has valued the land making positive allowance of 66.01% calculated at Rs.211.49 per sq.mts. and added the agreement cost of Rs.320.40 per sq. mtr. arriving at the land rate of Rs.532/ per sq.mts.. In my opinion, considering the relevant date of

acquisition in the present case being 20 August 1987, sale instance no.2 is too remote in point of time. It is also so agreed by the learned Counsel for the parties. Further the size of the plot is also too small and not comparable to the nature of the land being acquired under the present acquisition.

101. In regard to sale instance no.4 as referred by Shri.Maniar, it is an agreement dated 17 April 1986 which is about one year and four months prior to the relevant date of 20 August 1987. The land being sold under this agreement is 418.05 sq.mtrs. at a total consideration of Rs.3,50,000/- by Shri.Jaspal Singh Mela Singh Kapoor to M/s.Saibaba Constructions. This plot is situated at about 1200 meters away from the acquired land. It is also situated in the developing locality. Shri.Maniar has given positive allowance of 19.80% considering the proximity of this agreement to the relevant date which is of one year and four months. Considering the small size of the land, Shri.Maniar has made negative allowance of -35%. As the land under acquisition has frontage of 210 meters along Jogeshwari-Vikhroli Link Road and according to him the land is about 32 meters away from the main road, Shri.Maniar has made positive allowance of 30%. The rate as contained in the agreement is Rs.837.22/per sq.meters. Shri.Maniar by making these allowances has added 4.8% to the agreement which goes to 40.18% and has arrived at the value of the land at 877.00

sq.meters at the relevant date. In my opinion, there is no dispute that in regard to this sale instance, it is a registered agreement and has a proximity to the relevant date. Further it needs to be noted that the land is about 1200 meters away from the acquired land. Also size of the plot is too small as compared to the large land under acquisition. However, this sale instance to certain extent can only be referred to corroborate the claim for enhancement, although it would not be possible to accept fully the value of the land as derived from the sale instance.

102. The next instance is citation-Indicator no.1 as referred by Shri.Maniar in his valuation report. It is a deed of conveyance registered with the Sub-Registrar of Bombay dated 20 April 1985 whereby plot no.232 of Sher-E-Punjab Society, on C.T.S. No.368/79 of village Mogra admeasuring 418.10 sq.mt. was sold at a total consideration of Rs.3,00,000/-. According to Shri.Maniar the rate of land was worked out at Rs.717/- p.sq.mtr. A certified copy of the document although was not available with the Sub-Registrar office, however a copy of the Index II certified by the Sub-Registrar Bombay is placed on record. In my opinion, although there is an objection raised that a certified copy of Index II was not admissible and cannot be relied upon considering the provisions of Section 51A of the LA Act read with Section 57 of the Registration Act, the extract of certified copy of Index

II being on record of the valuation report in LAR no.4 of 1990, the document can be considered in evidence. Shri.Maniar has given negative allowance of -35% conferring size of the land and has added 15% rise in the value of the land for the difference period between the relevant date and the date of this agreement which is 2 years and 4 months. Shri.Maniar has also given positive allowance of 20% for large frontage thereby recording positive allowance of 14.92% and has accordingly arrived at a rate of Rs.856/- per square meter. It needs to be noted that the agreement itself is not available to ascertain the exact value of the land.

103. There is another instance on record Indicator No.2 which is a sale instance in regard to two flats dated 21 December 1987 and 12 October 1987 respectively the details of which are noted in the forgoing paragraphs. Considering these two instances, he derived the rate of land at Rs.848/- per sq. mtrs.

104. Thus on the basis of the valuation report and Shri.Maniar's evidence thereon, it is apparent that the rate of land for determination of the market value is Rs.455/- per sq.mtr. for instance no.1; as Rs.455/- per sq.mtr. for instance no.2; as Rs.532/- per sq.mtrs. for instance no.3; as Rs.877/- per sq.mtr. for instance no.4; as Rs.856/- per sq.mtr. for sale at Indicator no.1; and as Rs.848/- per sq.mtrs. for sale

at Indicator no.2. Thus the rate has varied from Rs.455/- per sq.mtr. to Rs.856/- per sq.mtr. Except for sale instance no.3, all the documents of agreements are proved.

105. Having considered the valuation of the land as available from Shri.Maniar's valuation report as relied on behalf of the claimants, the position in regard to the evidence of the acquiring body would be required to be considered.

106. The acquiring body has examined Shri.Sumant, Estate Manager of BEST. who has filed his affidavit in lieu of examination in chief on 5 December 2016 and who was also cross examined on behalf of the claimant. Mr.Sumant has referred the circumstances namely claimant Majas Madhu CHS Ltd. first by letter dated 5 May 1984 has offered to BEST acquiring body the land at the rate of Rs.75/- per sq.mtrs as compensation for acquiring their land for BEST depot. He has tendered in his evidence the said letter of Majas Madhu CHS Ltd. at Exhibit B to the affidavit. He has also produced letter dated 5 May 1984 which is written by Pearl Cosmetics & Chemicals Pvt. Ltd. wherein it was according to him the fair rate was Rs.75/- per sq.mtr. Shri.Sumant has deposed that the instances suggested by Shri.Maniar are without any basis and are without substance. He has stated that

Shri.Maniar has not intentionally submitted the earlier proposal of Majas Madhu CHS offering the rate of Rs.75/- per sq.mtr. He has stated that the surveyor has no personal knowledge of the status of the land in question and at around the relevant date and he has not visited the land at that time. Shri.Sumant was cross examined on behalf of the claimant. In answer to question no.3 he has stated that he was not connected with the present land acquisition proceedings till the award was made by SLAO on 25 October 1989. When asked whether BEST would produce Shri.PL.Ajgaonkar as witness in the present case, he has stated that Shri.Ajgaonkar had retired and he cannot confirm that Shri.Ajgaonkar would be produced as witness. In his cross examination, in the context of the said letter dated 5 May 1984 of Majas Madhu CHS, he answered that Majas Madhu CHS had offered compensation to be paid to it at the rate of Rs.75/- per sq.mtr. as set out in the letter. He also stated that no advance possession was taken in pursuance of the said letter. The extract of affidavit of evidence in regard to letter dated 5 May 1984 are required to be noted which read thus:-

Q.7	In the case of Majas Madhu Co-operative Housing Society, did the Special Land Acquisition Officer make an award on the basis of market value at the rate of Rs.75/- per sq.mtr?
Ans	A letter of Majas Madhu Co-operative Society is written in the year 1984 whereas the award was declared in the year 1989. So, I presume that there is proportionate increase in the rate of compensation.
Q.8	Please confirm whether the award made by the Special Land Acquisition Officer on 25 th October 1989, in respect of which the

Ans	present land acquisition reference has been made, relates to the same land of Majas Madhu Co-operative Housing Society Ltd. with respect to which the letter dated 5th May 1984 (Exhibit 'D-3') was addressed. I presume so.
Q.9 Ans.	Please state whether advance possession was in fact take pursuant to the letter dated 5th May 1984 ? No, advance possession was not taken.
Q.11 Ans	I put it to you that your interpretation of the letter dated 5th May 1984 addressed by Pearl Cosmetics and Chemicals Pvt.Ltd. to the Engineering (Civil) (Exhibit 'D-4') is not correct for the same reasons which I stated in my question no.6, Do you agree ? I do not agree. My interpretation is that Majas Madhu Co-operative Housing Society Ltd. worked out the rate of compensation of the land under acquisition to the tune of Rs.75/- per sq.mtr. approximately out of which they requested BEST to pay them Rs.50/- per sq.mtr. as payment for advance possession and they agreed to accept balance payment on the basis of actual rate of compensation finalized by the SLAO in his award.

107. From the above discussion on the evidence of Shri.Sumant it is quite clear that he was not a witness who was associated with the land acquisition in question. In his examination in chief he relied on the valuation report of Shri.Ajgaonkar dated 5 January 1988 and justified the same to state that the value of the land should be taken as Rs.62/- per sq.mtr. The only additional issue brought about by Shri.Sumant was by relying on the letters dated 5 May 1984 of Majas Madhu CHS and Pearl Cosmetics & Chemicals Pvt. Ltd. to contend that Majas Madhu CHS (claimant in LAR no.4 of 1990) had offered rate of Rs.75/- per sq.meter. At this stage it would be appropriate to note the

contents of those two letters of Majas Madhu CHS and Pearl Cosmetics & Chemicals Pvt.Ltd. respectively which read thus:-

“ 5 May 1984
PEARL COSMETICS AND CHEMICALS PVT. LTD.

The Engineer-in-Chief (Civil),
The Bombay Electric Supply and
Transport Undertaking,
B,E.S.T. House, Ormiston Road,
Post Box No. 192
Bombay – 400 039.

Sub: Acquisition of land for BEST Bus station, Bus Depot
etc. at Jogeshwari (East)

Dear Sir,

We have perused your letter no. ENC/28715/84 dated 30 April 1984, addressed to the Promoter Majas Madhu Coop. Hsg. Soc. Ltd. we confirm the negotiation made with you by the Promoter. We also confirm the agreement to accept 2/3rd amount of compensation at the rate of Rs.75/- per sq. mtr. i.e., at the rate of Rs.50/- per sq. mtr. payable from the date of handing over possession of the land to the B.E.S.T. and the balance amount payable as decided in the award mode by the Special Land Acquisition Officer/Government.

As requested by the promoter Majas Madhu Coop. Housing Soc. Ltd., we have to request you to pay us the amount of compensation and not to the Promoter Majas Madhu Coop. Hsg. Soc. Ltd.

Thanking you,

Yours faithfully,”

“MAJAS MADHU COOPERATIVE HOUSING SOCIETY LTD.

5th May 1984.

The Engineer-in-Chief (Civil),
The Bombay Electric Supply and
Transport Undertaking,
B,E.S.T. House, Ormiston Road,
Post Box No. 192
Bombay – 400 039.

Sub: Acquisition of land for BEST Bus station, Bus Depot etc. at Jogeshwari (East)

Dear Sir,

We have for acknowledgement your letter no. ENC/287155/84 of 34th instalment, we confirm that, we have agreed to accept the 2/3rd amount of compensation at the rate of Rs.75/- per sq. mtr. i.e., at the rate of Rs.50/- per sq. mtr. payable on the date of handing over possession of the land to the B.E.S.T. and the balance amount payable as decided in the award by the Special Land Acquisition Officer/Government.

We have to inform you that, by an agreement dated 4 January 1982, we have parted with the possession of the said property for development purpose to M/s. Pearl Cosmetics and Chemicals Pvt. Ltd., who have also made payment on our behalf to our vendor M/s. Madhu Builders Pvt. Ltd. The amount of M/s. Pearl Cosmetics and Chemicals Pvt. Ltd. The terms and conditions mentioned by you in your letter are also acceptable to them and the necessary letter for the said confirmation by the said company is also enclosed.

Thanking you,

Yours faithfully,
For Majas Madhu Coop. Hsg. Soc. Ltd.

PROMOTOR”

108. Perusal of these letters would indicate that these are letters addressed three years prior to issuance of the notification under Section 126(4) of the MRTP Act read with Section 6 of the LA Act. On this count itself they have no relevance. Secondly on a plain reading of these letters, it would be clear that there is no evidence to show that these letters were ever acted upon Shri.Sumant. He has clearly stated in his cross examination that no advance possession was taken. It is also required to be observed that in the evidence as led on behalf of the

acquiring body in LAR no.4 of 1990 no question was posed to the claimants witness on these letters. Further these letters were not the part of the proceedings before the SLAO. In any event the commencement of land acquisition proceedings would start from issuance of the said notification and the authority of the SLAO would be set into motion for determination of fair market value after the acquisition process commences. It is a matter of record that the claimants have submitted their respective valuation reports and their respective plans as also the acquiring body had submitted its valuation report namely the valuation report of Shri.PL.Ajgaonkiar, which were subject matter of consideration before the SLAO culminating into an award. Thus this letter dated 5 May 1984 of Majas Madhu CHS is totally inconsequential and would not in any manner assist the acquiring body. In the circumstances as observed above, the said letters interalia of Majas CHS dated 5 May 1984 would not create any embargo or operate as an estoppel against these claimants to claim enhancement of compensation from what was awarded by SLAO. In this context reliance of Shri.Korde on the decision of the Supreme Court in **“Bhag Singh & Ors. Vs. Union Territory of Chandigarh”**²⁵ is well founded. The Supreme Court has held that the technical approach to deny the benefit of enhanced compensation to the claimant is required to be avoided. It was held that once the claim is made against

the State Government for compensation for acquisition of their land and under the law, the State was bound to pay the compensation at the rate of market value of the land acquired and to deny such benefit to the claimants would tantamount to permitting the State Government to acquire the land of the claimants on payment of less than the true market value. It was held that when the land is acquired under the Land Acquisition Act, it was not fair and just to deprive the holder of his land without payment of the true market value when the law in so many terms declares that he shall be paid such market value. The State Government is required to do what is fair and just to the citizen and should not, as far as possible, except in cases where tax or revenue is received or recovered without protest or where the State Government would otherwise be irretrievably prejudiced, take up a technical plea to defeat the legitimate and just claim of the citizen.

109. The acquiring body has next examined Shri.Ajgaonkar, aged 70 years, who has filed his affidavit in lieu of examination in chief on 9 October 2018 and who was also cross examined on behalf of the claimant. Shri.Ajgaonkar in his affidavit in lieu of examination in chief has stated that he was working with the BEST Undertaking for more than 25 years and superannuated on 1 October 2006. He has stated that he has gone through the record, documents and file and on the basis of knowledge acquired from perusal of the said record, he was

deposing through the affidavit of evidence on behalf of the acquiring body in Land Acquisition Reference no.4 of 1990. He has stated that he has prepared the valuation report dated 5 January 1988 when he was working as a Chief Engineer (Civil) with the acquiring body. He has stated in his affidavit in lieu of examination-in-chief that the eastern side of the Western suburb was slowly developing at that time and at Jogeshwari East there was no bus depot and the land to be acquired was found suitable to establish bus depot to meet future transport requirements. He has stated that he was fully conversant with the development status in Jogeshwari East and the approximate distance between Jogeshwari Railway Station and the land to be acquired. He has stated that he has personally visited the site of the land to be acquired. He has also taken a walk along the locality and had taken notes of the status of the surrounding land. He has stated that the valuation report of the said land was prepared determining the land value as on the date of publication of the notification dated 20 August 1987 issued under Section 126(4) of the MRTP Act read with Section 6 of the LA Act. He has stated that existing market value of the land on the relevant date or thereabout was taken into consideration at the time of preparing the valuation report. He has stated that he has taken into consideration agreement of sale dated 2 February 1982 between M/s.Madhu Builders and Majas Madhu CHS in respect of the part of

land bearing Survey no.34 (pt), 35(pt), 40(pt) and 42(pt) located at Majas Village for a piece of land admeasuring 1,43,875 sq. mtrs. He has also stated that the land is located 4 km. And 7 km away from Jogeshwari and Andheri Railway Station. He has stated that the total consideration for the land was Rs.30,00,000/- that is Rs.2/- per square meter. He has stated that the agreement was signed by the respective representative of M/s.Majas Builders Pvt.Ltd. and Majas Madhu CHS. He has stated that the total consideration under the said agreement which is at Rs.30,00,000/- was calculated at Rs.1.50 per sq.ft. He has stated that BEST Undertaking had prepared the valuation report dated 5 January 1988 wherein the valuation of the land is made at Rs.62/- per sq. mtrs. taking into account the fair and reasonable market rate by giving reasonable rise. He has stated that he has signed the said valuation report dated 5 January 1988 and the same has been identified by him and the same is marked at Exhibit E-1. In short the evidence of Shri.Ajgaonkar was, as stated in his valuation report dated 5 January 1988 before the Land Acquisition Officer. At this stage it would be appropriate to refer the relevant extract of the valuation report dated 5 January 1988 of Shri.Ajgaonkar, which reads thus:-

“3. The area in the Eastern side of Western suburbs is developing very fast particularly in this area (i.e. Majaswadi Jogeshwari (E)) large number of hutments colonies as well as housing complexes have come up. This area is very thickly populated and people residing in the area are constantly demanding for Bus facility. At present no bus route has been provided to the residence of Jogeshwari (E) and residents have to

entirely depend upon bus services for going to Jogeshwari station. In order to establish a bus depot as well as but station at Majaswadi the said plot of land has been found to be suitable.”

110. Shri.Ajgaonkar in his cross examination has admitted that although the date of the agreement in regard to the sale instance as relied upon by him was 2 February 1982, however, the agreement between the parties was entered into on 12 January 1976 and it was on that date the rate of Rs.1.50 per sq.ft. of built up available FSI, was fixed between the parties. He also agreed that it would be necessary to take the date of transaction between the parties as 12 January 1976. In the cross examination to Shri. Ajgaonkar, on behalf of the claimant a question was asked in regard to reasonable rise in the valuation as stated in the valuation report, to which Shri.Ajgaonkar's answer was that it was based on internal calculation. Also a question was put to Shri.Ajgaonkar in regard to comparable sales method whether being adopted, to which he stated that it was so adopted and in addition to that if any temporary or permanent structures, fruit bearing trees, perennial wells are found on site, are also given due weightage which is a normal practice. When asked whether the relevant date for valuation in the present case is 20 August 1987, he replied that he cannot comment upon the same as he has not seen the same. Certain extract of cross examination of Shri.Ajgaonkar are required to be noted which are as under:-

Q.9. Do you agree that under this agreement of 12th January 1976 the rate of Rs.1.50 per square foot of built up available FSI was fixed between the parties?

Ans. Yes

Q.10. Do you agree that the rate of Rs.1.50 per square foot mentioned in the last recital at page 3 of Exhibit A is the same rate which was fixed in the agreement dated 12 January 1976 which is mentioned at page 2 of Exhibit A to which your attention was drawn a short time ago?

Ans. I do not agree.

Q.12. According to you was any building constructed on 12 January 1976, on the land which was mentioned in the First Schedule (internal page 12) to Exhibit A?

Ans. I do not recollect.

Q.13 I put it to you that the rate of Rs.1.50 per square foot of built-up available FSI mentioned at page 2 of Exhibit A is the same rate which is mentioned in the last recital at page 3 of Exhibit A?

Ans. Not necessarily

Q.16. According to you, looking at Exhibit A, when was the rate of Rs.1.50 per square feet on the basis of sanctioned FSI was fixed between the parties?

Ans. On 12th day of January 1976.

Q.17. Do you therefore agree that when we analyse Exhibit A, it is necessary to take the date of the transaction between the parties for purposes of valuation as 12th January 1976?

Ans. Yes

Q.25 You have referred to "by giving reasonable rise have you shown or explained at any place in your valuation report dated 5 January 1988 (Exhibit B to your Affidavit of Evidence), the reasonable rise mentioned by you in paragraph 9 of your Affidavit of Evidence?

Ans. This valuation report was filed o 5 January 1988, but all these reasons for working out the costs plus/minus etc. are available in internal calculations. So, those reasons must have been available in those calculation sheets. Normally those calculations are attached with office copy of the valuation report, but I do not remember those reasons after 30 years.

Q.26. Would it be correct to say that when you signed your Affidavit of Evidence on 9 October 2018, you did not remember the reasons mentioned by you in your previous answer?

Ans. Yes, it is correct.

Q.27 Would it be correct to say that your valuation is based on a method which is generally known as the “COMPARABLE SALES METHOD”?

Ans. No. Comparable sales method that we are definitely adopting and in addition to that after site inspection if any temporary or permanent structures, fruit bearing trees, perennial wells are found on site and accessibility to the plot then due weightage is given. This is our normal practice.

Q.29 Do you agree that the relevant date for valuation in the present case is 20 August 1987?

Ans. I cannot comment upon that as I have not seen those papers.

Q.31. Do you agree that there is a contradiction between the statement in paragraph 5 of your Affidavit of Evidence and paragraph 3 of your valuation report dated 5 January 1988 (Exhibit B to your Affidavit of Evidence) with regard to the pace at which the area was developing?

Ans. It appears to be contradictory, but in reality it is not so. Whatever I have mentioned in my Affidavit of Evidence is correct; however, while filling the valuation report the words “very fast” have been mentioned just to impress upon the Land Acquisition Officer to handle the case expeditiously. Actually, the real development of the area started sometime in 1990 or so when the work of JVLR was started.

Q.32 In the first sentence of paragraph 3 of your valuation report dated 5 January 1988 (Exhibit B to your Affidavit of Evidence) you have said that housing complexes have come up. Is this statement correct or incorrect?

Ans. Again this was also written to SLAO to impress upon him to expedite the case. Actually in the year 1988, there was no development around the Depot except some semi—permanent chawls and hutments in Majas area.

Q.38 Is it not clear from your own report that the Jogeshwari Vikhroli Link Road was already in existence on 28 August 1987?

Ans. It was not existence although it appears in this report, it was the proposed road.

Q.44 Will it be correct to say that you do not consider yourself as an expert on the subject of valuation of land and immovable properties?

Ans. When this valuation report was filed, I was working as Chief Engineer of the BEST Undertaking. At that time, Estate Department of the Undertaking was placed under me and detailed valuation etc. used to be carried out by Estate Department under my supervision. As such the expertise needed for the purpose was available in the Estate Department of BEST.

Q.46. Have you read the evidence of Mr. Harish Khiamal Nanwani, Mr. Atul Madan Gulati and Mr. Harshad Sunderlal Maniar, which was recorded in Land Acquisition Reference No. 5 of 1990?

Ans. No.

Q.47 Have you read the evidence of Mr. P.M. Salian, Mr. M.B. Vakharia and Mr. H.S. Maniar which was recorded L.A.R. No. 4 of 1990?

Ans. No.

Q.48 Have you read the valuation reports of Mr. Harshad Sunderlal Maniar which have been filed in these two Land Acquisition Reference bearing No. 4 of 1990 and 5 of 1990?

Ans. No.

Q.49. Have you read the award passed by Special Land Acquisition Officer (7), Bombay Suburban District, dated 25 October, 1989 which is a part of these two L.A.R. proceedings?

Ans. I must have read those awards at that time but I do not remember any details after lapse of 29 years.

Q.53. According to you if the rate of Rs.62/- per sq. mtr. determined by you is correct or the rate of Rs.130/- per sq. mtr. determined by the Special Land Acquisition Officer is correct?

Ans. The rate of Rs.62/- per sq. mtr. was determined as per the system we were following in the BEST Undertaking. However, the rate of Rs.130/- per sq. mtr. was determined by Special Land Acquisition Officer who can take a broader view in view of the material available with him. Finally, rate of Rs.130/- per sq. mtr. was accepted by the BEST Undertaking and as such this is supposed to be final rate.

Q.58 I put it to you that your valuation deserves to be rejected because you have not taken into consideration the material which was relevant and which has been produced before the Hon'ble

Court in the present Land Acquisition References, i.e., L.A.R. No. 4 of 1990 and 55 of 1990. Do you agree?

Ans. My valuation report has been superceded by the valuation report prepared by Special Land Acquisition Officer and since BEST Undertaking has accepted that valuation, I would prefer not to comment on this question.

Q.61 I put it to you that the land under acquisition in LAR No. 5 of 1990 had a direct frontage of 210 mtrs. on Jogeshwari—Vikhroli Link Road. Do you agree?

Ans. I do not agree. There was a frontage but it was not to the developed Jogeshwari—Vikhroli Link Road. In fact, after completing the work of depot as per approved plan and after obtaining Occupation Certificate from the authority, we were asked to surrender part of our depot land by demolishing the compound wall for widening of the existing narrow road to its full width. When we protested against surrendering the strip of land perhaps the authorities must have acquired the land of the other side of the road for its widening.

111. Perusal of the evidence of Shri.Ajgaonkar would indicate that the valuation report dated 5 January 1988 prepared by him and submitted before the SLAO, as relied on behalf of the acquiring body cannot be said to at all reliable. It is apparent from his evidence and as admitted by Shri.Ajgaonkar that the transaction under the sale instance had actually taken place on 12 January 1976 when the rate of Rs.1.50/ per sq.ft. of built up FSI was fixed between the parties. If the agreement is actually dated 12 January 1976 at which point of time the rate was agreed between the parties, then it is a sale instance which is almost 11 years prior to the relevant dated (20 August 1987). The transaction is too remote in point of time and would be required to be discarded, applying the settled principles on stale comparative

instances. Further the evidence of Shri.Ajgaonkar also does not generate any confidence. It appears that he was a totally non prepared witness. He has not refreshed his memory by studying any material relevant and necessary for the purpose of his evidence to assist the Court in determination of market value of the land on the relevant date. In his cross examination there are apparent contradictions as also pointed out on behalf of the claimant's. In these circumstances it would not be proper and in fact dangerous to give any credit to Shri.Ajgaonkar's evidence in regard to the valuation of Rs.62/- per sq. mtrs. as set out in the valuation report as the market value of the land on the relevant date.

112. For the above reasons the evidence led on behalf of the acquiring body in the proceedings of LAR no.5 of 1990, in my opinion, do not inspire confidence so as to be given a weightage to accept the submission of Mr.Godbole that the valuation report of Shri.Ajgaonkar that the land valued at Rs.62/- per sq.mtr. be accepted. Shri Godbole's contention that Shri.Ajgaonkar has appropriately given positive allowance to increase the rate at Rs.1.50 per sq.ft. equivalent to Rs.355/- sq.mtr. in the statement as indicated, also cannot be accepted in the manner as suggested by Shri.Godbole and when the rate of land is actually worked out to Rs.131.299. As observed, the said sale instance as relied on behalf of the acquiring body is too remote in time.

113. The next claim as made by claimant-Tyabji is on injurious affection under section 23 *fourthly* which provides for compensation for damage if any sustained by the person interested, at the time of the Collector taking possession of the land, by the reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner or his earnings. Shri Maniar in his valuation report has stated that the claimant Tyabji's land admeasuring 18156.20 sq. mtrs. subject matter of the acquisition formed part of Tyabji's larger holding admeasuring 1,49,443 sq. mtrs. leaving behind land admeasuring 33541.96 sq. mtrs. in CTS No.166A(S. No.5514). This portion of the land bounded red in plan Annexure-E annexed to his report. In the report, he has stated that as seen from the plan role marked "A, B, C, D, E, F" is proposed 30.30 mtrs. wide DP road. He has stated that road was existing upto A. The claimant could not have developed the rear side of the property mainly the remaining area of 33541.96 sq. mtrs. unless and until road portion marked "BC" and "DE" are constructed. He has stated that these two portion of land marked "BC" and "DE" does not belong to the claimant and as such the land portion bounded red on the plan will become land locked unless whole portion marked "BC" and "DE" which belonged to another owner is made available in absence of any road, no development of next portion of land will be taken up. According to the claimants as pointed out in Shri Maniar's

valuation report and his evidence, this portion of land has become land-locked and hence the case of injurious affection had arisen. Referring to the decision of the Supreme Court in **Tribeni Devi vs. Collector of Ranchi** (*supra*), Shri Maniar has stated that portion of the land which is left out (33541.96 sq. mtrs.) where there will be diminution of the value of land which is left out, a compensation of 5% would be reasonable. He has accordingly arrived at the following calculations:

Area of land injuriously affected	= 33,541.96 sq. mtrs.
Rate of land	= Rs.500/- per sq. mtr.
Total cost	= Rs.1,67,70,980/-
5% compensation	= Rs. 8,38,549/-

114. Shri Maniar has stated that the compensation has to be proportionately appropriated towards the area of the acquired land, i.e., 18,516.20 sq. mtrs. and thus, the compensation towards injurious affection to the adjoining land held by the claimant Tyabji and which is to be added on the rate of the acquired land arrived will be Rs.46.8 per sq. mtr. rounded at Rs.46/- per sq. mtr. According to him, the value of the acquired land will therefore accrue at Rs.546/- sq. mtr. which is Rs.500/- + Rs.46/-. Thus, according to him, the share market value of the acquired land will be Rs.546/- per sq.mtr. as on 20 August 1987. As per Shri Maniar, valuation of the land is as under:

“Valuation

Value of land admeasuring about 18,16,620 sq. mtrs. at Rs.546/- per sq. mtr. = Rs.99,13,285.20

In the light of above, I am of the opinion that the share market value of the acquired land will be Rs.546 per sq. mtr. in 20 August 1987. The claimants would be entitled to 12% component and 30% solatium as provided under section 23(1) (A) and 23(2) of L.A. Act, 1894 respectively.”

115. Mr. Korde has however submitted that if the market value of the land as asserted by the claimant at Rs.455/- per sq. mtr. is accepted, in that event, considering the area of land injuriously affected, the injurious affection will be calculated as 5% of the total cost of land, then Rs. 455 X 33541.96 which is equal to 1,52,61,591.80 and 5% of which would be Rs.7,63,079.59. Mr. Korde has fairly stated that the measure of compensation/damages qua injurious affection should not be clubbed with market value and it should be kept separate, as the amount of which the claimant are entitled by way of damages under clauses thirdly and fourthly of Section 23 of the L.A. Act

116. On examining the evidence, it is quite clear that the portion of the claimant's-Tyabji land admeasuring 33541.96 sq.meters in CTS No.166A, S.No.55/4 had become landlocked. There is nothing on record to indicate as also pointed out by Shri.Korde, learned Senior Counsel for the claimants on instructions, that the adjoining land being Survey no.54 did not belong to claimant-Tyabji. It is therefore, clearly a

situation of the balance portion of the land admeasuring 33541.96 sq.meters becoming landlocked. It is difficult to accept Shri.Godbole's contention that although the adjoining land Survey no.54 does not belong to claimant-Tyabji, however another land CTS no.167A (Survey no.34/2) closely connected belongs to claimant-Tyabji and therefore, it cannot be said that the balance portion of the land is landlocked. It is his submissions that a DP road subsequently had become available. The contention of Shri.Godbole is required to be instantly rejected, for the reason that it is crystal clear that there is no connect whatsoever between this landlocked land admeasuring 33541.96 sq.meters in CTS 166A (S. no.55/4) and CTS 167A (S.No.34/2). In any event the Court would be concerned in regard to the injurious affection as on the relevant date. After some years a D.P. Road was available can be no ground to reject this claim. Thus, the claim in regard to the injurious affection would certainly deserve consideration.

117. There is also much substance in the contention of Shri. Korde that the claim for injurious affection as set out I Shri.Maniar's valuation report has been not challenged in the cross examination at all, hence it deserves to be accepted. This is clear from the fact that Shri Maniar was asked only one question in regard to the assessment of

damages for injurious affection, namely, question no. 111 as noted in paragraph 43 above.

L.A.R. NO. 4 OF 1990:-

118. As noted above, Shri Korde has adopted his submissions as made in LAR No. 5 of 1990 for the purpose of this reference. In this LAR, there is no claim for injurious affection and the only claim which arises in LAR no. 4 is in regard to the market value of the land under acquisition.

119. Claimants-Majas CHS has examined Shri Poova Montu Salian, Secretary of Majas CHS. He has filed an affidavit in lieu of examination-in-chief dated 24 June 2005. In his affidavit he has stated that he has been Secretary of Majas CHS since 1982 and that he was in over all supervision of the property owned by the claimant Majas CHS, subject matter of the present reference when the same was acquired under the present land acquisition. He has stated that he was aware of the condition of the land since the year 1982 onwards and till the possession of the land under acquisition was handed over to the SLAO on 21 November 1989. He has stated that Majas CHS was owner of a larger plot of land totally admeasuring to 19486.30 sq. mtrs. out of which, area of 9286.50 sq. mtrs. in CTS 18 pt. and CTS 19 pt. which comprise of the land under acquisition for the purposes of present

reference. He tendered layout of the holding of the claimant major CHS showing the acquired land. He has stated that this plan was prepared by Shri.Bipin Barot, Architect. He also tendered a certified copy of joint measurement plan of the acquired land dated 3 January 1985 prepared under the order and direction of the SLAO and registered MR No.741/85. Shri Salian has stated that the acquired land was reserved for bus depot and bus station in the sanctioned development plan of 1981 for K-Ward. He has stated that the said land was sold by M/s.Madhu Builders Pvt. Ltd. (vendor) to the claimant Majas CHS by a registered conveyance dated 2 February 1982. He tendered the original conveyance on record as also the certified copy of Index-2 issued by the Sub-Registrar of Assurances. Shri.Salian has stated that the land situated adjacent to the acquired land was shown in the residential zone as per the sanctioned revise development plan for Greater Mumbai, K/West Ward. He has stated that he was personally familiar about the condition of the acquired land and the surrounding areas at the relevant time and even before and after the relevant date. He also stated that if any construction was to be undertaken on the acquired land, no filling was required to be done as also no cutting of the portion of the acquired land was necessary. He stated that the land under acquisition was completely vacant as there were no structures. Also there were no encroachment on the acquired land and the same was in exclusive

possession of Majas CHS. Shri.Salian also stated that the land was situated at the junction of two roads namely Badrudin Tayyabji (Diana Craft Road and Jogeshwari-Vikhroli BP Link Road running from West to East). He has stated that Jogeshwari-Vikhroli Link Road was already in existence and was abutting the acquired land before the relevant date. He also stated that the acquired land was located in the well developed locality as on the relevant date. He stated that on the eastern side of the acquired land was Tayabji Estate and open plot of the claimant Majas CHS and on the western side, there was Badrudin Tayyabji Road on which regular BEST buses plied. He has stated that the road had amenities like shops, establishments, residential buildings, transport facilities, hospitals at the relevant time on and before August 1987. He further stated that the acquired land was at a distance of 2 km from Jogeshwari Railway Station and was situated at 5 minutes walkable distance from Jogeshwari-Vikhroli Link Road. He has stated that on the eastern side of the acquired land, entire area was well developed with residential multi storied buildings and residential colonies namely Raheja Nagar, Poonam Nagar, Air India Colony, Green Field's Colony and ONGC quarters were situated on the eastern side at the distance of 100 to 200 sq. metres from the acquired land. Shri.Salian has stated that the acquired land has frontage on the Jogeshwari-Vikhroli Link Road and also on the Badrudin Tayyabji Road. There were shops nearby the

acquired land on both these roads. He stated that the acquired land was at a lower level by about 2 to 3 feet from the level of the adjacent road. He also stated that civil amenities like schools (Swami Samarth High School, St. Xaviers High School), hospitals (Holi Spirit Hospital), market near Raheja Nagar were within the walking distance of the acquired land. He also stated that the award amount of Rs.18,59,157/- was received by Majas CHS under protest. Being aggrieved by the inadequacy of the compensation, the present application for reference was filed.

120. Shri Salian was cross-examined on behalf of the acquiring body. In his cross-examination when he was asked on his statement in his affidavit in lieu of examination in chief namely if any construction is to be undertaken on the acquired land, no filling was required to be done and on what basis the statement was made, he answered that the building can be designed and constructed at low level also. In question No.56 when asked if he had mentioned specifically that Jogeshwari-Vikhroli Link Road was already in existence, he answered in the affirmative. He also answered in affirmative in regard to the existence of Badrudin Tayyabji Road (Diana Craft Road) being in existence in 1987.

121. It needs to be observed that except as noted above, there is nothing much of relevance in the cross-examination of Shri.Salian on behalf of the acquiring body which would displace his testimony in the examination in chief. It appears that the evidence of Shri.Salian in regard to the location of the land under acquisition namely that it was situated in a developed locality as also the land was abutting two roads namely Jogeshwari-Vikhroli Link Road and Badruddin Tayabji Road (Diana Craft Road) stood proved. Also Shri. Salian's testimony in regard to the different residential colonies in the vicinity as also the existence of schools, hospitals is in no manner disturbed in his cross-examination.

122. The next witness as examined on behalf of the claimant-Majas CHS is Shri Madhusudan Vakharia whose evidence is considered and discussed in extenso in the foregoing paragraphs in land acquisition reference No.5 of 1990 hence for the purposes of this reference it is not re-discussed as it would be a repetition, suffice it to observe that Shri. Vakharia' was examined to prove the articles of agreement of Instances No 1 and 2.

123. Claimant Majas CHS, also examined the Valuer Shri Harshad Sunderlal Maniar. He filed his affidavit in lieu of examination-in-chief dated 25 July 2007 by which he placed on record of this

Reference. Shri. Maniar deposed taking into consideration his valuation report as also the evidence of Shri M.B. Vakharia and Shri Salian, being the other witnesses examined on behalf of claimant Majas CHS. The valuation report is not different from the valuation report as prepared by Shri Maniar for claimant Tyabji in LAR No. 5 of 1990 except for the fact that Shri Maniar did not refer to sale instance no. 4 as referred by him in the valuation report as made for the purposes of LAR No. 5 of 1990. However, considering that common evidence is led in both these LARs, it will be permissible for the claimants to rely on sale instance no. 4 that contained in valuation report of Shri Maniar in LAR 5 of 1990.

124. There is an additional facet in regard to the land, subject matter of acquisition in LAR 4 of 1990. According to Shri Maniar this land has a better location, as the same was located at the junction of Jogeshwari-Vikhroli Link Road and Badruddin Tyabji Marg and 18.30 mtrs. wide road. The other aspect relevant for this land is a negative allowance of 14.64% towards cost of filling in as much as it is recorded that there is a pond / tank which is about 5575.50 sq.mtrs. having average depth of 1.75 mtrs. in this land non-acquisition. According to the claimants, there is not much difference in the size of pond/tank as set out in the affidavit of Shri Sumant in LAR 4 of 1990 who has stated that the area of the tank is 5718.70 sq. mtrs. The relevant extract in regard to the cost of filling in Shri Maniar's report is as under:

“Cost of filling

As per the fair market schedule of rates for storm water drain works for the period from 2-7-1990 and prepared by the Municipal Corporation of Greater Mumbai the rate of filling work works out to Rs.45/- per cu. Mtr. (Item no. 28, page 5). The schedule of rates for the year 1990 are higher than the prevailing rate in the year 1987. Since the schedule is not available for the year 1987, I have adopted the rate of filling for the year 1990 which are much higher than the year 1987, a copy of schedule of rates for storm water drain works is annexed at **Annexure ‘B’**.

The lowlying area is a tank land only and I have worked out the area of tank which is about 5575.50 sq. mtr. and average depth of filling is 1.75 mtr.

Thus the cost of filling works out as below:

$$5575.50 \times 1.75 \times 45 = \text{Rs. } 4,39,070.62$$

Say Rs.4,39,071/-

Overall effect of cost of filling for area admeasuring 9286.50 sq. mtr. will be

$$\frac{4,39,071 \times 1}{9286.50} \\ = \text{Rs.}47.28 \text{ per sq. mtr.}$$

Rate of instance land = Rs.30 X 10.764 = Rs.322.92 per sq. mtr.

Rs.	Rs.	Percentage
322.92	: 47.28	:: 100%
		= 14.64%

Negative allowance of 14.64% will have to be given.

125. On behalf of the claimants- Majas CHS, Shri Korde has submitted that Shri Maniar’s estimate of cost of filling should be accepted as correct, as he has taken the area of tank land at 5575.50 sq.mtrs., general depth of filling required to be taken at 1.75 mtrs. (5 feet 8 inches.)and cost for filling is at the rate of Rs.45/- per cu.mtr. It is submitted that the negative allowance of 14.64% towards cost of filling given by Shri Maniar should be treated as a separate cost and should not be built into the land cost. The reason being that cost of filling is a fixed

cost which does not depend on the rates of market value. On the basis of instance no. 1 and 2 according to the claimants and on the basis of the report of Shri Maniar, the cost of filling to be taken up for 4,39,070.62. the market value of the acquired land in this reference will be as follows:

“A) $9286.50 \times \text{Rs.}422.47 = 39,23,267.66$

B) Deduct cost of filling = Rs.4,39,070.62

C) Net market value (A-B) = 34,84,197

126. On behalf of the claimants, it is submitted that even the SLAO in his award under the factual situation and description has stated that the filling which was required about 1.5 to 2 mtrs. In my opinion, considering the evidence of Shri Sumant and Shri Maniar, it is quite clear that Shri Sumant has stated as to what is the depth of the tank/pond. He has also said that the depth of the pond is much more than the average depth of 1.75 mtr. as recorded by Shri Maniar. There is much substance in the contention as urged on behalf of the claimants that Shri Sumant's statement is purely an assumption which was drawn on the basis of letter received by BEST from various Ganesh Mandals that there were immersions Ganesh idols by the Ganesh mandals and none of the mandals mentioned dimension for depth of the pond. Also Shri Maniar was not cross-examined with regard to the depth of the pond. Thus, on a cumulative assessment of the SLAO and of Shri

Maniar, the depth of pond needs to be accepted at 1.75 mtrs., as the SLAO has also given allowance of 1.75 mtrs. to 2 mtrs.

127. In so far as the rate of Rs.45 per cubic mtr., Shri Maniar has applied the said rate from the fair market schedule of rate in regard to the storm water drain works of the Bombay Municipal Corporation for the period 1990. In this regard, it also needs to be observed that Shri Maniar has not been cross-examined with regard to the rate of cost of filling. Further, the acquiring body has also not produced any evidence to show that the rate was more than the rate adopted by Shri Maniar. In these circumstances, as the rate of Rs.45/- per cu. mtr. is based on the rate as fixed by the Bombay Municipal Corporation, in my opinion, this rate is required to be accepted and the negative allowance of Rs.4,39,071/- at the rate of Rs.45 per cubic mtr. for the cost of filling of the pond is required to be accepted.

128. Considering the various allowance Shri Maniar has marked out the following merits and demerits of the land as contained in his valuation report.

“The comparable merits and demerits of land under acquisition and land under above sale instances are given below:

Details	Land under acquisition	Land under sale instance no. 1	Land under sale instance no. 2	Allowance made on comparison
Location	Situate at the junction of	Situate along Jogeshwari-	Situate along Jogeshwari-	+10%

	Jogeshwari-Vikhroli Link Road and Badruddin Tyabji Marg and 18.30 mtr. wide road	Vikhroli Link Road	Vikhroli Link Road	
Encumbrance	Vacant	Vacant	Vacant	NIL
Size	9286.50 sq. mtrs.	7032.50	6696.00	-15%
Relevant date	20-8-1987	10-4-1985	10-4-1985	+35.83%
Situation	Require on an average 1.75 mtr. depth filling for portion of tank land admeasuring about 5575.50 sq. mtr.	Does not require any cutting or filling	Does not require any cutting or filling	-14.64% (As worked out above)
Permissible FSI	1.00	1.00	1.00	Nil

Total + 16.19%

By considering rise in value of land at 15% from 10-4-1985 to 20-8-1987, the rise works out to 35.83% (for 2 years, 4 months and 10 days)

Rate of instance land = Rs.30 X 10.764 = Rs. 322.92 per s. mtr.
 To arrive at value of land = Rs.322.92 + 52.28 = Rs.375.20
 Say Rs.375/- p. s. mtr.”

129. It may be observed that the other sale instances as set out in his valuation report in this land acquisition reference are the same instances as referred by Shri.Maniar in Land Acquisition Reference no.5 of 1990. Considering all these instances Mr.Maniar has valued the land under acquisition subject matter of the present reference at Rs.425/- per sq.mtrs. as on the relevant date (20 August 1987) and has valued the land at Rs.39,46,762.50. The relevant extract from the report reads thus:

“ Therefore, it can be seen that the prevailing market value of the land was Rs.425/- p.s.mt. or more as on 20-8-1987.

Looking to sale instances and indicators referred to above, I am of the opinion that the fair market value of land will be Rs.425/- p.s.mt. as on 20-8-1987.

VALUATION:

Value of land admeasuring about
9286.50 sq.mt. at Rs.425/- p.s.mt. =
Rs.39,46,762.50

In light of above, I am of the opinion that the fair market value of acquired land will be Rs.425/- p.s.mt. as on 20-8-1987. The claimants will be entitled to 12% component and 30% solatium as provided under section 23(1A) and 23(2) of L.A.Act I 1894 respectively.”

130. The issues as framed would stand decided by the following conclusions:

Conclusion on determination of market value of the land

131. On the above deliberation, I now proceed to determine the market value of land in both these references:

132. It is quite clear from the evidence which has come on record that a case for enhancement of compensation from what was awarded by the SLAO at the rate of Rs.130/- per sq. mtr. is made out. In passing, it may be observed that the compensation as awarded by SLAO was primarily relying on sale instance nos.6 and 7 of the award, which were instances in which the date of execution of agreement was 16 June 1982 and 28 June 1982 respectively. The relevant date for the purposes of the present requisition is 20 August 1987. These sale instances apart from being old were totally not comparable. In any case, the date which was worked

out by SLAO when tested on evidence is quite unrealistic and cannot be said to be fair market value of the land.

133. It is clear that both these lands at the relevant date were located in a developing area. The lands had excellent potential of being developed for residential purposes. There were residential colonies within 100 to 500 mtrs. from the land under acquisition. Also all civic amenities were at a walkable distance. The land of claimant Tyabji in LAR No. 5 of 1990 was abutting the Jogeshwari-Vikhroli Link Road. It had a valuable frontage of 210 sq. mtrs. There is no dispute that the land fell under the residential zone as per the draft revised development plan in the year 1984 and had substantial potential for development. There was also no embargo under the ULC Act.

134. In regard to land of claimant Majas Madhu CHS in LAR No. 4 of 1900, it was a land which was having frontage of 3 roads, namely, Badruddin Tayabji Road, Jogeshwari-Vikhroli Link Road and 18.30 mtr. wide road. The proximity to schools, other residential localities is also applicable to the land of claimant Tyabji, subject matter of LAR No. 5 of 1990. However, the land of claimant Majas Madhu CHS did not have any frontage. There is an additional facet that there was a pond of an area 5575.50 sq. mtrs. which required a filling exercise to be undertaken

to bring the rate at par with the fair market value which would be determined. Hence, such deduction of the cost of filling is necessary.

135. In regard to both these lands under acquisition as noted above, they cannot be considered to be fully developed lands as in the case of instance nos. 1 and 2 ready for immediate construction and thus the rate as determined under the sale instances as discussed would be required to be applied making some adjustments/allowances. In the situation in hand and in any case the rate of land cannot be decided by a mathematical precision. Considering the rates in the comparative instances at discussed in detail and the variation of these rates, in my opinion, the fair market value of the lands can be determined and held as under:

LAR No. 4 of 1990 - Rs.300/- per sq. mtr.

LAR No. 5 of 1990 - Rs.325/- per sq. mtr.

136. In so far claimant Tyabji 's claim for injurious affection in regard to the land subject matter of acquisition in LAR No. 5 of 1990, in my opinion, this claim is required to be recognized. This is for the reason that there is a clear evidence that the remaining plot of land of claimant-Tyabji admeasuring 33541.96 sq. mtrs. had become landlocked and was rendered without any access on account of acquisition in

question. The adjoining land to this remaining plot of land was not belonging to claimant-Tyabji, as noted above. Lack of access was certainly suffered by claimant Tyabji to this balance land. In my opinion, injurious affection at the rate of 5% of the market value of the balance landlocked land would be required to be granted to claimant Tyabji as permissible under section 23(*fourthly*) of the L.A. Act.

137. Accordingly, the references are partly allowed by the following award:

- (i) It is declared that the Claimant - Majas Madhu CHS in LAR No. 4 of 1990, is entitled for compensation at market value of acquired land admeasuring 9286.5 sq. mtrs. at the rate of Rs.300/- per sq. mtrs. instead of Rs.130/- per sq. mtr. as awarded by Special Land Acquisition Officer.(9286.5 sq. Mtr. X Rs. 300 = Rs.27,85,950/-)
- (ii) In LAR No.4 of 1990 the SLAO will be entitled to deduct cost of filling quantified at Rs. 4,39,071/-. This amount be deducted from the market value of the land.
- (iii) It is declared that Claimant - M/s. Tyabji Estates Pvt. Ltd. in LAR No. 5 of 1990 is entitled for compensation at the market value of acquired land admeasuring 18156.2 sq. mtrs. at the rate of 325/- per sq. Mtrs. (18156.2 sq. Mts. X Rs.325 = Rs.59,00,765/-)
- (iv) Claimant - Tyabji Estate Pvt. Ltd. is entitled to a claim for injurious affection at the rate of 5% for land admeasuring 33541.96 sq. mtrs. as under:

33541.96 sq. mtrs. X Rs.325 per sq. mtr. =
Rs.109,01,137/-

5% of Rs.1,09,01,137=Rs.5,45,056.85
(Say Rs. Rs.5,45,056/-)

- (v) The claimants in both these LARs are entitled to the benefit of Section 23(1-A) of the L.A. Act at the rate of 12% p.a. on market value for the period commencing from 26 October 1987 to 25 October 1989.
- (vi) The claimants in both these LARs are entitled to the benefit of solatium at the rate of 30% on market value as in clause (i), (ii) and (iii) above as per the provisions of Section 23(2) of the L.A. Act.
- (vii) The claimants in both the References would be entitled to interest on the enhanced and unpaid compensation at the rate of 9% p.a. for a period of one year from the date of possession of the land being taken over i.e., from 21.11.1989 and for the further period till the actual payment/deposit of the said compensation at the rate of 15% per annum.
- (viii) The payment already made to the claimants under the award as made by the SLAO to be adjusted at the time of calculating the amount due and payable to the claimants.
- (ix) The Special Land Acquisition Officer is directed to calculate the amount due and payable to the claimants at the awarded amounts within three months from today.

- (x) It would be open to the claimants as also the acquiring body to file their respective calculation of the amounts so payable as per this award and submit it before the SLAO within two weeks without prejudice to the rights of the parties which would be considered by the SLAO.
- (xi) The SLAO thereafter shall take further steps to pay the awarded amount to the claimants or deposit the same in the Registry of this Court.
- (xii) If the amount is deposited in the Registry of this Court, the claimants are entitled to withdraw the amount without any security after the appeal period is over.

138. Partly allowed with costs.

[G.S. KULKARNI, J.]

(Judgment is corrected as per speaking to the minutes of the order dated 26 August 2020.)