A M/S. J.G. ENGINEERS PVT. LTD.

v.

UNION OF INDIA AND ANR.

(Civil Appeal No. 3349 of 2005)

B APRIL 28, 2011

[R.V. RAVEENDRAN AND MARKANDEY KATJU, JJ.]

Arbitration and Conciliation Act, 1996 – ss.34 and 28 – Respondents had awarded works contract to the appellant – C *On ground of slow progress of the appellant-contractor, the respondents terminated the contract – Dispute –Appointment of sole arbitrator as per arbitration agreement contained in contract – Appellant filed statement of claims before the arbitrator – Respondents filed reply and also filed counter* D *claims – Arbitrator awarded sum with interest and costs in favour of the appellant and rejected the counter claims of the respondents – Respondents filed application u/s.34 for setting aside the award – District Judge affirmed the award – Order reversed by the High Court in arbitration appeal filed by the* E *respondents – The respondents' contention that the arbitrator had considered and allowed some claims which were 'excepted matters' and therefore, inarbitrable, that grant of some other claims by the arbitrator violated the express provisions of clause 10(cc) of the contract, and that the* F *counter-claims of respondents were erroneously rejected, found favour with the High Court – Held: On facts, the Arbitrator had the jurisdiction to try and decide all the claims of the appellant-contractor as also the claims of the respondents – Award of the Arbitrator on claims 1, 3 and 11* G *of the appellant-contractor has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained – Judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the*

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appellant also cannot be sustained since the award on those claims was upheld by the civil court and the High Court in appeal did not find any infirmity in regard thereto – Claim No.5 was for payment of escalation under clause 10(cc) of the contract – The High Court erred in setting aside the award in regard to claim No.5 also – Once the Arbitrator recorded the finding that the contractor was not responsible for the delay and that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of respondents claiming any of the counter-claims from the contractor does not arise – Award of the Arbitrator rejecting the counter claims, therefore, upheld – Government Contract – Works Contract.

Arbitration and Conciliation Act, 1996 – ss. 34 and 28 – Arbitral award – Interference with – Jurisdiction of civil court to examine validity of arbitral award – Held: A Civil Court examining the validity of an arbitral award u/s.34 exercises supervisory and not appellate jurisdiction – A court can set aside an arbitral award, only if any of the grounds mentioned in ss.34(2)(a)(i) to (v) or s.34(2)(b)(i) and (ii), or s.28(1)(a) or 28(3) read with s.34(2)(b)(ii), are made out – An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate s.34(2)(a)(iv) and 34(2)(b) – Making an award allowing or granting a claim, contrary to any provision of the contract, would violate s.34(2)(b)(ii) read with s.28(3).

Arbitration – Arbitral award dealing with and deciding several claims – Challenge to – Held: If an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent.

Contract – Breach of a condition of contract – Right to adjudication – Held: The question whether the other party committed breach cannot be decided by the party alleging

A *breach – A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach – That question can only be decided by an adjudicatory forum, that is, a court or an Arbitral Tribunal – Arbitration.*

B **The respondents had awarded the works contract of "extension of terminal building" at Guwahati airport to the appellant. On ground of slow progress of the appellant-contractor, the respondents terminated the contract.**

C **The appellant filed writ petition. The High Court referred the parties to arbitration as per the arbitration clause contained in the works contract. The appellant filed its statement of claims before the arbitrator. The respondents filed reply and also filed four counter claims.**
D **By award dated 5.9.2001 (as amended on 22.9.2001) the Arbitrator awarded a sum of Rs.1,04,58,298/- with interest and costs in favour of the appellant and rejected the counter claims of the respondents.**

E **The respondents filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 in the District Court for setting aside the aforesaid arbitral award. The District Judge dismissed the petition holding that none of the grounds under section 34(2) were made out. This order was reversed by the High Court in**
F **arbitration appeal filed by the respondents. The respondents' contention that the arbitrator had considered and allowed some claims which were 'excepted matters' and therefore, inarbitrable, that grant of some other claims by the arbitrator violated the**
G **express provisions of clause 10(cc) of the contract, and that the counter-claims of respondents were erroneously rejected, found favour with the High Court.**

In the instant appeal, the appellant contended that
H **the respondents had committed breach and its counter-**

claims were rightly rejected and further that the arbitral award was legal and not open to challenge under any of the grounds under section 34 of the Act. A

On the contentions urged in the instant appeal, the following questions arose for consideration : B

(i) Whether the High Court was justified in setting aside the award in respect of claims 1, 3, and 11 on the ground that they related to 'excepted matters'? C

(ii) Whether the High Court was justified in setting aside the award in regard to Claim Nos. 2, 4, 6, 7, 8 and 9?

(iii) Whether High Court was justified in holding that claim 5 for escalation was barred by clause 10(cc) of the contract? D

(iv) Whether the High Court was justified in setting aside the award rejecting counter-claims 1 to 4? E

Allowing the appeal, the Court

HELD:1. A Civil Court examining the validity of an arbitral award under section 34 of the Arbitration and Conciliation Act, 1996 exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in sections 34(2)(a)(i) to (v) or section 34(2)(b)(i) and (ii), or section 28(1)(a) or 28(3) read with section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate section 34(2)(b)(ii) F G H

A read with section 28(3) of the Act. [Para 7] [501-E-G]

Re: Question (i)

2.1. As per the arbitration agreement (contained in Clause 25 of the contract) all questions and disputes B relating to the contract, execution or failure to execute the work, whether arising during the progress of the work or after the completion or abandonment thereof, "except where otherwise provided in the contract", had to be referred to and settled by arbitration. The High Court held C that claims 1, 3 and 11 of the contractor were not arbitrable as they related to excepted matters in regard to which the decisions of the Superintending Engineer or the Engineer-in-Charge had been made final and binding under clauses (2) and (3) of the contract. Clauses D (2) and (3) of the contract relied upon by the respondents, no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/ final and conclusive, in regard to certain matters. But what is made final and conclusive by clauses (2) and (3) E of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on F consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer G will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the H

delay in execution and who committed breach is not made subject to any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract. [Paras 11, 13 and 14] [503-D-E; 507-F-G; 510-D-G]

2.2. The question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. The question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator examined the said issue and recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed

A as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that provisions which make the decision of the B Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the Arbitrator on items 1, 3 C and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained. [Paras 15, 17] [510-H; 511-A; 513-G-H; 514-A-F]

D *State of Karnataka vs. Shree Rameshwara Rice Mills* (1987 (2) SCC1601: 1987 (2) SCR 398; *Bharat Sanchar Nigam Ltd. vs. Motorola India Ltd.* (2009 (2) SCC 337: 2008 (13) SCR 445 – referred to.

E Re : Question (ii)

3. The High Court did not find any error in regard to the awards on claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in regard to these six items, only on the ground that in the event of counter claims 1 F to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of counter claims 1 to 4; and that as G the award on counter claims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to claim Nos. 2, 4, 6, 7, 8 and 9 were also liable to be set aside. It is now well-settled that if an award deals with and decides several claims separately and distinctly, even H if the court finds that the award in regard to some items

is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9. [Para 18] [514-G-H; 515-A-D]

Re : Question (iii)

4.1. Section 28(3) of the Act provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction. Sub-section (1) of section 28 provides that the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India. [Para 18] [515-E-F]

4.2. Where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under section 34(2)(b) of the Act. Claim No.(5) is for payment of escalation under clause 10(cc) of the contract for work done beyond July, 1995 till the date of termination. However, escalation in price shall be available only for the work done during the stipulated period of contract including such period for which the contract was validly extended under the provisions of clause (5) of the contract, without any action under clause (2) of the contract. The respondents contend that as the Superintending Engineer levied penalty (at 10% of the estimated cost of the work) for the period 10.1.1995

A to 14.3.1996 under clause (2) of the contract, the contractor was not entitled to payment of escalation under clause 10(cc). The arbitrator held that the contractor was not responsible for the delay and the respondents were responsible for the delay. If so, the B contractor will be entitled to a valid extension under the provisions of the contract, without levy of any liquidated damages. If the contractor is entitled to such extension without levy of penalty, then it follows that under clause 10(cc), the contractor would be entitled to escalation, in C terms of the contract for the work done during the period of extension. [Para 20] [516-B-H; 517-A-B]

4.3. The stipulated date for completion was 9.1.1995. The respondents granted the first extension upto 31.7.1995 without levy of liquidated damages, vide letter D dated 24.8.1995. In fact the respondent had paid the escalation in prices under clause 10(cc) upto June 1995. The contractor was however permitted to continue the work without levy of any liquidated damages, until termination on 14.3.1996. It was only on 30.9.1999 after E the contractor had submitted its statement of claim on 17.4.1997, the respondents chose to levy liquidated damages for the period 1.10.1995 to 14.3.1996. In view of the finding of the Arbitrator that the contractor was not responsible for the delay, the contractor was entitled to F second extension from 1.8.1995 also without levy of penalty. In fact, having extended the time till 31.7.1995 without any levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30.9.1999 from 10.1.1995. The High Court committed G an error in setting aside the award in regard to claim No.5 on the ground that it violates clause 10(cc) of the contract. [Paras 21, 22] [517-B-E; 518-A-B]

Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. 2003 (5) SCC 705: 2003 (3) SCR 691 – referred to. H

7Re : Question (iv)

5.1. Once the Arbitrator recorded the finding on consideration of the evidence/material, that the contractor was not responsible for the delay and that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of respondents claiming any of the counter-claims from the contractor does not arise. [Para 23] [518-C]

5.2. The High Court proceeded on the erroneous assumption that when clauses (2) and (3) of the contract made the decisions of the Superintending Engineer/ Engineer-in-Charge final as to the quantum of liquidated damages and quantum of extra cost in getting the balance work completed, the said provisions also made the decision as to the liability to pay such liquidated damages or extra cost or decision as to who committed breach final and therefore, inarbitrable; and that as a consequence, the respondents were entitled to claim the extra cost in completing the work (counter claims 1 and 3) and levy liquidated damages (counter claim No.2) and the arbitration costs (counter claim No.4). Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge. Therefore, the rejection of the counter claims of the respondents is unexceptionable and the High Court's finding that arbitrator ought not to have rejected them becomes unsustainable. The award of the Arbitrator rejecting the counter claims is therefore, upheld. Consequently, the order of the High Court is set aside and the order of the District Court is restored. [Para 23 and 24] [519-A-F]

A **Case Law Reference:**

1987 (2) SCR 398	**referred to**	**Para 15**
2008 (13) SCR 445	**referred to**	**Para 16**
B **2003 (3) SCR 691**	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3349 of 2005.

From the Judgment and Order dated 08.02.2005 of the C Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh in Arbitration Appeal No. 1 of 2004.

A.K. Ganguly, Pranab Kumar Mullick for the Appellant.

D T.S. Doabia, Kiran Bhardwaj, Sushma Suri and V.K. Verma for the Respondents.

The Judgment of the Court was delivered by

E **R.V.RAVEENDRAN, J.** 1. This appeal is directed against the judgment dated 8.2.2005 of the Guwahati High Court allowing Arbitration Appeal No.1/2004 filed by the respondents and setting aside the judgment dated 12.12.2003 passed by Additional District Judge, Kamrup, Guwahati (by which the District court had dismissed the petition filed by respondents F filed under section 34 of Arbitration & Conciliation Act, 1996 and affirmed the Award passed by the Arbitrator dated 5.9.2001, with clerical corrections made on 22.9.2001).

2. On 26.3.1993 the respondents awarded the work of G "extension of terminal building" at Guwahati airport to the appellant. As per the contract, the date of commencement of work was 10.4.1993 and the period of completion of the work was 21 months, to be completed in different stages. As the appellant (also referred to as the 'contractor') did not complete H the first phase of the work within the stipulated time, the

respondents terminated the contract by order dated 29.8.1994. The termination was challenged by the appellant in a writ petition filed before the Gawahati High Court. By judgment dated 27.9.1994, the High Court set aside the termination and directed the respondents to grant time to the appellant till the end of January 1995 for completion of the first phase reserving liberty to the appellant to apply for further extension of time. As the work was not completed, the respondents granted an extension upto 31.7.1995 by letter dated 24.8.1995, without levying any liquidated damages. The contractor proceeded with the work even thereafter. However, as the progress was slow, the respondents terminated the contract on 14.3.1996 on the ground of non-completion even after 35 months. The appellant filed a writ petition, challenging the cancellation. The High Court by order dated 25.6.1996, noticed the existence of the arbitration agreement and referred the parties to arbitration. In pursuance of it, on a request by the appellant, the respondents appointed Mr. C.Vaswani as the sole arbitrator on 14.2.1997.

3. On 17.4.1997, the appellant filed its statement of claims. Claims 1 to 11 aggregated to Rs.2,38,86,198.31 (subsequently, reduced to Rs.2,06,70,495/-). Claim 12 was for interest at 18% per annum on the total claim amount from 20.5.1996 to date of realization. Claim 13 was for Rs.2,13,729/- as cost of arbitration. On 3.2.1999, the respondents filed their reply and also filed their four counter claims before the arbitrator aggregating to Rs. 279,54,225/-.

4. By award dated 5.9.2001 (as amended on 22.9.2001) the Arbitrator awarded a sum of Rs.1,04,58,298/- with interest and costs in favour of the appellant and rejected the counter claims of the respondents. The particulars of the amounts claimed and the awards thereon are as under:

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Claims by appellant

Claim No.	Particulars of Claim	Amount claimed by appellant	Amoun awarded by Arbitrator
1	Claim for the balance payment of 34th Running account	Rs.11,26,518	Rs.11,26,518
2,4,5	2) Claim for the payment due under 35th Running Account bill	Rs.65,64,544	Rs.8,70,517
	4) Claim for the payment for Extra items of work executed		Rs.3,27,335
	5) Claim for escalation in rates for works executed after July 1995 till the date of termination		Rs.14,59,320
3	Claim for the refund of Security Deposit	Rs.1,00,000	Rs. 1,00,000
6	Claim for the difference in scale weight and sectional weight of steel	Rs. 37,608	Rs. 37,608
7 & 8	7) Claim for "on site' overheads and establishment expenses during the extended period of 14 months beyond the stipulated date of completion.	Rs.25,57,295	Rs.17,50,000
	8) Claim for 'off-site' overheads and establishment expenses during the extended period of 14 months beyond the stipulated date of completion.		
9	Claim for loss of hire charges of machinery, shuttering materials etc. engaged for execution of the work for the period beyond the stipulated date of completion.	Rs.30,79,160	Rs.8,75,000
10	Claim for compensation for the unutilized proportionate expenses	Rs.18,01,701	Nil

	incurred for establishing the site, and setting-up of infrastructure required for performance of full value of work.		
11	Claim for the loss of anticipatory profit @ 15% on the value of balance work which could not be executed due to termination of Contract	Rs.54,03,669	Rs.39,12,000
	Total	Rs.2,06,70,495	Rs.104,58,298

Counter Claims by respondents

Counter Claim No	Particulars of Counter Claim	Amount claimed by Respondents	Amount awarded by Arbitrator
1.	Excess cost of getting the work executed through an alternative agency - recoverable as per clause (3) of the agreement	Rs.1,46,69,227	Nil
2.	Liquidated damages levied under clause (2) of the agreement	Rs.56,84,998	Nil
3.	Escalation that would be payable to the alternative agency in regard to execution of remaining work (tentative).	Rs.75,00,000	Nil
4.	Cost of Arbitration	Rs.1,00,000	Nil
	Total	Rs.2,79,54,225	Nil

The Arbitrator awarded to the contractor, simple interest @ 9% per annum on Rs.38,21,298 for the period 14.9.1996 to 31.3.1997 and simple interest @ 15% per annum on Rs.1,04,58,298 for the period 1.4.1997 to date of payment (under Claim No.12). The Arbitrator also awarded Rs.39,610/

A - towards costs (under Claim No. 13). All the counter claims of respondents were rejected.

5. On 12.12.2001, the respondents filed an application (Misc. Arbn. Case No.590/2001) under Section 34 of the B Arbitration and Conciliation Act, 1996 (for short, 'the Act') in the District Court, Guwahati for setting aside the aforesaid award. The respondents filed an additional petition in the said proceedings, under section 34 of the Act on 27.1.2003, raising additional grounds of challenge. The learned District Judge, C Guwahati dismissed the petition vide order dated 12.12.2003, holding that none of the grounds under section 34(2) were made out. This order was reversed by the Guwahati High Court, by the impugned judgment dated 8.2.2005, in Arbitration Appeal No.1/2004 filed by the respondents, recording the following findings: (i) The award on claim Nos.1, 3 and 11 D related to 'excepted matters' which were beyond the scope of the arbitration agreement and could not be adjudicated by the Arbitrator. (ii) The award on Claim No.5 was contrary to the terms of price escalation clause (clause 10(cc) of the contract) and being patently illegal, required to be set aside. (iii) The E rejection of the counter claims of respondent, by ignoring the agreed terms of contract and the legal provisions, was also patently illegal. As a consequence, the award was liable to be set aside fully, as the respondents would have been entitled to adjust the amounts found due and payable against claims 2, F 4, 6, 7, 8, 9 against their counter-claims, if allowed. In view of the said findings the High Court directed as follows :

> "In view of the above, the appeal filed by the appellants is allowed. The award passed by the Arbitrator on 5.9.2001 and corrected on 22.9.2001 as well as the order dated 12.12.2003 passed by the learned Adhoc Additional District Judge No.2, Kamrup, Guwahati in Misc. (Arbitration) Case No.590/2001, are set aside. The arbitration proceeding is remitted back to the learned arbitrator for reconsideration of the counter claims of the

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necessary adjustment of the amount payable to the contractor/claimant against his claim nos. 2,4,6,7,8,9 and 13 in terms of the finding recorded by this Court."

6. The respondents' contention that the arbitrator has considered and allowed some claims which were 'excepted matters' and therefore, inarbitrable, that grant of some other claims by the arbitrator violated the express provisions of clause 10(cc) of the agreement, and that the counter- claims of respondents have been erroneously rejected, have found favour with the High Court. The appellant contends that the award does not violate clauses (2) and (3) of the agreement making certain decisions of Superintending Engineer/Engineer-in-Charge final, nor clause 10(cc) of the agreement relating to escalations. It is also contended that respondents committed breach and the counter-claims were rightly rejected. The appellant contends the award is legal and not open to challenge under any of the grounds under section 34 of the Act.

Questions for consideration

7. A Civil Court examining the validity of an arbitral award under section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in sections 34(2)(a) (i) to (v) or section 34(2)(b)(i) and (ii), or section 28(1)(a) or 28(3) read with section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate section 34(2)(b)(ii) read with section 28(3) of the Act. On the contentions urged, the following questions arise for our consideration :

(i) Whether the High Court was justified in setting aside the award in respect of claims 1, 3, and 11 on the ground that they related to 'excepted

A matters'?

(ii) Whether the High Court was justified in setting aside the award in regard to Claim Nos. 2, 4, 6, 7, 8 and 9?

B (iii) Whether High Court was justified in holding that claim 5 for escalation was barred by clause 10(cc) of the contract?

(iv) Whether the High Court was justified in setting
C aside the award rejecting counter-claims 1 to 4?

Re : Question (i):

8. Claim No. (1) for Rs.11,26,518 relates to the payment due in regard to the 34th running bill withheld by the respondent.
D It comprises Rs.5,90,000/- levied as compensation under clause (2) of the agreement, Rs.3,17,468 withheld towards alleged risk cost in getting the work executed by an alternative agency and Rs.2,19,050 being the escalation in regard to the period January 1995 to July 1995 which was admitted by the
E respondents to be due. The Arbitrator allowed the entire claim holding that the appellant was not responsible for the delay and consequently the rescission/termination was illegal and levy of liquidated damages and recovery of excess cost in getting the work completed through an alternative agency was not
F permissible, was bad.

9. Claim No.3 was for refund of security deposit of Rs.100,000/-. The respondents had encashed the bank guarantee for Rs.1 lakh which had been issued in lieu of security deposit and forfeited the same on the ground that the contractor
G was in breach. The arbitrator held the contractor was not in breach and the forfeiture was illegal and directed that the said sum of Rupees one lakh should be refunded to the contractor.

10. Claim No.11 was for Rs.54,03,669 being the loss of
H anticipated profit in regard to the value of the unexecuted work

which would have been executed by the contractor if the contract had not been rescinded by the respondents. The contractor contended that the termination was in breach of the contract and but for such termination the contractor would have legitimately completed the work and earned a profit of 15%. The arbitrator held that the respondents were responsible for the delay, that the contractor was not in breach and the termination was therefore illegal. He held that the value of the work which could not be executed by the contractor due to wrongful termination, was Rs.3,91,21,589 and 10% thereof would be the standard estimate of the loss of profits and consequently awarded Rs.39,12,000/- towards the loss of profits, which the contractor would have earned but for the wrongful termination of the contract by the respondents.

11. As per the arbitration agreement (contained in Clause 25 of the contract) all questions and disputes relating to the contract, execution or failure to execute the work, whether arising during the progress of the work or after the completion or abandonment thereof, "except where otherwise provided in the contract", had to be referred to and settled by arbitration. The High Court held that claims 1, 3 and 11 of the contractor were not arbitrable as they related to excepted matters in regard to which the decisions of the Superintending Engineer or the Engineer-in-Charge had been made final and binding under clauses (2) and (3) of the agreement.

12. We may refer to the relevant provisions of the said contract document, that is, clauses 2, 3(Part) and 25 (Part) to decide whether the claims 1, 3 and 11 were excepted matters, excluded from Arbitration:

Clause (2):

"The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be essence of the contract and shall be reckoned from the tenth day after the date on which the

A order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as *compensation an amount equal to one percent or such smaller amount as the* B *Superintending Engineer (whose decision in writing shall be final) may decide* on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in C all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one-eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed, three eighths of the works, before one-half of such time has elapsed and D three-fourths of the work; before three-fourths of such time has elapsed. However for special jobs if a time-schedule has been submitted by the Contractor and the same has been accepted by the Engineer-in-Charge. The contractor shall comply with the said time schedule. In the event of E the contractor failing to comply with this condition, he shall be liable to pay as compensation an *amount equal to one percent or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide* on the said estimated cost of the whole work for F every day that the due quantity of work remains incomplete. Provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent, on the estimated cost of the work as shown in the tender."

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Clause 3 :

"The Engineering-in-charge may without prejudice to his right against the contractor in respect of any delay or inferior workmanship or otherwise or to any claims for

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damage in respect of any breaches of the contract and without prejudice to any rights or remedies under any of the provisions of this contract or otherwise and whether the date of completion has or has not elapsed by notice in writing absolutely determine the contract in any of the following cases:

(i) If the contractor having been given by the Engineer-in-charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in any inefficient or other improper or unworkmanlike manner, shall omit to comply with the requirements of such notice for a period of seven days thereafter or if the contractor shall delay or suspend the execution of the work so that either *in the judgment of the Engineer-in-charge (whose decision shall be final and binding) he will be unable to secure completion of the work by the date of completion* or he has already failed to complete the work by that date...

(ii) *x x x x* (not relevant)

(iii) If the contractor commits breach of any of the terms and conditions of this contract.

(iv) If the contractor commits any acts mentioned in Clause 21 hereof.

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the President of India shall have powers:

(a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under hand of the Engineer-in-Charge shall be conclusive evidence) upon such determination or rescission the security deposit of the contractor shall be liable to be forfeited and shall be absolutely at the disposal

A of Government.

(b) x x x x (not relevant)

(c) After giving notice to the contractor to measure up the work of the contractor and to take such part thereof as
B shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (*of the amount of which excess*
C *the certificate in writing of the Engineer-in-Charge shall be final and conclusive*) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under this contract or on any other account whatsoever or from his security deposit or
D the proceeds of sales thereof or a sufficient part thereof as the case may be."

In the event of any one or more of the above courses being adopted by the Engineer-in-Charge the contractor shall
E have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of contract. And in case action is taken under any of provisions aforesaid. The contractor
F shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to
G be paid the value so certified.

Clause 25:

"Except where otherwise provided in the contract all

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questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution of failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, C.P.W.D. in charge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said C.P.W.D. at the time of such appointment. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he has expressed views on all or any of the matters in dispute or difference."

(emphasis supplied)

13. Clauses (2) and (3) of the contract relied upon by the respondents, no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/final and conclusive, in regard to certain matters. But the question is whether clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject matter of arbitration. We will refer to and analyse each of the 'excepted matters' in clauses (2) and (3) of the agreement to find their true scope and ambit :

(i) Clause (2) provides that if the work remains uncommenced or unfinished after proper dates, the

A contractor shall pay as compensation for everyday's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender. *What is made final is only* B *the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for everyday's delay that is whether it should be 1% or lesser. His decision is not made final in regard to the question as to why the work was not commenced* C *on the due date or remained unfinished by the due date of completion and who was responsible for such delay.*

(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an D amount equal to 1% or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for everyday the due quantity of the work remains incomplete, subject to a ceiling of ten percent. *This* E *provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and not on the question as to whether the contractor had failed to complete the work or the portion of the work within the* F *agreed time schedule, whether the contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.*

G (iii) The first part of clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-Charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has already failed to complete the work by that date, certain H

consequences as stated therein, will follow. *What is made final by this provision is the decision of the Engineer-in-Charge as to whether the contractor will be able to secure the completion of the work by the due date of completion, which could lead to the termination of the contract or other consequences. The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of Engineer-in-Charge is made final.*

(iv) The second part of clause (3) of the agreement provides that where the contractor had made himself liable for action as stated in the first part of that clause, the Engineer-in-Charge shall have powers to determine or rescind the contract and the notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence of such termination or rescission. *This does not make the decision of the Engineer-in-Charge as to the validity of determination or rescission, valid or final. In fact it does not make any decision of Engineer-in-Charge final at all. It only provides that if a notice of termination or rescission is issued by the Engineer-in-Charge under his signature, it shall be conclusive evidence of the fact that the contract has been rescinded or determined.*

(v) After determination or rescission of the contract, if the Engineer-in-Charge entrusts the unexecuted part of the work to another contractor, for completion, and any expense is incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, the decision in writing of the Engineer-in-Charge in regard to such excess shall be final and conclusive, shall be borne and paid by the original

A contractor. *What is made final is the actual calculation of the difference or the excess, that is if the value of the unexecuted work as per the contract with the original contractor was Rs.1 lakh and the cost of getting it executed by an alternative contractor was Rs.1,50,000/-* B *what is made final is the certificate in writing issued by the Engineer-in-Charge that Rs.50,000 is the excess cost. The question whether the determination or rescission of the contractor by the Engineer-in-Charge is valid and legal and whether it was due to any breach on* C *the part of the contractor, or whether the contractor could be made liable to pay such excess, are not issues on which the decision of Engineer-in-Charge is made final.*

14. Thus what is made final and conclusive by clauses (2) and (3) of the agreement, is not the decision of any authority D on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who E committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of F the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to G any decision of the respondents or its officers, nor excepted from arbitration under any provision of the contract.

15. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to H

decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. In *State of Karnataka vs. Shree Rameshwara Rice Mills* (1987 (2) SCC 160) this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This court held :

> "Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the other officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.
>
> We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and

A recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed."

16. The question whether the issue of breach and liability are excluded from arbitration, when quantification of liquidated damages are excluded from arbitration was considered by this Court in *Bharat Sanchar Nigam Ltd. vs. Motorola India Ltd.* (2009 (2) SCC 337). This court held :

"The question to be decided in this case is whether the liability of the respondent to pay liquidated damages and the entitlement of the appellant, to collect the same from the respondent is an excepted matter for the purpose of Clause 20.1 of the General Conditions of contract. The High Court has pointed out correctly that the authority of the purchaser (BSNL) to quantify the liquidated damages payable by the supplier Motorolla arises once it is found that the supplier is liable to pay the damages claimed. *The decision contemplated under Clause 16.2 of the agreement is the decision regarding the quantification of the liquidated damages and not any decision regarding the fixing of the liability of the supplier. It is necessary as a condition precedent to find that there has been a delay on the part of the supplier in discharging his obligation for delivery under the agreement.*

It is clear from the reading of Clause 15.2 that the supplier is to be held liable for payment of liquidated damages to the purchaser under the said clause and not under Clause 16.2. The High Court in this regard correctly observed that it was not stated anywhere in Clause 15 that the question as to whether the supplier had caused any delay in the matter of delivery will be decided either by the appellant/ BSNL or by anybody who has been authorized on the terms of the agreement. Reading Clause 15 and 16 together, it is apparent that Clause 16.2 will come into operation only after a finding is entered in terms of Clause

15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, Clause 16.2 is attracted only after the supplier's liability is fixed under Clause 15.2. It has been correctly pointed out by the High Court that the question of holding a person liable for Liquidated Damages and the question of quantifying the amount to be paid by way of Liquidated Dmages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under Clause 16.2, is secondary to it.

Quantification of liquidated damages may be an excepted matter as argued by the appellant, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. Even if the quantification was excepted as argued by the appellant under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages."

(emphasis supplied)

17. In view of the above, the question whether appellant was responsible or respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the respondents were in breach and the termination of contract was illegal. Therefore, the

A respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and B the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible C for the delay and was in breach. In view of the finding of the arbitrator that the appellant was not responsible for the delay and that the respondents were responsible for the delay, the question of respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, D does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final E and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the respondents. Consequently, the award of the Arbitrator on items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, F cannot be sustained.

Re : Question (ii)

18. The arbitrator had considered and dealt with claims G (1), (2, 4 and 5), (6), (7 and 8), (9) and (11) separately and distinctly. The High Court found that the award in regard to items 1, 3, 5 and 11 were liable to be set aside. The High Court did not find any error in regard to the awards on claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in H regard to these six items, only on the ground that in the event

of counter claims 1 to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of counter claims 1 to 4; and that as the award on counter claims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to claim Nos. 2, 4, 6, 7, 8 and 9 were also liable to be set aside. It is now well-settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9.

Re : Question (iii)

19. Section 28(3) of the Act provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction. Sub-section (1) of section 28 provides that the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India. Interpreting the said provisions, this court in *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.* [2003 (5) SCC 705] held that a court can set aside an award under section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to

A the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

B 20. It is well-settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under section 34(2)(b) of the Act. Claim No.(5) is for payment of C escalation under clause 10(cc) of the contract for work done beyond July, 1995 till the date of termination. Clause 10(cc) of the agreement reads thus:

Clause 10(cc)

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"... subject to the condition that such compensation for the escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the contract is validly extended under the E provisions of clause 5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less".

Thus, escalation in price shall be available only for the work F done during the stipulated period of contract including such period for which the contract was validly extended under the provisions of clause (5) of the contract, without any action under clause (2) of the contract. The respondents contend that as the Superintending Engineer levied penalty (at 10% of the G estimated cost of the work) for the period 10.1.1995 to 14.3.1996 under clause (2) of the contract, the contractor was not entitled to payment of escalation under clause 10(cc). The arbitrator held that the contractor was not responsible for the delay and the respondents were responsible for the delay. If so, H the contractor will be entitled to a valid extension under the

provisions of the contract, without levy of any liquidated damages. If the contractor is entitled to such extension without levy of penalty, then it follows that under clause 10(cc), the contractor would be entitled to escalation, in terms of the contract for the work done during the period of extension.

21. As noticed above, the stipulated date for completion was 9.1.1995. The respondents granted the first extension upto 31.7.1995 without levy of liquidated damages, vide letter dated 24.8.1995. In fact the respondent had paid the escalation in prices under clause 10(cc) upto June 1995. The contractor was however permitted to continue the work without levy of any liquidated damages, until termination on 14.3.1996. It was only on 30.9.1999 after the contractor had submitted its statement of claim on 17.4.1997, the respondents chose to levy liquidated damages for the period 1.10.1995 to 14.3.1996. In view of the finding of the Arbitrator that the contractor was not responsible for the delay, the contractor was entitled to second extension from 1.8.1995 also without levy of penalty. In fact, having extended the time till 31.7.1995 without any levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30.9.1999 from 10.1.1995. Be that as it may.

22. We extract below the reasoning of the Arbitrator for grant of escalation for the work done from 1.8.1995 to 14.3.1996 under clause 10(cc) of the contract :

> "The escalation upto July'95 has been covered under claim no.1. The respondent has not paid any further escalation beyond July, 95, since the extension thereafter has not been granted and the contract was rescinded..... The respondent has denied the claim as the escalation is payable only for the stipulated period and period extended without levy of penalty. As I have already decided that the action of rescission of the contract and the action of levying the compensation/penalty under Clause 2 by the respondent is incorrect and the claimant was not

A responsible for the delay, the escalation for the total work done, automatically becomes payable."

The High Court therefore committed an error in setting aside the award in regard to claim No.5 on the ground that it violates B clause 10(cc) of the contract.

Re : Question (iv)

23. Once the Arbitrator recorded the finding on consideration of the evidence/material, that the contractor was C not responsible for the delay and that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of respondents claiming any of the following from the contractor does not arise:

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(i) Extra expenditure incurred in getting the balance of work completed through another contractor under clause 3 of the agreement [counter claim (1) for Rs.1,46,69,277].

E (ii) Levy of liquidated damages under clause 2 of the agreement at 10% of estimated cost of work for the delay between 10.1.1995 to 14.3.1996 [counter claim No.(2) for Rs.56,84,998].

F (iii) Claim on account of expected demand for escalation in rates payable to the alternative contractor in getting the work completed, in addition to the extra expenditure claimed under counter claim No.1 [counter claim No.(3) for tentative sum of Rs.75 lakhs to be ascertained after the work was G actually completed and the bill of the new agency is settled].

(iv) Claim for cost of arbitration [counter claim No.(4) for Rs.100,000/-].

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The High Court proceeded on the erroneous assumption that when clauses (2) and (3) of the agreement made the decisions of the Superintending Engineer/Engineer-in-Charge final as to the quantum of liquidated damages and quantum of extra cost in getting the balance work completed, the said provisions also made the decision as to the liability to pay such liquidated damages or extra cost or decision as to who committed breach final and therefore, inarbitrable; and that as a consequence, the respondents were entitled to claim the extra cost in completing the work (counter claims 1 and 3) and levy liquidated damages (counter claim No.2) and the arbitration costs (counter claim No.4). Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge. Therefore, the rejection of the counter claims of the respondents is unexceptionable and the High Court's finding that arbitrator ought not to have rejected them becomes unsustainable. The award of the Arbitrator rejecting the counter claims is therefore, upheld.

Conclusion

24. No part of the decision of the High Court is sustainable. The appeal is therefore allowed, the impugned order of the High Court is set aside and the order of the District Court dated 12.12.2003, is restored.

B.B.B. Appeal allowed.

A TRISHALA JAIN AND ANR.

v.

STATE OF UTTARANCHAL AND ANR.

(Civil Appeal Nos.7496-7497 of 2005 etc.)

B MAY 05, 2011

[ASOK KUMAR GANGULY AND SWATANTER KUMAR, JJ.]

Land Acquisition Act, 1894 – ss.23 and 24:

C

Fair market value of the acquired land – Determination of – Land Acquisition Officer applied the belting system and categorizing the land into three different categories awarded the compensation accordingly – However, Reference Court D *held that the land as a whole was similarly placed and was to be used for one purpose, thus there was no question of applying the belting system and accordingly awarded uniform compensation to all the claimants – This finding of Reference Court upheld by the High Court – Correctness of this* E *concurrent view not questioned by any of the parties before the Supreme Court – Held: The concurrent finding recorded by the Courts below having remained unchallenged before the Supreme Court need not be interfered with.*

Fair market value of the acquired land – Determination F *of – Sale instances (exemplars) – Claimants placed reliance upon two sale instances and sought compensation on that basis – Reference Court declined to consider the two sale instances produced by the claimants – Justification of – Held: Justified – Both the seller and the purchaser in the sale* G *instances relied upon by the claimants were either claimants in different claim petitions or belonged to the same family – The claimants had full knowledge of acquisition of land as well as the purpose for which the said land was sought to be acquired – Circumstances and evidence clearly indicate that*

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there was clear attempt on the part of the claimants to execute sale deeds for the purpose of hiking up land price just before acquisition to get more compensation – The said two sale instances were sham, collusive, lacked bona fides and were executed with the intention to raise the price of the land in question with the pretence of it being actual market value – Decision of Reference Court rightly upheld by the High Court.

Determination of market value of acquired land – Principle of deduction in land value covered by a comparable sale instance – Applicability of –Deduction on account of expenses of development of the site – Held: Normally deduction is to be applied on account of carrying out development activities like providing roads or civic amenities such as electricity, water etc. when the land has been acquired for construction of residential, commercial or institutional projects – It shall also be applied where the sale instances (exemplars) relate to smaller pieces of land and in comparison the acquisition relates to a large tract of land – In addition thereto, deduction can also be applied on account of wastage of land – The cases where the acquired land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of 'no deduction' – Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of 'no deduction' may be applied – In the instant case, there is evidence on record to show that plotting was done only on part of the acquired land and the land is surrounded by colonies like ITBP etc. but, there is no evidence to show that the acquired land itself is developed and is having all the required facilities and amenities – It may be a case where less deduction may be applied but certainly it is not a case of 'no deduction' – It also cannot be believed,

A *in the absence of specific documentary evidence, that no further development is required on the acquired land – Under the circumstances, no infirmity in the approach of the High Court in applying the principle of deduction – In the facts and circumstances of the present case, deduction of 10% from the*
B *market value on account of development charges and other possible expenditures was justifiable and called for.*

Determination of Compensation – Application of principle of guesstimate for determining the amount of compensation – Held: More often than not, it is not possible to fix the
C *compensation with exactitude or arithmetic accuracy – Depending on the facts and circumstances of the case, the Court may have to take recourse to some guesswork while determining the fair market value of the land and the consequential amount of compensation that is required to be*
D *paid to the persons interested in the acquired land – 'Guess' as understood in its common parlance is an estimate without any specific information while 'calculations' are always made with reference to specific data – 'Guesstimate' is an estimate based on a mixture of guesswork and calculations and it is a*
E *process in itself – 'Guesstimate' is with higher certainty than mere 'guess' or a 'conjecture' per se – However, principle of some guesswork would have hardly any application in a case of no evidence – Discretion of the court in applying guesswork to the facts of a given case is not unfettered but has to be*
F *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 ss.23 and 24 of the Act and cannot be made in detriment thereto – On facts, it is a case of acquisition of land*
G *which is situated on a reasonably good location surrounded by developed areas having civic amenities and facilities and further development activity was going on in nearby areas – The land acquired had the potential of being developed for residential or institutional purposes and the same was*
H *acquired for construction of a Government Polytechnic*

Institute – Therefore, it is a case where the Court should apply minimal deduction which will meet the ends of justice and would help in determining just and fair compensation for the land in question – 10% deduction from the market value of the acquired land would meet the ends of justice.

The instant appeals came up before this Court as a result of a common Notification issued under Section 4(1) of the Land Acquisition Act, 1894. The following common questions arose for consideration:

I. **Whether or not the belting system ought to have been applied for determination of fair market value of the acquired land?**

II. **What should be the just and fair market value of the acquired land on the date of issuance of notification under Section 4 of the Act?**

III. **Whether there ought to have been any deduction after determining the fair market value of the land?**

IV. **What compensation and benefits are the claimants entitled to?**

Disposing of the appeals, the Court

HELD:

Question No. 1.

1. The Special Land Acquisition Officer (SLAO), while giving its award had applied the belting system and categorizing the land into three different categories had awarded the compensation accordingly. However, the Reference Court had held that the land as a whole was similarly placed and was surrounded by developed areas and it was to be used for one purpose, i.e. construction

A of Government Polytechnic Institute, thus there was no question of applying the belting system. Keeping in view the documentary and oral evidence on record, the Reference Court set aside the belting system and awarded uniform compensation to all the claimants. This
B finding of the Reference Court was upheld by the High Court in the impugned judgments. The correctness of this concurrent view has also not been questioned by any of the parties in the present appeals. Therefore, concurrent finding recorded by the Courts below which
C remained unchallenged before this Court need not be disturbed by this Court. [Para 10] [543-F-H; 544-A-B]

Question No. II

2.1. The principal evidence relied upon by the
D claimants in all these cases are the two sale instances shown at serial Nos. 109 and 110. According to the claimants, they were entitled to compensation on the basis of these two sale instances. From the factual matrix the question that requires consideration of this Court is
E whether the Reference Court was justified in law with reference to the facts on record in declining to consider the two sale instances produced by the claimants at serial Nos. 109 and 110 or in other words, was it justified on part of the Reference Court to keep them outside the
F zone of consideration while determining the market value of the acquired land. It cannot be disputed that both the seller and the purchaser in sale instances at serial Nos. 109 and 110 are either claimants in different claim petitions or belong to the same family. The claimants had
G full knowledge of acquisition of land and as well as the purpose for which the said land was sought to be acquired. [Paras 11, 12 and 13] [544 -C-D; 546-E-G; 547-B]

2.2. A fraudulent move or design is not capable of

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direct proof in most cases; it can only be inferred. Under such circumstances, the Court has to take a general view keeping in mind the facts and circumstances of the case with particular reference to the intent of parties, their action in furtherance thereto and the object sought to be achieved by them. In the instant case, it is not in dispute that these sale deeds have been executed in favour of the family members or persons known to the claimants. These are circumstances and evidence which clearly indicate that the sale instances relied upon by the claimants are result of collusion between these parties. There was clear attempt on the part of the claimants to execute sale deeds for the purpose of hiking up land price just before acquisition to get more compensation. These two sale instances which have been executed just about two months prior to the issuance of the notification under Section 4(1) stand out as transactions which are sham, collusive, lack bona fide and have been executed with the intention to raise the price of the land in question with the pretence of it being actual market value. There is no infirmity in this view of the Reference Court which was rightly upheld by the High Court. [Paras 13 and 14] [547-C-G]

Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari **(1950) 1 SCR 852 – relied on.**

A.P. State Road Transport Corporation, Hyderabad v. P. Venkaiah **(1997) 10 SCC 128: 1997 (3) SCR 1054;** *Cement Corporation of India v. Purya* **(2004) 8 SCC 270;** *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona* **(1988) 3 SCC 751: 1988 (1) Suppl. SCR 531 and** *State of Haryana v. Ram Singh* **(2001) 6 SCC 254: 2001 (3) SCR 1178 – referred to.**

Question No. III

3.1. The law with regard to applying the principle of

A deduction to the determined market value of the acquired land is quite consistent, though, of course, the extent of deduction has varied very widely depending on the facts and circumstances of a given case. It is not possible to state precisely the exact deduction which could be made
B uniformly applicable to all the cases. Normally the rule is that deduction is to be applied cn account of carrying out development activities like providing roads or civic amenities such as electricity, water etc. when the land has been acquired for construction of residential,
C commercial or institutional projects. It shall also be applied where the sale instances (exemplars) relate to smaller pieces of land and in comparison the acquisition relates to a large tract of land. In addition thereto, deduction can also be applied on account of wastage of
D land. [Para 18] [549-H; 550-A-C]

3.2. It is also neither possible nor appropriate to stricto sensu define a class of cases where the Court would not apply any deduction. This again would be dependant upon the facts and circumstances of a given
E case. The cases where the acquired land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of 'no deduction'.
F Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of
G 'no deduction' may be applied. These may be the cases where least or no deduction could be made. Such cases are exceptional and/or rare as normally the lands which are proposed to be acquired for development purposes would be agricultural lands and/or semi or haphazardly
H developed lands at the time of issuance of notification

under Section 4(1) of the Act, which is the relevant time to be taken into consideration for all purposes and intents for determining the market value of the land in question. [Para 19] [550-E-H; 551-A-B] A

3.3. It is evident that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits. This Court, depending on the facts and circumstances of each given case, has taken the view that deduction on account of expenses of development of the sites could vary from 10% to 86.33% depending on the nature of the land, its situation, the purpose and stage of development [Paras 20, 21] [552-H; 553-A-D] B C D E

3.4. In the present case, there is evidence on record to show that plotting has been done only on part of the acquired land and the land is surrounded by colonies like ITBP etc. but, there is no evidence to show that the acquired land itself is developed and is having all the required facilities and amenities. It may be a case where less deduction may be applied but certainly it is not a case of 'no deduction'. It also cannot be believed, in the absence of specific documentary evidence, that no further development is required on the acquired land. The claimants, on whom the onus lies to prove inadequacy of compensation have not even stated that whether under the relevant laws they are expected to leave any F G H

A **part of their land open when they are permitted to raise construction on the land in question. Under these circumstances, there is no infirmity in the approach of the High Court in applying the principle of deduction. A deduction of 10% from the market value on account of**
B **development charges and other possible expenditures would be justifiable and called for in the facts and circumstances of the present case. [Para 25] [556-C-F]**

Land Acquisition Officer, Kammarapally Village v. Nookala Rajamallu **(2003) 12 SCC 334: 2003 (6) Suppl.**
C **SCR 67;** *Bhagwathula Samanna & Ors v. Special Tahsildar & Land Acquisition Officer* **(1991) 4 SCC 506: 1991(1) Suppl. SCR 172;** *K.S. Shivadevamma v. Assistant Commissioner and Land Acqusition Officer* **(1996) 2 SCC 62: 1995(6) Suppl. SCR 364;** *Ram Piari v. Land Acquisition Collector, Solan*
D **(1996) 8 SCC 338: 1996 (3) SCR 307;** *Hasanali Walimchand (Dead) by L v. State of Maharashtra* **(1998) 2 SCC 388: 1998 (1) SCR 1;** *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona* **(1988) 3 SCC 751: 1988 (1) Suppl. SCR 531;** *V. Hanumantha Reddy (Deceased) by L v. Land*
E *Acquisition Officer & Mandal R. Officer* **(2003) 12 SCC 642;** *Atma Singh v. State of Haryana* **(2008) 2 SCC 568: 2007 (12) SCR 1120 and** *Charan Dass v. Himachal Pradesh Housing & Urban Development Authority* **(2010) 13 SCC 398: 2009 (14) SCR 163 – referred to.**

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Question No. IV:

Determination of Compensation – Application of principle of guesstimate for determining the amount of compensation to be awarded for the land acquired under
G **the Act**

4.1. Acquisition of land is an act falling in the purview of eminent domain of the State. It essentially relates to the concept of compulsory acquisition as opposed to
H **voluntary sale. It is trite that no person can be deprived**

of his property save by authority of law in terms of Article 300A of the Constitution of India. The provisions of the Act provide a complete mechanism for 'deprivation of property in accordance with the law' as stated under the Act. Justifiability and fairness of such compensation is subject to judicial review within the confines of the four corners of the Act. Once the lands are acquired under the Act, the persons interested therein are entitled to compensation as per the provisions of the Act. Thus, in the present case the land in question has been acquired under the provisions of a law which specifically provide that acquisition can only be for a public purpose and upon payment of compensation to the claimants in accordance with law. The compensation payable to the claimants has to be computed in terms of Sections 23 and 24 of the Act. The market value of the land has to be determined at the date of the publication of the notification under Section 4(1) of the Act, after taking into consideration what is stated under Sections 23(1), 23(1A), 23(2) and excluding the considerations stated under Section 24 of the Act. More often than not, it is not possible to fix the compensation with exactitude or arithmetic accuracy. Depending on the facts and circumstances of the case, the Court may have to take recourse to some guesswork while determining the fair market value of the land and the consequential amount of compensation that is required to be paid to the persons interested in the acquired land. [Para 26] [557-A-F]

4.2. 'Guess' as understood in its common parlance is an estimate without any specific information while 'calculations' are always made with reference to specific data. 'Guesstimate' is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time 'guess' cannot be treated synonymous to 'conjecture'. 'Guess' by itself may be a statement or

A result based on unknown factors while 'conjecture' is made with a very slight amount of knowledge, which is just sufficient to incline the scale of probability. 'Guesstimate' is with higher certainty than mere 'guess' or a 'conjecture' per se. The concept of 'guesswork' is B not unknown to various fields of law. It has been applied in cases relating to insurance, taxation, compensation under the Motor Vehicles Act as well as under the Labour Laws. All that is required from a Court is that such guesswork has to be used with greater element of C caution and within the determinants of law declared by the Legislature or by the Courts from time to time. [Paras 27, 28] [557-G-H; 558-A-C]

4.3. Under the Act, as settled by various judgments of this Court, there are different methods of computation D of compensation payable to the claimants, for example it can be based upon comparable sale instances, awards and judgments relating to the similar or comparable lands, method of averages, yearly yields with reference to the revenue earned by the land etc. Whatever method E of determining the compensation is applied by the court, its result should always be reasonable, just and fair as that is the purpose sought to be achieved under the scheme of the Act. For attaining that purpose, application of some guesswork may be necessary but this principle F would have hardly any application in a case of no evidence. In other words, where the parties have not brought on record any evidence, then the court will not be in a position to award compensation merely on the basis of imagination, conjecture etc. [Para 32] [561-C-F]

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4.4. The Court may apply some guesswork before it could arrive at a final determination, which is in consonance with the statutory law as well as the principles stated in the judicial pronouncements. The guesswork has to be used for determination of H

compensation with greater element of caution and the principle of guesstimation will have no application to the case of 'no evidence'. This principle is only intended to bridge the gap between the calculated compensation and the actual compensation that the claimants may be entitled to receive as per the facts of a given case to meet the ends of justice. It will be appropriate 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 and 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. Applying these principles to the facts of the present case, this Court has to take recourse to the 'principle of guesstimation' inasmuch as it is essential for fixation of fair market value of the land which shall be the basis for determining the compensation payable to the claimants. [Paras 33, 34] [561-F-H; 562-A-E]

4.5. All the claimants in the present appeals have primarily relied upon the sale instances shown at serial Nos. 109 and 110. These sale instances have rightly been ignored by the Courts below. Besides the fact that these sale deeds are executed between the members of the family, the claimants had full knowledge of the Government's intention to acquire these lands, for the purpose specified, even prior to issuance of notification under Section 4(1) of the Act. These are reasons enough to doubt the consideration paid in these sale deeds. The SLAO, in his Award, has taken note of 140 sale instances immediately preceding the issuance of Notification under Section 4(1) of the Act. The Reference Court specifically

A recorded that the highest value reflected in these 140 sale instances is Rs. 12,55,550.50 per acre, except in sale instances at serial Nos. 109 and 110 produced by the claimants. The claimants did not produce any other evidence except these two sale instances which had B been executed between the members of the family and contained unreasonably high price of the land. There is tremendous gap between the prices of the land fetched in all other sale deeds on one hand, the highest being Rs. 12,55,550.50 per acre and that in sale deeds executed by C the claimants between themselves on the other hand which is Rs. 34,87,648 per acre, for sales effected within a span of 2-3 days for similarly situated lands in the same village. It certainly arouses suspicion in the mind of the Court as to the intention behind execution of these sale D deeds. Ex facie they appear to have been executed to hike up the price of the land just before the issuance of Notification under Section 4(1) of the Act. If considered from the point of view of a reasonable man, all these circumstances clearly fall beyond the ambit of coincidence and appear to have been 'managed' to E achieve the end of receiving higher compensation. The sale instances at serial Nos. 109 and 110 produced by the claimants are liable to be ignored for the purposes of fixation of market value of the acquired land as these transactions are sham and lack bona fide. The two F exhibits produced by the claimants offend the very essence of the parameters stated under Section 23 of the Act. Thus, the view taken by the Reference Court and the High Court, rejecting these instances as collusive and sham is liable to be sustained. The sale instance shown G at serial No. 108 is certainly an exemplar which can be taken into consideration. This is a sale deed executed on 29th November, 1991 where a land admeasuring 0.90 acres has been sold at a rate of Rs.12,55,550.50 per acre. As far as the location and potential of this land is H concerned, it is situated at a distance of 1½ furlong of the

acquired land in the same village. It is the case of the claimants in all these appeals that the acquired land is surrounded by developed areas like ITBP Colony on the North and there was a 20 feet wide passage ending on the acquired land. Facilities of post office, electricity, hospital, schools etc. were available in those colonies which are very close to the acquired land. The Reference Courts, in their respective awards, also noticed that heavy construction activity was going on nearby Shimla Road and the value of this land is continuously rising. Another relevant piece of evidence with reference to potential and location of the land is the statement of PW-4, an Architect by profession. He claims to have visited the site and made plans to divide the land in question into plots after making provision for civic amenities, children park etc. In these circumstances, it is difficult to doubt that the land in question has substantial potential and is located adjacent to developed areas. According to this witness, there has been a decreasing trend in the value of the land in that area. The declaration under Section 6 was issued in April, 1992 itself at a time when the prices had started falling. The cumulative effect of the documentary and oral evidence on record is that it is a case of acquisition of land which is situated on a reasonably good location surrounded by developed areas having civic amenities and facilities and further development activity was going on in nearby areas. It was also submitted by the claimants that plotting has already been done on the acquired land and some plots of land have been sold immediately prior to the issuance of the Notification under Section 4(1) of the Act. It is evident that the land acquired had the potential of being developed for residential or institutional purposes and the same was acquired for construction of a Government Polytechnic Institute. Therefore, it is a case where the Court should apply minimal deduction which will meet the ends of justice and would help in determining just and fair

A B C D E F G H

A compensation for the land in question. This Court is of the considered view that 10% deduction from the market value of the acquired land would meet the ends of justice. The sale instance at serial No. 108 falls in the Revenue Estate of the same Village and is situated at a distance B of 1½ furlong from the acquired land. The acquired land belonging to the claimants forms part of Khasra No.39/2 while, in the same Reveue Estate, the sale instance at serial No. 108 is part of Khasra No. 410. Thus a sale deed related to a land in such proximity of time and distance C cannot be said to be incomparable sale instance, i.e. it has to be taken as a comparable sale instance. Though it relates to the sale of a smaller plot of land but is certainly bigger than the land sold by the claimants between themselves. Its location and potential, if not identical in D absolute terms, is certainly comparable for the purposes of determining market value of the land in question. It is a well established principle that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with E a rider that the Court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. Keeping in view the surrounding developed areas and location and potential of the land it will meet the ends of justice if 10% deduction is made F from the estimated market value of the acquired land. The comparable sale instance under serial No. 108 depicted the fair value of land in that area at the time of issuance of Notification under Section 4(1) of the Act which is Rs.12,55,550.50 per acre. The time gap between this sale G instance and issuance of said Notification is merely two months which would hardly call for any increase in the said value but to balance the equities between the parties we would round off the figure to Rs. 13,00,000 per acre. By applying the principle of guesstimate, thus, the market H value of the acquired land is determined at Rs. 13,00,000

per acre as on the date of the issuance of the Notification under Section 4(1) of the Act. Deducting 10% therefrom, it would come to Rs.11,70,000 per acre which will be the compensation payable to the claimants with statutory benefits and interests thereupon in accordance with law. [Paras 35 to 44] [562-F; 563-A-H; 564-A, F-G; 565-C-H; 566-A-H; 567-A-H]

Charan Dass v. Himachal Pradesh Housing & Urban Development Authority **(2010) 13 SCC 398: 2009 (14) SCR 163;** *Thakur Kamta Prasad Singh (Dead) through LRs v. State of Bihar* **(1976) 3 SCC 772: 1976 (3) SCR 585;** *Special Land Acquisition Officer v. Karigowda* **(2010) 5 SCC 708: 2010 (5) SCR 164 and** *Commissioner of Central Excise, Jaipur v. Rajasthan Spinning and Weaving Mills Ltd.* **2007 (12) SCR 703 – referred to.**

Case Law Reference:

(1950) 1 SCR 852	relied on	Para 13
1997 (3) SCR 1054	referred to	Para 16
(2004) 8 SCC 270	referred to	Para 16
2001 (3) SCR 1178	referred to	Para 17, 38
2003 (6) Suppl. SCR 67	referred to	Para 18, 21
1991 (1) Suppl. SCR 172	referred to	Para 20, 23
1995 (6) Suppl. SCR 364	referred to	Para 21
1996 (3) SCR 307	referred to	Para 21
1988 (1) Suppl. SCR 531	referred to	Para 21
1998 (1) SCR 1	referred to	Para 21
(2003) 12 SCC 642	referred to	Para 22
2007 (12) SCR 1120	referred to	Para 24
2009 (14) SCR 163	referred to	Para 24, 28

A | **1976 (3) SCR 585** | **referred to** | **Para 29**

2010 (5) SCR 164 | **referred to** | **Para 30**

2007 (12) SCR 703 | **referred to** | **Para 31**

B CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7496-7497 of 2005 etc.

From the Judgment & Order dated 20.07.2005 of the High Court of Uttaranchal at Nainital in First Appeal No. 920 & 921 of 2001.

C

WITH

C.A. Nos. 7498-7499 of 2005, 1122 of 2011 & 3613 of 2008.

R.S. Hegde, Girish Ananthamurthy, P.P. Singh, Braj Kishore Mishra, Aparna Jha, Abhishek Yadav, Vikram D Patralekh, Satyajit A. Desai, Som Nath Padhan for the Appellants.

Rachna Srivastava, Jitendra Mohan Sharma, Vijay K. Jain for the Respondents.

E

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. By this common judgment, we propose to dispose of the afore-noticed six Civil Appeals as they arise from different judgments of the High Court of F Uttaranchal but are result of a common Notification issued under Section 4(1) of the Land Acquisition Act, 1894 (in short the 'Act') and thus are based upon similar facts and documentary and oral evidence.

G **FACTS:**

C. A. Nos.7496-7497 of 2005 and 7498-7499 of 2005

2. On 30th January, 1992, the Government of Uttar Pradesh (now the State of Uttaranchal) issued a Notification

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under Section 4(1) of the Act for acquiring some land for a public purpose, namely the construction of Government Polytechnic Institute in the District of Dehradun. This Notification came to be published in the Official Gazette on 22nd February, 1992. On 18th April 1992, declaration under Section 6(1) of the Act was issued which was published in the Official Gazette on 12th May, 1992 identifying the land admeasuring 12.85 acres for acquisition for the said purpose in village Sewala Kalan, Pargana Kendriya Doon, District Dehradun, out of which lands admeasuring 4.58 acres and 3.031 acres belonged to the first and the second claimant respectively. In furtherance to this Notification, possession of the acquired land was taken on 7th July, 1992. The Special Land Acquisition Officer (in short the 'SLAO') pronounced his award on 8th June, 1993. While determining compensation, the SLAO applied belting system to the acquired land and assessed the market value of the first belt admeasuring 0.56 acres at the rate of Rs. 9,78,223.40 per acre, second belt admeasuring 1.38 acres at the rate of Rs. 6,52,482.27 per acre and for the third belt admeasuring 10.91 acres at the rate of Rs. 4,39,362.70 per acre. However, the claimants, being dissatisfied with the award of the SLAO, filed applications under Section 18 of the Act which in turn came to be referred to the Court of competent jurisdiction (hereinafter referred to as the 'Reference Court').

3. The Reference Court, in LA Case No. 386 of 1993, considered the list of 140 sale instances attached with the award of the SLAO. It noticed that the SLAO had relied on sale instance at serial no. 43 related to land admeasuring 0.094 acre for a total consideration of Rs. 92,000 and assessed the market value of acquired land at the rate of Rs. 9,78,723 per acre before applying the belting system. This sale deed was executed on 10th June, 1991 and the land was from the revenue estate of the same village but at some distance from the acquired land. The Reference Court also noticed the evidence of DW 1, Ram Singh, who had stated

A that ITBP quarters are located to the north of the acquired land; and to the east of ITBP Colony, is a 20 feet wide passage which ends on the acquired land. A high tension line of 1100 K.V. also runs near the acquired land. This witness admitted that the land in question was full of residential B potentialities. Reliance was also placed upon the statements of PW7 and PW8 in regard to the urbanization of the surrounding areas and the potential of the land in question for building construction and residential purposes.

C 4. Out of those 140 sale instances, sale instance at serial Nos. 109 and 110 are stated to be the sale deeds executed on 26th November, 1991 and 27th November, 1991, which were heavily relied upon by the Reference Court. The Reference Court vide its judgment-cum-award dated 12th May, 1995 held application of belting system improper as entire D land was acquired for one purpose, i.e. construction of Government Polytechnic Institute. It determined the market value of the land at the rate of Rs. 6,40,000 per bigha and after applying 20% deduction, enhanced compensation to flat rate of Rs. 5,12,000 per bigha along with other statutory E benefits.

5. The State, aggrieved by the enhancement of compensation awarded to the claimants by the Reference Court, preferred appeals being First Appeal Nos. 920-921 of F 2001, before the concerned High Court. The High Court vide its judgment dated 20th July, 2005, primarily accepted the findings recorded by the Reference Court on merits and merely raised the deduction from 20% to 33.33% thus awarding the compensation at the rate of ` 4,26,667 per G bigha. The High Court recorded a definite finding that the Reference Court was fully justified in setting aside the order of the SLAO applying belting system for determination of compensation in relation to the acquired land. It also did not consider it appropriate to rely upon the sale instances placed on record by the State and practically affirmed the findings of H

the Reference Court including finding based upon sale instances at serial Nos. 109 and 110 for determining the market value of the acquired land. The High Court modified the order of the Reference Court only by raising the deduction on account of development charges and fixing of the final amount of compensation as afore-indicated.

6. Against the above judgment of the High Court, Civil Appeal Nos.7498-7499 of 2005 have been preferred by the State of Uttaranchal while Civil Appeal Nos. 7496-7497 of 2005 have been preferred by the claimants.

C.A. No. 1122 OF 2011

7. Civil Appeal No. 1122 of 2011 has been preferred by the State of Uttaranchal against the judgment of the Uttaranchal High Court dated 9th March, 2006 passed in First Appeal Nos. 918 and 919 of 2001. Vide that order the Court had primarily relied upon another judgment of the Division Bench of that Court passed in First Appeal Nos. 920-921 of 2001 (in the case of *State of U.P. through Collector, Dehradun v. Smt. Trishla Jain*) and awarded compensation at the rate of Rs. 4,26,667 per bigha reducing the compensation of Rs. 5,12,000 per bigha as awarded by the Reference Court. The High Court in this case had echoed in entirety the reasoning and compensation awarded by the other Bench in the case of *Trishala Jain* (supra). This judgment of the High Court, impugned in Civil Appeal No. 1122 of 2011, therefore has to be treated at parity for all intents and purposes with the impugned judgment in Civil Appeal Nos. 7496-7497 of 2005 and Civil Appeal Nos. 7498-7499 of 2005.

C.A. No. 3613 of 2008

8. Civil Appeal No. 3613 of 2008 is directed against the judgment of the Uttaranchal High Court dated 11th May, 2006 passed in First Appeal Nos. 60-63 of 2001. It is necessary

A for us to notice the facts giving rise to this appeal separately because there are certain distinguishing features with regard to factual matrix as well as evidence of this case. The land in question in this case also forms part of the land admeasuring 12.85 acres sought to be acquired by the Notification dated
B 30th January, 1992 issued under Section 4(1) of the Act and is covered by the common award passed by the SLAO on 8th June, 1993 awarding the compensation at the same rate as in other cases. The claimants herein made a separate reference under Section 18 of the Act and the Reference
C Court, in LA Case No. 121 of 1994, awarded compensation at the rate of Rs. 12,50,000 per acre (i.e. Rs. 2,38,095.24 per bigha approximately) in addition to granting other statutory benefits and interests. It needs to be noticed that the two sale instances at serial Nos. 109 and 110, which were the
D foundation of the judgment pronounced by the Reference Court in other cases, i.e. sale deeds dated 26th November, 1991, and 27th November,1991, had been rejected on the ground that they were not admissible in evidence as neither the vendor nor the vendee had been produced to prove the sale instances in Court. The Reference Court also noticed the
E contention raised on behalf of the State, i.e. these sale instances were collusive. It will be useful to refer to the relevant part of the judgment of the Reference Court which reads as under:

F "The respondent No.2 have (sic) taken a special stand in his written statement that the sale deed executed by Sri Viresh Jain was forged and fictitious and collusive and no reliance can be placed on such a sale deed. He has further argued that the judgment passed in L.A. Case
G No. 386 of 1993 *Smt. Trishla Jain vs. Collector and another* in such circumstances cannot be made the basis for awarding compensation in the present case. The rtno. 2 has filed voluminous documents in support of their case that the sale deed executed by Sri Viresh Jain were
H collusive and were made only to create evidence of hither

compensation. He has further filed various documents, which supports the contention of the respondent no. 2 that Sri Dinesh Jain and Sri Viresh Jain themselves offered their 100 bigha of land in village phoolsani for the purpose of Government polytechnic. He has also filed documents and the copy of the Selection Committee in which Sri Manoj Kumar Jain, Upkhand Adhikari, U.S.E.B. was a member, Sri Manoj Kumar Jain was examined as a witness. He was admitted that he is the brother in law of Sri Dinesh Jain and Sri Viresh Jain. He has also admitted that he was member of the selection committee which was to select the land for Government polytechnic. Various other documents were also filed by the respondent no. 2 vide which the signatures of Jinendra Kumar Jain and Smt. Veena Kumar Jain were identified by Sri Dinesh Jain. His sole concentration was that the sale deed executed by Sri Viresh Jain was collusive and since Sri Manoj Kumar Jain was one of the member of the selection committee appointed for the acquisition of land for Government Polytechnic, the information was leaked to Sri Viresh Jain and, therefore, they manipulated these two sale deeds by transferring the land to their near relations say the sister and the son of his BUA without passing valid consideration. The learned counsel for the respondent no. 2 has placed reliance on the law laid down by the Hon'ble Supreme Court in AIR 1951 page (sic) 16 *Yashvant Deoro vs. Jai Chand Ram Chand*. It is correct that the fraudulent motive or design is not capable of direct proof in most of the cases. Such intention could only be inferred. It is worthy to point out that the two sale deeds relied upon by the claimants executed by Sri Viresh Jain in favour of Sri Jinendra Kumar Jain and Smt. Veena Kumar Jain have not been proved in accordance with law as laid down by the Hon'ble Supreme Court in as much as vendee or vendor of these sale deeds or any attesting witnesses have not been produced in evidence. Therefore, they cannot be

made the basis of awarding of compensation in the present case. The judgment in L.A. Case No. 386 of 1993 *Smt. Trishala Jain v. Collector and another* is under appeal and the entire matter with regard to the alleged collusive sale deed is yet to be thrashed out. Therefore, it is not fair and justified for this court to comment upon these sale deeds. For the purpose of decision of this case it is only sufficient, if these two sale deeds are discarded and if they are not considered and not made the basis for awarding compensation in these cases. Therefore, it is held that these two sale deeds cannot be made basis for awarding any compensation, in the present case and the argument of the claimants fails in this respect."

Having held thus, the Reference Court relied upon the sale instance at serial No. 108, out of 140 sale instances, of the list produced and proved by the SLAO. As per the sale instance at serial No. 108, a land admeasuring 0.90 acre was sold at the rate of Rs. 12,55,550.50 per acre on 29th November, 1991. Examining this document with other evidence on record, particularly statement of DW2, the Reference Court finally awarded compensation at the rate of Rs. 12,50,000 per acre without applying any deduction.

The claimants, aggrieved by the above judgment of the Reference Court dated 6th February, 2001, preferred an appeal before the Uttaranchal High Court. The High Court, vide its judgment dated 11th May, 2006, while referring to the different judgments of this Court as well as of different High Courts, opined that the Reference Court had fallen in error of law in not applying, to a certain extent, deduction from the market value determined by that court in accordance with law. The High Court did not interfere with the determination of the market value of the acquired land but applied a deduction of 33.33% on such value and finally awarded compensation to the claimants at the rate of Rs. 8,33,334 per acre with other

statutory benefits and interests thereupon. Dissatisfied with this judgment of the High Court reducing the compensation awarded by the Reference Court, the claimants-Krishna Devi and others have filed the present appeal before this Court.

Questions of Fact and Law that fall for Determination:

9. On examination of the present appeals, the following common questions arise for consideration of this Court:

I. Whether or not the belting system ought to have been applied for determination of fair market value of the acquired land?

II. What should be the just and fair market value of the acquired land on the date of issuance of notification under Section 4 of the Act?

III. Whether in the facts and circumstances of the present case there ought to be any deduction after determining the fair market value of the land?

IV. What compensation and benefits are the claimants entitled to?

Question No. 1.

10. As already noticed, the SLAO, in all cases, while giving its award had applied the belting system and categorizing the land into three different categories had awarded the compensation accordingly. However, the Reference Court had held that the land as a whole was similarly placed and was surrounded by developed areas and it was to be used for one purpose, i.e. construction of Government Polytechnic Institute, thus there was no question of applying the belting system. Keeping in view the documentary and oral evidence on record, the Reference Court set aside the belting system and awarded uniform compensation to all the claimants. This finding of the

A Reference Court was upheld by the High Court in the impugned judgments. The correctness of this concurrent view has also not been questioned by any of the parties in the present appeals before us. Therefore, concurrent finding recorded by the Courts below which remained unchallenged
B before this Court need not be disturbed by this Court.

Question No. II

11. Now, we have to examine the most important question arising in the present appeal as to how this Court should
C determine the fair market value of the acquired land in the given facts and circumstances. First of all, we need to refer to the evidence that was produced by the parties in support of their respective claims. The principal evidence relied upon by the claimants in all these cases are the two sale instances
D shown at serial Nos. 109 and 110. These were executed by Shri Viresh Jain, in favour of Jitendra Kumar and Smt. Veena Kumari, on 26th November, 1991 and 27th November, 1991 respectively. These lands are situated in Khasra No. 39/2, a part of which was acquired under the same Notification. Under
E these sale deeds areas of 440.8 sq. yards and 283.3 sq. yards were sold at the rate of Rs. 32,72,603.49 and Rs. 34,87,648.30 per acre respectively. The claimants in different cases examined themselves to prove these sale instances as a whole, as they are the main witnesses and the sale
F instances were also executed between themselves. It needs to be noticed that one of the purchasers and the seller are the claimants in the present appeals and the other purchaser is their close relative. According to the claimants, they were entitled to compensation on the basis of these two sale
G instances. The claimants have also brought on record documents, viz., Exh.11 and Exh.12, which are the agreements signed between Trishala Jain and one Vikram Singh Bangari, executed on 23rd April, 1991 for the purpose of leveling of the land in question. Shri Bangari was examined as PW 6 who submitted that he had completed the leveling work on or
H

before 3rd February, 1992. Further, the testimony of PW7, according to the claimants, clearly shows that there was urbanization all over the periphery of municipal limits and building activities were increased even beyond the municipal limits. Claimants have also relied upon other evidence including the cross examination of DW 1, Ram Singh, who admitted that these sale deeds were unlikely to have been executed at higher rate for enhancing the rate of compensation of the acquired land. As we have already noticed, this witness also gave the statement that towards the North of the acquired land, there were several quarters of ITBP and there was 20 feet wide passage which ended on the acquired land. He further stated that some shops are located in the South of the acquired land across the road and facilities of schools and post office are also available near the acquired land. On the backdrop of this entire evidence, the claimants contended that the deduction applied by the High Court is not justified and their claim for compensation in line with the two sale instances proved by them on record is to be upheld. According to them, the sale instances produced by the SLAO were far away from the acquired land and were not relevant or comparable instances.

12. On the other hand, the SLAO, in his award, had considered details of 140 sale instances executed over a period from the Revenue Estate of the same Village. Most of these sale instances were found to be not relevant by the Reference Court. The SLAO had relied upon the sale deed at Serial No.43 in which the land admeasuring 0.094 acres had been sold by a registered sale deed on 10th June, 1991 for a sum of `92,000 giving the value of the land at the rate of Rs. 9,78,732.40 per acre, and determined the market value of the land acquired at that rate. When the matter came up before the Reference Court for consideration, in all other references except Reference No. 121 of 1994 titled as *Chamel Singh v. Collector, Dehradun,* the Reference Court had relied upon the two sale instances produced by the

A claimants and awarded compensation at the rate of Rs. 5,12,000 per bigha which was later reduced by the High Court to Rs. 4,26,667 per bigha. In the case of *Chamel Singh* (supra), the Reference Court rejected these two sale instances at serial Nos. 109 and 110 as vendor or vendee had not been B examined. It also noticed the allegation of the State that those sale deeds were not bona fide and have been executed only with the intention to enhance the value of the acquired land and as such declined to rely on them in its judgment. The Reference Court in that case also rejected the reliance placed C by SLAO upon sale deed at serial No. 43 for determining the market value of acquired land and instead relied upon the sale instance at serial No. 108 where the land admeasuring about 0.90 acres was sold on 29th November, 1991 at the rate of Rs. 12,55,550.50 per acre. After discussing the evidence at some detail, the Reference Court awarded the compensation D to the claimants at the rate of Rs.12,50,000 per acre without making any deduction from such market value. In appeal the High Court, however, applied a deduction of 33.33% and awarded compensation to the claimants at the rate of Rs. 8,33,334 per acre. From the above factual matrix the first E question that requires consideration of this Court is whether the Reference Court was justified in law with reference to the facts on record in declining to consider the two sale instances produced by the claimants at serial Nos. 109 and 110. In other words, was it justified on part of the Reference Court to keep F them outside the zone of consideration while determining the market value of the acquired land?

13. Firstly, it cannot be disputed that both the seller and the purchaser in sale instances at serial Nos. 109 and 110 G are either claimants in different claim petitions or belong to the same family. The sale deed is stated to be executed by Sh. Viresh Jain in favour of Jitender Kumar Jain and Smt. Veena Kumari Jain (sister of Sh. Viresh Jain). Veena Kumari Jain has described herself as wife of M. Kumar who appears H to be Sh. Manoj Kumar Jain, who was examined as a witness

as he was a Member of the Selection Committee dealing with the acquisition of the land for the purpose of construction of Government Polytechnic Institute. In his examination he admitted that he was brother-in-law of Sh. Viresh Jain. As a member of that Committee he had a definite role to play in selection of the land for that purpose. In other words, the claimants had full knowledge of acquisition of land and as well as the purpose for which the said land was sought to be acquired. With respect we reiterate the view expressed by this Court in the case of *Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari* [(1950) 1 SCR 852] that a fraudulent move or design is not capable of direct proof in most cases; it can only be inferred. Under such circumstances, the Court has to take a general view keeping in mind the facts and circumstances of the case with particular reference to the intent of parties, their action in furtherance thereto and the object sought to be achieved by them.

14. It is not in dispute that these sale deeds have been executed in favour of the family members or persons known to the claimants. These are circumstances and evidence which clearly indicate that the sale instances relied upon by the claimants are result of collusion between these parties. There was clear attempt on the part of the claimants to execute sale deeds for the purpose of hiking up land price just before acquisition to get more compensation. These two sale instances which have been executed just about two months prior to the issuance of the notification under Section 4(1) stand out as transactions which are sham, collusive, lack bona fide and have been executed with the intention to raise the price of the land in question with the pretence of it being actual market value. We are unable to find any infirmity in this view of the Reference Court in LA Case No. 121 of 1994 which has rightly been upheld by the High Court.

15. It will be appropriate at this stage to notice that in C.A. Nos. 7498-99 of 2005 a specific ground has been taken by

A the State that the High Court erred in not considering the application of State filed under Order XLI Rule 27 of the Code of Civil Procedure, 1908 during pendency of First Appeal Nos. 920 and 921 of 2000 to lead additional evidence to show that the sale deeds relied upon by the Reference Court in LA Case
B No. 386 of 1993 and accepted by the High Court were collusive and the claimants had prior knowledge of the impending acquisition proceedings. This additional evidence is basically related to the facts which have already been mentioned by us while discussing the facts of C.A No. 3613
C of 2008. In that application, it was specifically stated that Smt. Veena Kumari is sister of one of the claimants, i.e. Viresh Jain and she is wife of Manoj Kumar Jain, who was member of the Selection Committee aforereferred and these facts had duly been verified from the local police station vide letter dated
D 11th September, 1996. However, this application appears to have been rejected by the High Court without recording any appropriate reasons in support thereof. In view of the peculiar fact that the Reference Court, in its award in L.A. Case No. 121 of 1994 which is subject matter before us in C.A. No.
E 3613 of 2008, has noticed this entire evidence in great detail, it can hardly be contended that the application has rightly been rejected by the High Court. In our opinion, the High Court should have allowed this application particularly when the entire evidence sought to be produced by way of additional evidence challenged the very basis of the judgment of the High
F Court. In view of these peculiar facts we need not discuss this issue at any greater length and according to us the facts stated in that application can be examined by this Court as they are already part of the judicial record in C.A. No. 3613 of 2008, which has been listed for hearing along with other
G appeals and all these appeals have been heard together.

16. Corollary to the discussion under this head is the question that whether the Reference Court, in LA Case No. 121 of 1994, was right in law in rejecting the two sale
H instances for the reason that vendor or vendee had not been

examined to prove them in Court and thus these sale instances were inadmissible in evidence. While recording such a finding the Reference Court had relied upon the judgment of this Court in the case of *A.P. State Road Transport Corporation, Hyderabad v. P. Venkaiah,* [(1997) 10 SCC 128]. This issue need not detain us any further as it is no longer res integra that the judgment of this Court in the above case has been overruled by a Constitution Bench of this Court in the case of *Cement Corporation of India v. Purya,* [(2004) 8 SCC 270]. Thus, in our view, these two sale instances cannot be rejected on that ground after the dictum of the Constitution Bench in the above case. Though, this observation is subject to the other findings recorded by us in this judgment.

17. A Bench of this Court in the case of Chimanlal Hargovinddas (supra) stated that the Court while tackling the problem of valuation of the land under acquisition should necessarily make some general observations. Explaining the factors, which must be etched on the mental screen while performing such exercise, this Court specifically held, "only genuine instances have to be taken into consideration (sometimes instances are rigged up in anticipation of acquisition of land)". Further, this Court in the case of State of Haryana v. Ram Singh [(2001) 6 SCC 254], has reiterated this principle and held, "It is open to the Court to accept the certified copy as the reliable evidence and without examining parties to the documents. This does not however, preclude the Court from rejecting the transaction itself as being malafide or sham provided such a challenge is already before the Court".

Question No. III

18. The law with regard to applying the principle of deduction to the determined market value of the acquired land is quite consistent, though, of course, the extent of deduction

A has varied very widely depending on the facts and circumstances of a given case. In other words, it is not possible to state precisely the exact deduction which could be made uniformly applicable to all the cases. Normally the rule stated by this Court consistently, in its different judgments, is B that deduction is to be applied on account of carrying out development activities like providing roads or civic amenities such as electricity, water etc. when the land has been acquired for construction of residential, commercial or institutional projects. It shall also be applied where the sale instances C (exemplars) relate to smaller pieces of land and in comparison the acquisition relates to a large tract of land. In addition thereto, deduction can also be applied on account of wastage of land. This Court in the case of *Land Acquisition Officer, Kammarapally Village v. Nookala Rajamallu* [(2003) 12 D SCC 334], had also observed that it is advisable to apply some deduction on account of exemplars of plots of smaller size relied upon by way of evidence by the parties. This is the normal rule stated by the Court but is not free of exceptions.

E 19. Similarly, it is neither possible nor appropriate to stricto sensu define a class of cases where the Court would not apply any deduction. This again would be dependant upon the facts and circumstances of a given case. The cases where the acquired land itself is fully developed and has all essential F amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of 'no deduction'. Furthermore, where the evidence led by the parties is of such instances where the compensation paid is G comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of 'no deduction' may be applied. These may be the cases where least or no deduction could be made. Such cases are H exceptional and/or rare as normally the lands which are

proposed to be acquired for development purposes would be agricultural lands and/or semi or haphazardly developed lands at the time of issuance of notification under Section 4(1) of the Act, which is the relevant time to be taken into consideration for all purposes and intents for determining the market value of the land in question.

20. This Court in the case of *Bhagwathula Samanna & Ors v. Special Tahsildar & Land Acquisition Officer,* [(1991) 4 SCC 506], stated that it is permissible to take into account of exemplars of even small developed plots for determining value of a large tract of land acquired, if the latter is also fully developed with all facilities requiring little or no further development. In the facts and circumstances of that case the Court felt that it was not appropriate to resort to deduction of 1/3rd value of the comparable sale instances as development charges. The Court reiterated the general rule that if market value of a large property is to be fixed on the basis of a sale transaction for smaller property, a deduction is to be made taking into consideration the expenses required for development of that larger tract and make smaller plots within that area and held as under :

> "8. In awarding compensation in acquisition proceedings, the Court has necessarily to determine the market value of the land as on the date of the relevant Notification. It is useful to consider the value paid for similar land at the material time under genuine transactions. The market value envisages the price which a willing purchaser may pay under bona fide transfer to a willing seller. The land value can differ depending upon the extent and nature of the land sold. A fully developed small plot in an important locality may fetch a higher value than a larger area in an undeveloped condition and situated in a remote locality. By comparing the price shown in the transactions all variables have to be taken into consideration. The transaction in regard to smaller property cannot, therefore,

A be taken as a real basis for fixing the compensation for larger tracts of property. In fixing the market value of a large property on the basis of a sale transaction for smaller property, generally a deduction is given taking into consideration the expenses required for development
B of the larger tract to make smaller plots within that area in order to compare with the small plots dealt with under the sale transaction. This principle has been stated by this Court in *Tribeni Devi's* case (supra).

C 11. The principle of deduction in the land value covered by the comparable sale is thus adopted in order to arrive at the market value of the acquired land. In applying the principle it is necessary to consider all relevant facts. It is not the extent of the area covered under the acquisition, the only relevant factor. Even in the vast area
D there may be land which is fully developed having all amenities and situated in an advantageous position. If smaller area within the large tract is already developed and suitable for building purposes and have in its vicinity roads, drainage, electricity, communications etc. then the
E principle of deduction simply for the reason that it is part of the large tract acquired, may not be justified.

13. The proposition that large area of land cannot possibly fetch a price at the same rate at which small plots are
F sold is not absolute proposition and in given circumstances it would be permissible to take into account the price fetched by the small plots of land. If the larger tract of land because of advantageous position is capable of being used for the purpose for which the
G smaller plots are used and is also situated in a developed area with little or no requirement of further development, the principle of deduction of the value for purpose of comparison is not warranted."

It is thus evident from the above enunciated principle that
H the acquired land has to be more or less developed land as

its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits.

21. This Court, depending on the facts and circumstances of each given case, has taken the view that deduction on account of expenses of development of the sites could vary from 10% to 86.33% depending on the nature of the land, its situation, the purpose and stage of development. Reference can be made to the cases of *K.S. Shivadevamma v. Assistant Commissioner and Land Acqusition Officer* [(1996) 2 SCC 62], *Ram Piari v. Land Acquisition Collector, Solan* [(1996) 8 SCC 338], *Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona* [(1988) 3 SCC 751], *Hasanali Walimchand (Dead) by L` v. State of Maharashtra* [(1998) 2 SCC 388].

In *K.S. Shivadevamma* (supra), this Court held as under:

"10. It is then contended that 53% is not automatic but depends upon the nature of the development and the stage of development. We are inclined to agree with the learned counsel that the extent of deduction depends upon development need in each case. Under the Building Rules 53% of land is required to be left out. This Court has laid as a general rule that for laying the roads and other amenities 33-1/3% is required to be deducted. Where the development has already taken place, appropriate deduction needs to be made. In this case, we do not find any development had taken place as on that

A date. When we are determining compensation under Section 23(1), as on the date of notification under Section 4(1), we have to consider the situation of the land development, if already made, and other relevant facts as on that date. No doubt, the land possessed potential
B value, but no development had taken place as on the date, In view of the obligation on the part of the owner to hand over the land to the City Improvement Trust for roads and for other amenities and his requirement to expend money for laying the roads, water supply mains, electricity
C etc., the deduction of 53% and further deduction towards development charges @ 33-1/3%, ordered by the High Court, was not illegal."

Thus, a deduction of 53% was given on account of Building Rules and a further deduction of 33.33% on account
D of development charges on the fact of that case, amounting to a total of 86.33% deduction. The above view was reiterated in the case of *Nookala Rajamallu* (supra).

22. On similar lines, this Court in the case of *V. Hanumantha Reddy (Deceased) by LRS v. Land Acquisition*
E *Officer & Mandal R. Officer* [(2003) 12 SCC 642], while considering that the acquired land was adjacent to developed land, held that neither its high potentiality nor its proximity to a developed land can be a ground for not deducting the
F development charges and that normally 1/3rd deduction could be allowed.

23. Though in the case of *Bhagwathula Samanna* (supra) referring to the peculiar facts of the case, this Court observed that it was not necessary to make any deduction, the
G consistent view taken by this Court is that normally deduction has to be made. In the cases above mentioned this Court has directed to make deduction ranging from 20% to 86.33%.

24. The learned Counsel for the claimants relied upon the
H judgment of this Court in the case of *Atma Singh v. State of*

Haryana [(2008) 2 SCC 568], to contend that even if exemplars of small plots are tendered in evidence, the deduction cannot be more than 10%. He contended that the Reference Court as well as the High Court both have fallen in error of law in applying the deduction of 20% and 33.33% respectively. In this judgment, this Court clearly observed that the price fetched for small plots cannot form safe basis for valuation of large tracts of land as substantial area is used for development of sites by providing various facilities for which expenses are also incurred; such amount, which normally would vary from 20% onwards depending upon the facts of each case, should be deducted. However, in that case the land had been acquired for setting up a sugar factory which, for its efficient running, may also require part of the land to be used for construction of residential colonies for the staff working in the factory. The sugar factory that was sought to be constructed on the acquired land was to carry on its business to make profits. The Court noticed that earlier the by-products of a sugar factory like molasses were treated as waste and its disposal itself was a problem. However, with the passage of time and scientific developments, such by-products are being used for production of Alcohol and Ethanol which added to the profits. It was in these circumstances that Court was of the view that it was not a case for higher deduction and discounted only 10% from the determined market value of the acquired land. Thus the claimants cannot derive any advantage to contend that there should not be any deduction in this case. Reliance by them was also placed upon the judgment of this Court in the case of Charan Dass v. Himachal Pradesh Housing & Urban Development Authority [(2010) 13 SCC 398]. In that case the Court was concerned with the question that whether deduction of 40% from the market value determined by the High Court towards development charges was justified or not. This Court held that where the acquired land falls in the amidst of an already developed land with amenities of roads, electricity etc., deduction on this account may not be warranted. At the same

A time it also held that where all civic and other amenities are yet to be provided to make the land suitable for building purposes or when under the local building regulations setting apart some portion of the lands for sanctioning common facilities is mandatory, an appropriate deduction may be B justified. Referring to the facts of that case, this Court permitted deduction of 30% as development charges from the market value of the land.

25. In the present case, there is evidence on record to C show that plotting has been done only on part of the acquired land and the land is surrounded by colonies like ITBP etc. but, there is no evidence to show that the acquired land itself is developed and is having all the required facilities and amenities. It may be a case where less deduction may be applied but certainly it is not a case of 'no deduction'. It also D cannot be believed, in the absence of specific documentary evidence, that no further development is required on the acquired land. The claimants, on whom the onus lies to prove inadequacy of compensation have not even stated that whether under the relevant laws they are expected to leave E any part of their land open when they are permitted to raise construction on the land in question. Under these circumstances, we are unable to find any infirmity in the approach of the High Court in applying the principle of deduction. In our opinion a deduction of 10% from the market F value on account of development charges and other possible expenditures would be justifiable and called for in the facts and circumstances of the present case.

Question No. IV:

G **Determination of Compensation**

Application of principle of guesstimate for determining the amount of compensation to be awarded for the land acquired under the Act

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26. Acquisition of land is an act falling in the purview of eminent domain of the State. It essentially relates to the concept of compulsory acquisition as opposed to voluntary sale. It is trite that no person can be deprived of his property save by authority of law in terms of Article 300A of the Constitution of India. The provisions of the Act provide a complete mechanism for 'deprivation of property in accordance with the law' as stated under the Act. Justifiability and fairness of such compensation is subject to judicial review within the confines of the four corners of the Act. Once the lands are acquired under the Act, the persons interested therein are entitled to compensation as per the provisions of the Act. Thus, in the present case the land in question has been acquired under the provisions of a law which specifically provide that acquisition can only be for a public purpose and upon payment of compensation to the claimants in accordance with law. The compensation payable to the claimants has to be computed in terms of Sections 23 and 24 of the Act. The market value of the land has to be determined at the date of the publication of the notification under Section 4(1) of the Act, after taking into consideration what is stated under Sections 23(1), 23(1A), 23(2) and excluding the considerations stated under Section 24 of the Act. More often than not, it is not possible to fix the compensation with exactitude or arithmetic accuracy. Depending on the facts and circumstances of the case, the Court may have to take recourse to some guesswork while determining the fair market value of the land and the consequential amount of compensation that is required to be paid to the persons interested in the acquired land.

27. 'Guess' as understood in its common parlance is an estimate without any specific information while 'calculations' are always made with reference to specific data. 'Guesstimate' is an estimate based on a mixture of guesswork and calculations and it is a process in itself. At the same time 'guess' cannot be treated synonymous to 'conjecture'. 'Guess'

A by itself may be a statement or result based on unknown factors while 'conjecture' is made with a very slight amount of knowledge, which is just sufficient to incline the scale of probability. 'Guesstimate' is with higher certainty than mere 'guess' or a 'conjecture' per se.

B

28. The concept of 'guesswork' is not unknown to various fields of law. It has been applied in cases relating to insurance, taxation, compensation under the Motor Vehicles Act as well as under the Labour Laws. All that is required from a Court is that such guesswork has to be used with greater C element of caution and within the determinants of law declared by the Legislature or by the Courts from time to time. In the case of *Charan Dass* (supra) this Court on the use of guesswork for determining compensation, has held as under:-

D "10. Section 15 of the Act mandates that in determining the amount of compensation, the Collector shall be guided by the provisions contained in Sections 23 and 24 of the Act. Section 23 provides that in determining the amount of compensation to be awarded for the land E acquired under the Act, the Court shall, inter alia, take into consideration the market value of the land at the date of the publication of the Notification under Section 4 of the Act. The Section contains the list of positive factors and Section 24 has a list of negatives, vis-a-vis the land under F acquisition, to be taken into consideration while determining the amount of compensation. As already noted, the first step being the determination of the market value of the land on the date of publication of Notification under Sub-section (1) of Section 4 of the Act. One of the principles for determination of the market value of the G acquired land would be the price that a willing purchaser would be willing to pay if it is sold in the open market at the time of issue of Notification under Section 4 of the Act. But finding direct evidence in this behalf is not an easy task and, therefore, the Court has to take recourse

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to other known methods for arriving at the market value of the land acquired. One of the preferred and well accepted methods adopted for ascertaining the market value of the land in acquisition cases is the sale transactions on or about the date of issue of Notification under Section 4 of the Act. But here again finding a transaction of sale on or a few days before the said Notification is not an easy exercise. In the absence of such evidence contemporaneous transactions in respect of the lands, which have similar advantages and disadvantages is considered as a good piece of evidence for determining the market value of the acquired land. It needs little emphasis that the contemporaneous transactions or the comparable sales have to be in respect of lands which are contiguous to the acquired land and are similar in nature and potentiality. Again, in the absence of sale deeds, the judgments and awards passed in respect of acquisition of lands, made in the same village and/or neighbouring villages can be accepted as valid piece of evidence and provide a sound basis to work out the market value of the land after suitable adjustments with regard to positive and negative factors enumerated in Sections 23 and 24 of the Act. *Undoubtedly, an element of some guess work is involved in the entire exercise, yet the authority charged with the duty to award compensation is bound to make an estimate judged by an objective standard.*

(emphasis supplied)

29. Even in the case of *Thakur Kamta Prasad Singh (Dead) through LRs v. State of Bihar* [(1976) 3 SCC 772], this Court had held that there is an element of guesswork inherent in most cases involving determination of the market value of the acquired land and observed as under:

"6. Section 23 of the Act provides that in determining the

A amount of compensation to be awarded for land acquisition under the Act the court shall inter alia take into consideration the market value of the land at the date of the publication of the notification under Section 4 of the Act. Market value means the price that a willing B purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when laid out in the most advantageous manner excluding any advantages due to the carrying out of the scheme for C which the property is compulsorily acquired. In considering market value the disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. There is an element of guesswork inherent in most cases involving D determination of the market value of the acquired land, but this in the very nature of things cannot be helped. The essential thing is to keep in view the relevant factors prescribed by the Act. If the judgment of the High Court reveals that it has taken into consideration the relevant factors, its assessment of the fair market value of the E acquired land should not be disturbed. No such infirmity has been brought to our notice as might induce us to disturb the finding of the High Court. The appeal consequently fails and is dismissed but in the circumstances without costs."

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30. Similar view was taken by another Bench of this Court in the case of *Special Land Acquisition Officer v. Karigowda* [(2010) 5 SCC 708] where this Court held, "the Court is entitled to apply some amount of reasonable guesswork to G balance the equities and fix a just and fair market value in terms of the parameters specified under Section 23 of the Act."

31. The observations made by this Court in a case under the Central Excise Valuation Rules, 1975 titled as H

Commissioner of Central Excise, Jaipur v. Rajasthan Spinning and Weaving Mills Ltd. [2007 (12) SCR 703], can be aptly referred to at this stage wherein this Court had held that valuation is not an exact science and some amount of guesswork exists in valuation. Different methods for valuation are prescribed by Valuation Rules which may be applied by the Department but it has to be ultimately ascertained by applying the rule of convergence, the estimated ad valorem value of which would constitute the base of the assessable value.

32. Under the Act, as settled by various judgments of this Court, there are different methods of computation of compensation payable to the claimants, for example it can be based upon comparable sale instances, awards and judgments relating to the similar or comparable lands, method of averages, yearly yields with reference to the revenue earned by the land etc. Whatever method of determining the compensation is applied by the court, its result should always be reasonable, just and fair as that is the purpose sought to be achieved under the scheme of the Act. For attaining that purpose, application of some guesswork may be necessary but this principle would have hardly any application in a case of no evidence. In other words, where the parties have not brought on record any evidence, then the court will not be in a position to award compensation merely on the basis of imagination, conjecture etc.

33. These precedents clearly demonstrate that the Court may apply some guesswork before it could arrive at a final determination, which is in consonance with the statutory law as well as the principles stated in the judicial pronouncements. As already noticed, the guesswork has to be used for determination of compensation with greater element of caution and the principle of guesstimation will have no application to the case of 'no evidence'. This principle is only intended to bridge the gap between the calculated compensation and the

A actual compensation that the claimants may be entitled to receive as per the facts of a given case to meet the ends of justice. It will be appropriate for us to state certain principles controlling the application of 'guesstimate:

B (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 C 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.

D

34. Applying these principles to the facts of the present case, we have to take recourse to the 'principle of guesstimation' inasmuch as it is essential for fixation of fair market value of the land which shall be the basis for E determining the compensation payable to the claimants. Now, we will discuss the evidence led by the parties in that behalf.

35. All the claimants in the present appeals have primarily relied upon the sale instances shown at serial Nos. 109 and 110. These sale instances were not relied upon by the SLAO F while making the award and were also rejected by the Reference Court in LA Case No.121 of 1994. This view of the Reference Court was upheld by the High Court vide its judgment in First Appeal Nos. 60-63 of 2001 which is subject matter of the appeal before this Court in C.A. No. 3613 of G 2008. We have already noticed that as per these sale instances the value of the land comes to a rate of Rs. 32,72,603 and Rs. 34,87,648 per acre respectively. While accepting the concurrent view of the Reference Court and the High Court subject matter of CA No. 3613 of 2008, we have H already held that these sale instances are liable to be ignored

and have rightly been ignored by the Courts below. Besides the fact that these sale deeds are executed between the members of the family, the claimants had full knowledge of the Government's intention to acquire these lands, for the purpose specified, even prior to issuance of notification under Section 4(1) of the Act through Mr. M.K. Jain. These are reasons enough to doubt the consideration paid in these sale deeds.

36. The SLAO, in his Award, has taken note of 140 sale instances immediately preceding the issuance of Notification under Section 4(1) of the Act. The Reference Court, in LA Case No. 121 of 1994, specifically recorded that the highest value reflected in these 140 sale instances is Rs. 12,55,550.50 per acre, except in sale instances at serial Nos. 109 and 110 produced by the claimants. It is interesting to note that the claimants did not produce any other evidence except these two sale instances which had been executed between the members of the family and contained unreasonably high price of the land. There is tremendous gap between the prices of the land fetched in all other sale deeds on one hand, the highest being Rs. 12,55,550.50 per acre and that in sale deeds executed by the claimants between themselves on the other hand which is Rs. 34,87,648 per acre, for sales effected within a span of 2-3 days for similarly situated lands in the same village. It certainly arouses suspicion in the mind of the Court as to the intention behind execution of these sale deeds. Ex facie they appear to have been executed to hike up the price of the land just before the issuance of Notification under Section 4(1) of the Act. If considered from the point of view of a reasonable man, all these circumstances clearly fall beyond the ambit of coincidence and appear to have been managed' to achieve the end of receiving higher compensation. In light of these facts and the reasons already recorded, we have no hesitation in holding that the sale instances at serial Nos. 109 and 110 produced by the claimants are liable to be ignored for the purposes of fixation of market value of the acquired land as these transactions are

A sham and lack bona fide.

37. The SLAO, in his award had relied upon sale instance shown at serial No. 43 and had therefore determined the market value of the land at the rate of ` 9,78,723.40 per B acre (i.e. Rs. 1,86,423.50 per bigha approximately). The compensation awarded on the basis of the above market value and by applying belting system was not accepted by the Reference Court. The Reference Court in LA Case No. 121 of 1994, instead relied upon sale deed at serial No. 108 where C the land was sold at the rate of Rs. 12,55,550.50 per acre on 29th November, 1991, i.e. even subsequent to the sale instances relied upon by the claimants. The Reference Court had therefore awarded compensation at the rate of Rs. 12,50,000 per acre which was reduced by the High Court to Rs. 8 ,33,334 after applying a deduction of 33.33%. D

38. The Reference Court, in LA Case Nos. 386 of 1993, had determined the market value of the land at a rate of Rs. 6,40,000 per bigha (i.e. Rs. 33,60,000 per acre approximately) and after applying a deduction of 20% awarded compensation E at the rate of Rs. 5,12,000 per bigha. This was reduced further by the High Court by increasing the deduction from 20% to 33.33% and therefore awarding a sum of Rs. 4,26,667 per bigha (i.e. ` 22,40,001.80 per acre) as compensation. The two exhibits produced by the claimants were the sole basis for F awarding compensation to the claimants in this line of cases. These exhibits offend the very essence of the parameters stated under Section 23 of the Act as defined by this Court in the case of Ram Singh (supra). Thus, the view taken by the Reference Court and the High Court, which is subject matter G of C.A. No. 3613 of 2008, rejecting these instances as collusive and sham is liable to be sustained.

39. The judgment of the Reference Court and that of the High Court in these cases, accepting the sale instances under serial Nos. 109 and 110, cannot be sustained in law and is H liable to be set aside. However, as it appears from the record

the earlier judgments of the Division Benches of the High Court in First Appeal Nos. 920-921 of 2001, dated 20th July, 2005, and in First Appeal Nos. 918-919 of 2001, dated 09th March, 2006 were not brought to the notice of the Division Bench of the High Court which pronounced the judgments in First Appeal Nos. 60-63 of 2001, dated 11th May, 2006.

40. Now, after we have rejected the sale instances at serial Nos. 109 and 110, we have to consider what compensation the claimants are entitled to receive in accordance with other evidence on record. The sale instance shown at serial No. 108 is certainly an exemplar which can be taken into consideration. This is a sale deed executed on 29th November, 1991 where a land admeasuring 0.90 acres has been sold at a rate of Rs. 12,55,550.50 per acre. As far as the location and potential of this land is concerned, we may refer straightaway to the award of the Reference Court, in LA Case No. 121 of 1994, where it referred to the statement of PW1, Sh. Gyan Swarup, stating that the land which was subject matter of this sale deed is situated at a distance of 1½ furlong of the acquired land in the same village. It is the case of the claimants in all these appeals that the acquired land is surrounded by developed areas like ITBP Colony on the North and there was a 20 feet wide passage ending on the acquired land. Facilities of post office, electricity, hospital, schools etc. were available in those colonies which are very close to the acquired land. The Reference Courts, in their respective awards, have also noticed that heavy construction activity was going on nearby Shimla Road and the value of this land is continuously rising.

41. Another relevant piece of evidence with reference to potential and location of the land is the statement of PW-4 Girdhari Lal Arora, noticed in the judgment of the Reference Court in L.A. Case No. 386 if 1993, who is an Architect by profession. He claims to have visited the site and made plans to divide the land in question into plots after making provision

A for civic amenities, children park etc. In these circumstances, it is difficult to doubt that the land in question has substantial potential and is located adjacent to developed areas. He further stated, "In the year 1992 the value of the land around, the acquired land was ` six to 6.50 lacs per bigha and B thereafter there had been a slump in the prices of the land". Statement of this witness has to be given its due value as nothing controversial appears to have come in evidence in his cross-examination. According to this witness, there has been a decreasing trend in the value of the land in that area. The C declaration under Section 6 was issued in April, 1992 itself at a time when the prices had started falling.

42. The cumulative effect of the documentary and oral evidence on record is that it is a case of acquisition of land which is situated on a reasonably good location surrounded D by developed areas having civic amenities and facilities and further development activity was going on in nearby areas. It was also submitted by the claimants that plotting has already been done on the acquired land and some plots of land have been sold immediately prior to the issuance of the Notification E under Section 4(1) of the Act. It is evident that the land acquired had the potential of being developed for residential or institutional purposes and as already noticed, the same was acquired for construction of a Government Polytechnic Institute. Therefore, it is a case where the Court should apply minimal F deduction which will meet the ends of justice and would help in determining just and fair compensation for the land in question. We are of the considered view that 10% deduction from the market value of the acquired land would meet the ends of justice.

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43. It is not in dispute before us that sale instance at serial No. 108 falls in the Revenue Estate of the same Village and as recorded by the Reference Court, in LA Case No. 121 of 1994, it is situated at a distance of 1½ furlong from the acquired land. The acquired land belonging to the claimants

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forms part of Khasra No.39/2 while, in the same Reveue Estate, the sale instance at serial No. 108 is part of Khasra No. 410. Thus a sale deed related to a land in such proximity of time and distance cannot be said to be incomparable sale instance, i.e. it has to be taken as a comparable sale instance. Though it relates to the sale of a smaller plot of land but is certainly bigger than the land sold by the claimants between themselves. Its location and potential, if not identical in absolute terms, is certainly comparable for the purposes of determining market value of the land in question. It is a well established principle that the value of sale of small pieces of land can be taken into consideration for determining even the value of a large tract of land but with a rider that the Court while taking such instances into consideration has to make some deduction keeping in view other attendant circumstances and facts of that particular case. We have already held that keeping in view the surrounding developed areas and location and potential of the land it will meet the ends of justice if 10% deduction is made from the estimated market value of the acquired land.

44. The comparable sale instance under serial No. 108 depicted the fair value of land in that area at the time of issuance of Notification under Section 4(1) of the Act which is Rs. 12,55,550.50 per acre. The time gap between this sale instance and issuance of said Notification is merely two months which would hardly call for any increase in the said value but to balance the equities between the parties we would round off the figure to Rs. 13,00,000 per acre. By applying the principle of guesstimate, thus, we determine the market value of the acquired land at Rs. 13,00,000 per acre as on the date of the issuance of the Notification under Section 4(1) of the Act. Deducting 10% therefrom, it would come to Rs. 11,70,000 per acre which will be the compensation payable to the claimants with statutory benefits and interests thereupon in accordance with law.

45. Ergo, for the reasons aforerecorded, we pass the following orders in the appeals, subject matter of the present judgment :

(i) The Civil Appeal No. 3613 of 2008, the appeal preferred by the claimants Krishna Devi and Others, is partially accepted and the judgment of the High Court impugned in this appeal is modified to the extent that the claimants would be entitled to receive compensation at the rate of Rs. 11,70,000 per acre with interests and other statutory benefits permissible under the law.

(ii) Civil Appeal Nos. 7498-7499 of 2005 preferred by the State of Uttaranchal are partially accepted and the compensation payable to the claimants is reduced from Rs. 22,40,001.80 per acre to Rs. 11,70,000 per acre. The claimants would be entitled to interest and all statutory benefits permissible under the law.

(iii) Civil Appeal No. 1122 of 2011 preferred by the State of Uttaranchal is partially accepted and the compensation payable to the claimants is reduced from Rs. 22,40,001.80 per acre to Rs. 11,70,000 per acre. The claimants would be entitled to interest and all statutory benefits permissible under the law.

(iv) Civil appeal Nos. 7496-7497 of 2005 preferred by the other claimants are dismissed without any order as to costs.

B.B.B. Appeals disposed of.