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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL (STAMP) NO. 30932 OF 2016
WITH
CIVIL APPLICATION NO. 4631 OF 2016
WITH
CIVIL APPLICATION NO. 4632 OF 2016
IN
FIRST APPEAL (STAMP) NO. 30932 OF 2016**

The New India Assurance Co. Ltd.
Development Officer / Agent: 825 / 17916,
Issuing Office: 141600 (Office Code)
Jeevan Seva, S.V. Road,
Santacruz (W), Mumbai – 400 056.
Through Centralized Motor TP Claims Hub,
41-B, 4th Floor, Maker Tower – E,
Near World Trade Centre, Cuffe Parade,
Mumbai – 400 005.

... Appellant
(Org. Insurer)

Versus

1. Mr. Julius T.J. Freitas
Aged 85 years, Father of the deceased,
Residing at B-2/57-58,
Heaven View, Green Fields “B”
Co-operative Hsg. Soc. Ltd.
Jogeshwari Vikhroli Link Road,
Andheri (E), Mumbai – 400 093.
2. Mrs. Grace I.M. Freitas
Aged 75 years, Mother of the deceased,
(since deceased through Legal Representatives)
- 2A. Mrs. Maryann S. Noronha,
Aged 52 years, R/at C-1404, R.N.A. Heights,
Jogeshwari – Vikhroli Link Road,
Andheri (E), Mumbai – 400 093.
- 2B. Ms. Sabrina Palmira Freitas,
Daughter, Aged 45 years,
89, Rock field road,
Onehunga, Auckland 1061,
New Zealand.

3. Mr. Saheb Nabi Patel,
Age Adult, Occ.: Not known,
R/at Room No. 302, A-Wing, Ashish Apts.,
Taluka Biwandi, Dist. Thane – 400 601. ... Respondents
(Resp. Nos.1 & 2 – Original
Claimants and Resp. No.3–
Opp. Party)

**WITH
CROSS OBJECTION (STAMP) NO. 4752 OF 2017
IN
FIRST APPEAL (STAMP) NO. 30932 OF 2016**

Mr. Julius T.J. Freitas,
Aged 85 years, Father of the deceased,
Residing at B-2/57-58,
Heaven View, Green Fields “B”
Co-operative Hsg. Soc. Ltd.
Jogeshwari Vikhroli Link Road,
Andheri (E), Mumbai – 400 093. ... Objectionist

In the matter of between :

The New India Assurance Co. Ltd.
Development Officer / Agent: 825 / 17916,
Issuing Office: 141600 (Office Code)
Jeevan Seva, S.V. Road,
Santacruz (W), Mumbai – 400 056.
Through Centralized Motor TP Claims Hub,
41-B, 4th Floor, Maker Tower – E,
Near World Trade Centre, Cuffe Parade,
Mumbai – 400 005. ... Appellant
(Org. Insurer)

Versus

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Aged 85 years, Father of the deceased,
Residing at B-2/57-58,
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3. Mr. Saheb Nabi Patel,
Age Adult, Occ.: Not known,
R/at Room No. 302, A-Wing, Ashish Apts.,
Taluka Biwandi, Dist. Thane – 400 601.
- ... Respondents
(Resp. Nos.1 & 2 – Original
Claimants and Resp. No.3–
Opp. Party)

**WITH
CIVIL APPLICATION NO. 3616 OF 2019
IN
FIRST APPEAL (STAMP) NO. 30932 OF 2016**

Mr. Julius T. J. Freitas
Aged 85 years, Father of the
deceased, Residing at B-2/57-58,
Heaven View, Green Fields “B”
Co-operative Hsg. Soc. Ltd.
Jogeshwari Vikhroli Link Road,
Andheri (E), Mumbai – 400 093.

... Applicant
(Org. Resp. No.1)

In the matter of between :

The New India Assurance Co. Ltd.
Development Officer / Agent: 825 / 17916,
Issuing Office: 141600 (Office Code)
Jeevan Seva, S.V. Road,
Santacruz (W), Mumbai – 400 056.
Through Centralized Motor TP Claims Hub,
41-B, 4th Floor, Maker Tower – E,
Near World Trade Centre, Cuffe Parade,
Mumbai – 400 005.

... Appellant
(Org. Insurer)

Versus

1. Mr. Julius T.J. Freitas
Aged 85 years, Father of the deceased,
Residing at B-2/57-58,
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 - 2B. Ms. Sabrina Palmira Freitas,
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- ... Respondents
(Resp. Nos.1 & 2 – Original
Claimants and Resp. No.3–
Opp. Party)

.....

Mr. Devendranath S. Joshi for the Appellant in FAST/30932/16 and
Applicant in CAF/4632/16.

Ms. Bhavana Bhatt for the Applicant in XOBST/4752/17 (Claimant).

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CORAM : R.D. DHANUKA, J.

RESERVED ON : 14th NOVEMBER, 2019

PRONOUNCED ON : 19th DECEMBER, 2019

JUDGMENT :

. The New India Assurance Company Limited (Insurer) and the claimants have filed the First Appeal and Cross Objection respectively, impugning different parts of the judgment and award dated 17th May, 2016 passed by the Motor Accident Claim Tribunal bearing MACP No. 2123 of 2009. By consent of parties, both the proceedings were heard together and are being disposed of finally by a common judgment. Some of the relevant facts for the purpose of deciding the aforesaid proceedings are as under:-

2. The respondent no.1 and 2 were the original claimants before the Tribunal. Respondent No.2 claimed to be the owner of the offending Motor Dumper bearing No. MH-04-CG-2262. It was the case of the claimants that the deceased Annabelle Freitas was daughter of the claimants. The said deceased was riding Kinetic Honda Scooter with Helmet on her head on 3rd August, 2009 at about 9:00 hrs, near Vile Parle, Mumbai when the offending Motor Dumper No. MH-04-CG-2262 came from behind in rash and negligent manner, gave dash to her, due to which she was thrown down and came below the tyre of the dumper smashing her head. The said deceased was taken to Cooper hospital but was declared dead. The said deceased was about 39 years old.

3. It was the case of the claimant that they were totally dependent on her

income. The claimants accordingly filed an application bearing no. 2123 of 2009 before the Tribunal *inter-alia* praying for compensation. The claim filed by the claimants was resisted by the respondents. The claimants had examined their constituted attorney as a witness. The driver of the offending vehicle was not examined by the insurer to rebut the evidence adduced by the claimants.

4. The Tribunal passed a judgment and order on 17th May, 2016 directing the respondents before the Tribunal including the appellant herein to jointly and severally pay a sum of Rs.33,38,894/- inclusive of the “No Fault Liability” to the claimants in equal shares along with interest @ 9% p.a. from the date of application, till realisation. The Tribunal directed the owner of the dumper and also the insurer company to deposit the amount of compensation with accrued interest by account payee cheque drawn in favour of the claimants. Being aggrieved by the said judgment and order dated 17th May, 2016, the appellant (org. resp. no.2) filed this appeal. The original owner of the offending vehicle did not challenge the said judgment and award by filing any appeal. The claimants filed Cross Objection impugning part of the said judgment and award made by the said Tribunal.

5. Mr. D.S. Joshi, learned counsel for the appellant (org. resp. no.2) invited my attention to the part of the cross-examination of the witness

examined by the claimants and also some of the documents from the compilation of documents filed by the claimants' advocate. It is submitted by the learned counsel that the witness examined by the claimants was not an eye witness. He submits that the finding of the Tribunal that the offending dumper had dashed scooter of the deceased from behind is contrary to the statement made by the eye witness before the Police stating that the deceased was driving ahead of the offending vehicle. The said deceased was not wearing headgear and had committed violation of the rules under the Motor Vehicle Act, 1988.

6. It is submitted by the learned counsel that the Tribunal has erroneously relied upon the statement made by Santosh Doiphode who was an alleged eye witness to the accident, whose statement was recorded by the Police, who was not examined as a witness by the claimants. The appellant did not have any opportunity to cross-examine the said alleged eye witness. The Tribunal thus could not have considered the said statement as an evidence on the part of the claimants. He submits that even otherwise the said statement made before the Police was inadmissible in evidence.

7. It is submitted that even otherwise the said statement made by the Santosh Doiphode, it was stated that the said two wheeler driven by the said deceased was going ahead of his vehicle. If the dumper was ahead of the two wheeler, the driver of the dumper could not have seen the two wheeler. He

submits that the said offending dumper did not dash the two wheeler from behind as erroneously held by the Tribunal.

8. Learned counsel for the appellant however fairly invited my attention to the statement made by Mr. Imam Shahu Hussain Shaikh on 3rd August, 2009 before the local Police Station stating that the said two wheeler driven by the said deceased was ahead of the dumper. He however submits that though the said statement was produced by the appellant before the Tribunal and though the said statement was marked as Exhibit (Exh. No.51), since the said Mr. Imam Shahu Hussain Shaikh was not examined as a witness by the appellant, the contents of the said document could not have been considered as proved. Learned counsel however does not dispute that the said statement was strongly relied upon by the appellant and on an application made by the appellant, the said statement was taken on record and was marked as Exh. 51.

9. In so far as the quantification of the claim considered by the Tribunal is concerned, learned counsel invited my attention to the salary certificate of the said deceased produced on record and would submit that the amount of Rs.53,619/- paid to the said deceased by the employer was paid under different heads such as (i) Basic Pay, (ii) Transport Allowance, (iii) HRA Paid, (iv) Incidental Allowance, (v) Telephone Facility, (vi) Periodicals and Journals, (vii) Executive Allowance and (viii) Provident Fund AMC. He also

invited my attention to the various deductions made from the gross earnings reflected in the said pay slip for the month of July, 2009. It is submitted by the learned counsel that for the purpose of computation of gross earning, the payment made towards transport allowance, telephone facilities, periodicals and journals, executive allowance and provident fund AMC could not be considered as part of the salary as those benefit would not go to the family members upon death of victim but those heads of payment would be exclusive of personal nature and for the benefit of the said deceased exclusively.

10. It is submitted that the Tribunal however has considered the entire salary of the said deceased as Rs.53,619/- per month as paid by the employer without deducting various such heads of payment, which were totally personal in nature and benefit thereof would not go to the family members. It is submitted that in so far as the deductions are concerned, only the deduction towards professional tax and income tax would be eligible from the total earnings after deducting the other items referred to aforesaid. In support of the aforesaid submission, learned counsel placed reliance on the judgment of Supreme Court in case of ***National Insurance Co. Ltd. v/s. Indira Srivastava and others, (2008) 2 SCC 763*** and in particular paragraph nos. 10 to 16, 19 and 25. He submits that those heads referred to aforesaid which were also considered by the Tribunal towards transport allowance, telephone facilities, periodical and journals and provident fund AMC were

reimbursement of the expenses incurred during the course of carrying out official duty. The family members would not get any benefit of such expenses incurred inclusively on the said deceased during the course of carrying out official duty.

11. In so far as the objection raised in the Cross Objection filed by the claimants is concerned, learned counsel submits that the appellant has not disputed that the said deceased was less than 40 years old. He submits that the Tribunal has considered 30% of the salary as future prospects. Learned counsel invited my attention to the judgment of Supreme Court in case of ***National Insurance Company Limited v/s. Pranay Sethi and Ors., (2017) 16 SCC 680*** and in particular paragraph 59.3 thereby and would submit that the Supreme Court has held that 50% of the gross earning of the deceased shall be considered towards future prospects where the deceased had a permanent job and has below the age of 40 years while determining the income. He fairly submits that the Tribunal could not have considered the 30% of the gross salary as future prospects.

12. The next submission of the learned counsel for the appellant is that the Tribunal could not have applied multiplier of 15 but ought to have applied multiplier of 5. He submits that the Tribunal in this case has allowed the compensation of Rs.1,00,000/- towards loss of love and affection of the deceased to the claimants, Rs.10,000/- for funeral expenses and Rs.50,000/-

for loss to the estate. He submits that these compensations allowed by the Tribunal are contrary to the principles of law laid by the Supreme Court in case of ***National Insurance Company Limited*** (supra). In support of this submission he placed reliance on paragraph 59.8 of the said judgment and would submit that the Supreme Court had considered the compensation towards loss of estate, loss of consortium and funeral expenses as Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively. He submits that in this case the payment of any loss of consortium does not arise and thus the Tribunal could have awarded a sum of Rs.15,000/- towards loss of estate, and Rs.15,000/- funeral expenses.

13. Learned counsel for the appellant placed reliance on the judgment of this Court in case of ***Mr. Pukh Raj Bumb v/s. Mr. Jagannath Atchut Naik and Ors., 2013 (6) ALL MR 528*** and in particular paragraph 28 and would submit that merely because the documents produced by a party is marked as exhibit, the contents thereof cannot be considered as proved and has to be proved strictly. He submits that the statement produced by the respondent thus though was marked as exhibit, no reliance on the contents thereof can be placed by the claimants or the Tribunal.

14. Learned counsel for the appellant placed reliance on the judgment of Supreme Court in case of ***Lachoo Ram and Others v/s. Himachal Road Transport Corporation, (2014) 13 SCC 254*** and in particular paragraph 10

in support of the submission that simplicitor filing of an FIR against the driver of the vehicle would not make the driver negligent unless the claimants would have independently proved the negligence of the said dumper driver. Learned counsel placed on the judgment of Supreme Court in case of ***Nishan Singh and Others v/s. Oriental Insurance Company Limited, (2018) 6 SCC 765*** and in particular paragraphs 12 and 13.

15. Ms. Bhatt, learned counsel for the claimants on the other hand strongly placed reliance on the statement made by Mr. Imam Shahu Hussain Shaikh, which was relied upon by the appellant and would submit that the said driver of the dumper had admitted his negligence and the responsibility for the said accident in which the predecessor of the claimants expired. He submits that the said statement would also indicate that the said deceased was wearing helmet at the time of accident.

16. Learned counsel placed reliance on the affidavit in lieu of examination-in-chief filed by Mrs. Maryann Noronha, constituted attorney of the claimants who was examined as the witness before the Tribunal and submit that the said witness had deposed in the said affidavit that the said deceased was wearing helmet on her head at the time of the said accident in which she died. He submits that there was no cross-examination on this deposition of the said witness by the appellant's counsel. No witness summons was issued to the driver of the dumper to enter the witness box.

She submits that the Tribunal thus could not have rendered a finding that the said deceased was also negligent to the extent of 30%. She submits that the Tribunal ought to have held the driver of the dumper as fully negligent and ought not to have deducted 30% of the amount on that basis.

17. Learned counsel for the claimants placed reliance on the salary certificate of the deceased for the period from 1st April, 2008 to 31st March, 2009 and would submit that the benefit of all the components of salary of the said deceased would go to the family members of the said deceased. She submits that all perks being paid to the said deceased by the employer as part of her pay packet have to be considered for the purposes of deriving the gross earning of the said deceased for computation of the other compensation.

18. Learned counsel for the claimants submits that in addition to the allowances allowed by the Tribunal to the claimants, the claimants would be also entitled to additional compensation towards filial consortium i.e. Rs.40,000/- to each of the claimants being the parents of the said deceased who was spinster at the date of her death. she submits that the Motor Vehicles Act is a beneficial and welfare legislation. The Court is duty bound and entitled to award “just compensation”, irrespective of whether any plea in that behalf was raised by the claimants or not. In support of this submission, learned counsel placed reliance on the judgment of Supreme

Court in case of ***Magma General Insurance Co. Ltd. v/s. Nanu Ram and Others, 2018 ACJ 2782.***

19. Learned counsel for the appellant in rejoinder invited my attention to the cross-examination of the witness examined by the claimants and would submit that the said witness has admitted in her evidence that she was not personally present at the time of accident. He submits that she was not even eye witness and thus could not have deposed that the said deceased was wearing helmet at the time of the accident. The evidence of the said witness was hearsay. He submits that at the time of spot panchnama carried out by the Police, no items were recovered at the time of the said accident including the helmet if any. He submits that the claimants thus could not claim that the said deceased was wearing helmet at the time of her accident.

20. Ms. Bhatt, learned counsel for the claimants states that the mother of the said deceased had expired. The sisters of the said deceased have filed affidavit giving their no objection if the amount of compensation is exclusively paid to the father of the said deceased i.e. claimant no.1 Mr. Julius T.J. Freitas.

REASONS AND CONCLUSION

21. A perusal of the judgment and award passed by the Tribunal,

indicates that the Tribunal has rendered a finding that on 3rd August, 2009 the said deceased died in motor accident involving Motor Dumper No. MH-04-CG-2262 and has further held that the accident took place because of negligence on the part of the driver of motor dumper no. MH-04-CG-2262. The claimants had examined their constituted attorney as a witness. The appellant did not issue any witness summons upon the driver of the dumper bearing registration no. MH-04-CG-2262. In the written statement, it was the case of the appellant that the said dumper was proceeding in the moderate speed with due care, caution and proper look out on the vehicular traffic on the road when suddenly the said deceased who was riding a motor scooter in a fast speed, rash and negligent manner, without observing the vehicular traffic on the road and in the process dashed the front portion of the said motor dumper, as a result whereof the accident occurred.

22. The witness examined by the claimants on the other hand deposed that the said deceased was riding her Kinetic Honda Scooter with helmet on her head with care and caution, in a prescribed speed and had taken into consideration the traffic rules. The offending motor dumper, which was coming behind, in full speed in rash and negligent manner, gave a dash to the Kinetic Honda Scooter of the deceased. Due to the impact of the violent/heavy dash, the deceased was thrown down and the tyre of the motor dumper went over the face of the deceased smashing her head after the scooter was thrown down to the right side. The said witness also relied upon

the FIR, Panchnama and Death Certificate in her evidence. In her cross-examination, the said witness admitted that she had not seen the accident and thus she could not tell that the accident took place due to negligence of the said deceased.

23. The claimants had also examined Mr. Vijay Kumar Hembrom, Manager, H.R., UTI AMC Ltd., to prove the salary of the deceased. The said witness produced the computerized salary slip of the said deceased for the month of June 2009, mentioning monthly salary as Rs.53,619/- with the list of documents. He also produced the rough estimate of her minimum monthly salary at Rs.69,826/- that she would have earned as on the date of evidence led by the said witness. The said witness was cross-examined by the learned Advocate appearing for the appellant. The said witness deposed that the said deceased and the said witness were working in the same rank. His salary at the time of evidence was about Rs.1,15,000/-.

24. The claimants also placed reliance on the statement made by Mr.Santosh D. Doiphode recorded by the Vile Parle Police Station. In the said statement of the said witness it was stated that at the time of the accident, the said deceased had worn helmet. No witness summons was issued to the said Mr. Santosh D. Doiphode nor he was examined as a witness by the claimants. In my view, the statement of the said Mr. Santosh D. Doiphode thus could not be relied upon as a piece of evidence by the

claimants or by the Tribunal.

25. The appellant also placed reliance on another statement made by Mr. Imam Shahu Hussain Shaikh on 3rd August, 2009 before the Vile Parle Police Station. The said statement was tendered by the appellant before the Tribunal with an application contending that the said statement was necessary document on the point of negligence on the part of the deceased and therefore shall be taken on record and marked exhibit and be read as evidence. The appellant had applied for production of the certified true copy of the said statement and had prayed for taking the same on record. Pursuant to the said application made by the appellant, the Tribunal passed an order allowing the production of the said document, strongly relied upon by the appellant. In so far as the statement of Mr. Imam Shahu Hussain Shaikh which was relied upon by the appellant before the Tribunal is concerned, though the said statement was made before the Vile Parle Police Station and was considered in the FIR filed against the said driver of the dumper who had made, that statement was not considered. In the said statement, the said driver admitted his negligence while driving the said dumper. The said dumper driver took the responsibility on him for the said accident. Various other panchnamas were also relied upon before the Tribunal.

26. In my view, though the said statement which was strongly relied upon by the appellant was only marked as exhibit and the said witness was not

examined by the appellant, the statements made by the said driver of the dumper, whose statement was strongly relied upon by the appellant as evidence could be relied upon by the Tribunal. The appellant who had tendered the said document cannot be allowed to urge that the statement relied upon by the appellant itself of the said dumper driver not having filed affidavit in lieu of examination-in-chief cannot be relied upon. The admissions made in the said statement thus were to be treated as part of the evidence by the Tribunal and could not have been ignored while deciding the claims made by the claimants.

27. In so far as the judgment of this Court in case of **Mr. Pukh Raj Bumb** (supra) relied upon by the learned counsel for the appellant in support of the submission that mere marking of a document as exhibit is not enough to prove the execution, proof of contents and evidentiary value of the documents is concerned, Mr. Joshi, learned counsel for the appellant is right in his submission that in so far as the statement of Mr. Santosh D. Doiphode recorded before the Senior Inspector of Police, Vile Parle Police Station, which was relied upon by the claimants could not have been considered by the Tribunal on the ground that the said Mr. Santosh D. Doiphode was not examined as a witness by the claimants and thus there was no opportunity to his client to cross-examine the said Mr. Santosh D. Doiphode. However, the appellant cannot be allowed to be agitate the same issue, so far as the statement of Mr. Imam Shahu Hussain Shaikh whose statement was relied

upon by the appellant itself and w marked as Exhibit 51 is concerned. The said statement was tendered by the appellant along with their application dated 24th April, 2016 with a request to take the said statement on record and to be read in evidence. The appellant had not disputed the contents of the said statement but on the other hand had relied upon the said statement and had requested the Tribunal to read the said statement in evidence.

28. In my view, the appellant thus cannot be allowed to urge that the said statement of Mr. Imam Shahu Hussain Shaikh which was tendered in evidence by the appellant could not be read in evidence since the said person was not examined as a witness by the appellant. The appellant having tendered the said statement in the evidence was bound by the statements made by the said Mr. Imam Shahu Hussain Shaikh in the said statement made before the Police. If the claimants would have tendered the evidence of the said Mr. Imam Shahu Hussain Shaikh without examining the said Mr. Imam Shahu Hussain Shaikh as their evidence, those statements would not have been binding on the appellant. In my view, the judgment of this Court in case of **Mr. Pukh Raj Bumb** (supra) thus would not assist the case of the appellant, in so far as the statement of Mr. Imam Shahu Hussain Shaikh is concerned.

29. In so far as the judgment of Supreme Court in case of **Lachoo Ram and Others** (supra) relied upon by the learned counsel for the appellant is

concerned, Supreme Court in the said judgment has held that simply the involvement of the bus in the accident cannot make the respondent liable to pay compensation unless it can be held on the basis of materials on record that the accident was caused by rash and negligent act of the driver. The witness could not see the actual accident because at that time the motorcyclist, in an effort to overtake the bus had gone on its right side and was not visible and therefore he could only hear the sound of crash. In my view, the facts before the Supreme Court in the said judgment were totally different. In this case, the statement of the driver of the dumper vehicle who was driving the said vehicle which dashed the said deceased by virtue of which the said victim expired, in his statement confirmed that he had dashed the said two wheeler driven by the said victim and had taken the entire responsibility of the said accident. The said statement was relied upon as an evidence by the appellant. The judgment of Supreme Court in case of **Lachoo Ram and Others** (supra) thus would not assist the case of the appellant.

30. In so far as the judgment of Supreme Court in case of **Nishan Singh and Others** (supra) relied upon by the appellant is concerned, the Supreme Court has considered Regulation 23 of the Rules of the Road Regulations, 1989 which provided that the driver of the motor vehicle running behind another vehicle, has to keep sufficient distance from that other vehicle to avoid collusion, if the vehicle in front should suddenly slow down or stop. In

my view, the said Regulation would not apply to the facts of this case. The driver of the said dumper vehicle himself admitted in the said statement that he was behind the said two wheeler and had dashed the said two wheeler from behind. The judgment of the Supreme Court in case of **Nishan Singh and Others** (supra) thus would not assist the case of the appellant.

31. In so far as the submission of the learned counsel for the appellant that the Tribunal could not have considered Transport Allowance, Telephone Facilities, Periodicals and Journals, Executive Allowance and Provident Fund AMC while computing the gross earning of the said deceased for the purpose of computation of various compensation is concerned, a perusal of the affidavit of evidence filed by the witness examined by the claimants indicates that in paragraph 4 thereof, she had deposed that the said deceased was working with UTI and was earning Rs.53,619/- p.m. She also tendered salary slips and memorandum of appointment along with the said affidavit. In her further examination-in-chief, the said witness tendered various documents including memorandum of appointment dated 22nd May, 1992 and pay slips for the months of January to June 2009.

32. The claimants had also examined Mr. Vijay Kumar Hembrom, Manager, H.R., UTI AMC Ltd., as one of the witness. The witness had produced the certificate true copy of the computerized salary slip for the month of June 2009 mentioning monthly salary as Rs. 53,619/- and also

produced rough estimate of her minimum monthly salary at Rs.69,826/- that she would have earned as on the date of recording evidence of the said witness before the Tribunal. He deposed that the said rough estimate of her minimum monthly salary prepared by the said witness himself was based on the salary data in the system and existing remuneration policy of the employer. In his cross-examination-in-chief the said witness deposed that in addition to the basic salary, the other regular monthly benefits/allowances forming part of salary are also taken into account as reflected in the statement prepared by him. He had not taken into account the said allowances based on merit and performance and variable pay which is purely based on the performance.

33. A perusal of the cross-examination of the said witness examined by the claimants to prove the gross earning of the said deceased indicates that the said witness and the said deceased were working in the same rank, his salary at the time of recording evidence was about Rs.1,15,000/- and thus he had given rough estimate of the salary of the deceased without other benefits which she would have received, if she would have alive.

34. A perusal of the said cross-examination clearly indicates that the appellant did not cross-examine the said witness on the issue whether any of the heads of payment forming part of the salary of Rs.53,619/- were personal in nature and were by way of reimbursement of those expenditures incurred

during the course of her official duty in the office only. The appellant had ample opportunity to seek clarification from the said witness who had tendered the salary slip of the said deceased showing payment of the said amount of Rs.53,619/- inclusive of various heads of payment. The appellant thus cannot be allowed to now urge before this Court that the payment reflected in the said salary certificate such as Transport Allowance, Telephone Facilities, Periodical and Journals and Provident Fund AMC were the reimbursement of the expenses incurred during the course of carrying out official duty and in the office premises.

35. Be that as it may, the appellant could not demonstrate even before this Court whether the Transport Allowance paid to the said deceased was in respect of any vehicle used by her for attending the official duty or not. Similarly, in respect of the Telephone Facilities also, the appellant could not demonstrate nor could prove that such payment facilities was for provided in the office only and not outside including residence.

36. In respect of Periodicals and Journals also it was not the case of the appellant that the Periodicals and Journals were purchased by the said deceased for reading in the office of the employer where she was working. If the Periodicals and Journals, if any were purchased by the said deceased and were used by all the family members, the benefit of the said amount would be for all the members of the family which was deprived of by the claimants

family members. In so far as the payment towards Provident Fund AMC is concerned, the appellant did not raise any objection in respect of those head of components of salary at any point of time. In so far as deduction from the salary towards income tax and professional tax made in the said salary certificate is concerned, Mr. Joshi, learned counsel for the appellant agreed that only those two heads of deductions would be permitted for the purpose of computing gross earning.

37. In so far as the judgment of Supreme Court in case of ***National Insurance Co. Ltd. v/s. Indira Srivastava and others*** (supra) relied upon by the learned counsel for the appellant is concerned, the Supreme Court in the said judgment adverted to the earlier judgment in case of ***Asha v/s. United India Insurance Co. Ltd., (2008) 2 SCC 774***. In the said judgment, the Supreme Court had held that what would be “just compensation” must be determined having regard to the facts and circumstances of each case. The basis for considering the entire pay packet is what the dependents have lost due to death of the deceased. It is in the nature of compensation for future loss towards the family income.

38. The Supreme Court in the said judgment in case of ***National Insurance Co. Ltd. v/s. Indira Srivastava and others*** (supra) has held that the amounts which were required to be paid to the deceased by his employer by way of perks, should be included for computation for his monthly income

as that would have been added to his family income by way of contribution to the family as contradistinguished to the ones which were for his benefit. The statutory amount of tax payable thereupon must be deducted. The Supreme Court also considered the definition of “income” as defined in **P. Ramanatha Aiyar’s Advanced Law Lexicon (3rd Edn.)** and also the definition of “income” constituted in various judgments of Supreme Court and held that if the dictionary meaning of the word “income” is taken to its logical conclusion, it should include those benefits, either in terms of money or otherwise, which are taken into consideration for the purpose of payment of income tax or professional tax although some elements thereof may or may not be taxable or would have been otherwise taxable but for the exemption conferred thereupon under the statute.

39. The Supreme Court also adverted to of the earlier judgment in case of **New India Assurance Co. Ltd. v/s. Kalpana, (2007) 3 SCC 538** in which it was held by the Supreme Court that although the words “net income” have been used but the same itself would ordinarily means gross income minus statutory deductions. The Supreme Court rejected the contentions of the Insurance Company that various heads of earning reflected in the salary certificate of the employee were required to be executed for the purpose of gross earning.

40. In my view, perks which are paid in addition to the gross salary to an

employee during the course of employment are part and parcel of the salary and have to be considered as a pay packet in the hands of an employee. Learned counsel for the claimants is right in her submission that all perks paid to the said deceased by her employer which were forming part of the salary were to be considered to arrive at the gross earning for computation of other heads of compensation. The judgment of Supreme Court in case of ***National Insurance Co. Ltd. v/s. Indira Srivastava and others*** (supra) thus would not assist the case of the appellant but on the contrary would assist the case of the claimants. In my view, there is no thus perversity in the order passed by the Tribunal in considering the gross earning at Rs.53,619/- subject to the deduction of professional tax and income tax.

41. A perusal of the judgment and award rendered by the Tribunal indicates that though admittedly the said deceased was below the age of 40 years at the time of her accident, though the Tribunal ought to have considered the 50% of the gross earning towards “future prospects” as the said deceased had a permanent job, the Tribunal has considered the compensation for “future prospects” only at 30% of the gross salary. Mr.Joshi, learned counsel for the appellant fairly invited my attention to the paragraph 59.3 the judgment of Supreme Court in case of ***National Insurance Company Limited v/s. Pranay Sethi and Ors.*** (supra). In my view, the claimants thus would be entitled to 50% of the gross earning and not 30% as awarded by the Tribunal. This part of the cross-objection filed by

the claimants thus deserves to be allowed. This amount thus comes to Rs.9,65,142/-. After deducting the income tax and profession tax amount of Rs.2,50,000/- and Rs.300/- respectively, 50% towards deductions from salary, amount comes to Rs.3,57,421/-.

42. In so far as the submission of the learned counsel for the appellant that the Tribunal ought to have applied the multiplier of 5 and not 15 is concerned, in my view this submission of the learned counsel is contrary to the principles laid down by the Supreme Court in case of ***National Insurance Company Limited v/s. Pranay Sethi and Ors.*** (supra). In paragraph 59.7 of the said judgment, it is held by the Supreme Court that the age of deceased should be the basis for applying the multiplier. In this case since the said deceased was less than 40 years at the time of accident, the claimants were entitled to the application of multiplier of 15 and not 5. I do not find any infirmity in this part of the judgment and award passed by the Tribunal. The submission of the learned counsel being contrary to the principles laid down by the Supreme Court in case of ***National Insurance Company Limited v/s. Pranay Sethi and Ors.*** (supra) is thus rejected. After applying the multiplier of 15, the amount comes to Rs.53,61,315/-

43. In so far as the compensation of Rs.1,00,000/- towards loss of love and affection of the deceased, Rs.10,000/- for funeral expenses and ambulance and Rs.50,000/- towards loss of estate is concerned, in my view

the principles laid down by the Supreme Court in case of ***National Insurance Company Limited v/s. Pranay Sethi and Ors.*** (supra) would apply to the facts of this case. The claimants would not be entitled to claim loss of consortium but would be liable to entitled Rs.15,000/- towards loss of estate and Rs.15,000/- towards funeral expenses. The part of the judgment and award to this extent is modified. After adding this amount, amount comes to Rs.53,91,315/-

44. In so far as the submission of the learned counsel for the claimants that the Tribunal could not have attributed 30% negligence towards the said deceased and could not have reduced the claim of both the compensation by 50% is concerned, the question that was considered by the Tribunal was whether the said deceased had wore the helmet on her head while driving the said two wheeler which was dashed by the dumper vehicle from behind.

45. Learned counsel for the claimants strongly placed reliance on the statement made by Mr.Santosh Dharmaji Doiphode on 3rd August, 2009 who had stated in his statement before the Vile Parle Police Station that the said deceased had wore the helmet while driving the said two wheeler when she met with an accident with the said Dumper. Learned counsel for the claimants did not dispute that no witness summons was issued to the said Mr.Santosh Dharmaji Doiphode for recording his evidence. The appellant did not have an opportunity to cross-examine the said Mr.Santosh Dharmaji

Doiphode, whose statement was recorded before Vile Parle Police station. No helmet was found at the spot of accident. Considering the said Panchanama, the Tribunal has rendered a finding that the said deceased was not wearing the helmet and head gear and her head only was smashed. The Tribunal accordingly has rendered a finding that the deceased was negligent in obeying the rules framed under the Motor Vehicles Act, 1888 therefore there was a contributory negligence on her part to the extent of 30%. The Tribunal accordingly reduced the compensation to the extent of 30% and arrived at net compensation of Rs.30,78,894/-.

46. Insofar as reliance on the deposition of the witness examined by the claimants on the issue whether the said deceased was wearing the helmet or not at the time of accident is concerned, it is the case of the claimants that there was no cross-examination on the said deposition of the said witness that the said deceased had wore the helmet when she was driving the said two wheeler and met with an accident. A perusal of the cross-examination of the said witness examined by the claimants clearly indicates that the said witness clearly admitted in her cross-examination that she had not seen the accident and she could not tell that the accident took place due to her negligence.

47. In my view, the said witness thus having no personal knowledge of the fact whether the said deceased had worn the helmet or not at the time of

the said accident, her deposition in the affidavit in lieu of examination in chief to that effect could not have been considered as proved and more particularly when the said witness herself had admitted that she had not seen the accident. In my view, there is thus no substance in the submission made by the learned counsel for the claimants that there was no cross-examination on the deposition of the said witness that the said deceased had worn the helmet when driving the said two wheeler which met with an accident. In my view since the said deceased had violated the provisions by not wearing the helmet, the Tribunal rightly found the contributory negligence of the said deceased to the extent of 30% and has rightly deducted the said amount while computing the compensation from the total amount. After deducting 30% amount from Rs.53,91,315/-, amount comes to Rs.37,73,920.50/-. I do not find any infirmity with this part of the judgment and award.

48. Insofar as the reliance placed on the judgment of the Supreme Court in case of ***Ramla & Ors. vs. National Insurance Company Ltd. & Ors. (2019) 2 SCC 192*** by the learned counsel for the claimants is concerned, the Supreme Court in the said judgment has held that there is no restriction that the Court cannot award compensation exceeding the claim amount since the function of the Tribunal or the Court under section 168 of the Motor Vehicles Act, 1888 is to award “just compensation”. The Motor Vehicles Act is a beneficial and welfare legislation. “Just compensation” is the one which is reasonable on the basis of the evidence produced on record. The

principles of law laid down by the Supreme Court in the said judgment applies to the facts of this case. I am respectfully bound by the principles laid down by the Supreme Court in the said judgment. In my view, the claimants though have not claimed compensation towards filial consortium though the claimants being the parents of the spinster deceased, I am inclined to consider the compensation of Rs.40,000/- each payable to each of the claimant towards filial compensation in view of the judgment of the Supreme Court in case of **Magna General Insurance Co. Ltd.** (supra). After allowing filial compensation of total Rs.80,000/- amount comes to Rs.38,53,920.51/- rounded off to Rs.38,53,921/-.

49. I therefore, pass the following order :-

- (a) First Appeal (Stamp) No.30932 of 2016 and Cross Objection (Stamp) No.4752 of 2017 are partly allowed. The compensation awarded to the claimants is enhanced from Rs.33,38,894/- to Rs.38,53,921/- with interest at 9% p.a. from the date of application till realization.
- (b) In view of the demise of the original claimant no.2 and in view of the affidavits filed by the sisters of the said deceased giving their no objection that the entire compensation amount be paid to the claimant no.1, the claimant no.1 would be entitled to be paid the entire compensation exclusively.
- (c) If there is any short fall in the amount paid by the appellant in the deposit amount made by the appellant pursuant to the interim order passed by this Court, such amount shall be directly paid to

the claimant no.1 within four weeks from today. If the entire amount deposited by the appellant is not withdrawn by the claimant no.1, the claimant no.1 would be entitled to withdraw such amount upon production of the authenticated copy of this order. If any additional Court fees is payable by the claimants under the statute, the same shall be paid within four weeks from today and upon payment of such deficit Court fees, if any, the Tribunal shall permit the claimant no.1 to withdraw the balance amount.

- (d) The judgment and award of the Tribunal under challenge in the first appeal and the cross objection stands modified accordingly.
- (e) In view of the disposal of the first appeal and cross objection, all pending civil application also stand disposed of.
- (f) There shall be no order as to costs.

(R.D. DHANUKA, J.)