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

**FIRST APPEAL NO. 565 OF 2018  
WITH  
CIVIL APPLICATION NO. 1689 OF 2018  
IN  
FIRST APPEAL NO. 565 OF 2018**

The New India Assurance Co. Ltd.  
DO: 111200, 3<sup>rd</sup> Floor,  
Asian Building, 17 R Kamani Road,  
Ballard Estate, Mumbai – 400 001.  
Policy No. 15160031090100200733  
Valid from: 21.08.2009 to 20.08.2010.

... Appellant/  
Applicant

***Versus***

1. Smt. Aruna Hanumant Yadav,  
Aged about 38 yrs.,  
widow of the deceased
2. Mr. Vaibhav Hanumant Yadav,  
Aged about 19 years,  
Son of the deceased
3. Mast. Ketan Hanumant Yadav,  
Aged about 16 years,  
Son of the deceased  
(Applicant No.3 being minor  
Through his mother and natural  
Guardian Smt. Aruna H. Yadav)
4. Shri Bhaguji Sripati Yadav,  
Aged about 65 years,  
Father of the deceased
5. Smt. Anusaya Bhaguji Yadav,  
Aged about 60 years,  
Mother of the deceased,  
All are residing at :-  
Kapila Vastu Hsg. Co. Opp. Soc.  
Room No. 304, Plot No. 620 and 621,  
Section No.1, Navi Mumbai.

6. Sunil S. Sahani,  
Flat No.5, Building No.1,  
Shraddha Heritage,  
Mumbai Pune Road, Pimpri,  
Pune 411 018 (Owner of the  
M/Car No. MH-14-BK-6156

... Respondents

**WITH  
CIVIL APPLICATION NO. 1690 OF 2018  
IN  
FIRST APPEAL NO. 565 OF 2018**

1. Smt. Aruna Hanumant Yadav,  
Aged about 38 yrs.,  
widow of the deceased
2. Mr. Vaibhav Hanumant Yadav,  
Aged about 19 years,  
Son of the deceased
3. Mast. Ketan Hanumant Yadav,  
Aged about 16 years,  
Son of the deceased  
(Applicant No.3 being minor  
Through his mother and natural  
Guardian Smt. Aruna H. Yadav)
4. Shri Bhaguji Sripati Yadav,  
Aged about 65 years,  
Father of the deceased
5. Smt. Anusaya Bhaguji Yadav,  
Aged about 60 years,  
Mother of the deceased,  
All are residing at :-  
Kapila Vastu Hsg. Co. Opp. Soc.  
Room No. 304, Plot No. 620 and 621,  
Section No.1, Navi Mumbai.

... Applicants

**IN THE MATTER BETWEEN :-**

The New India Assurance Co. Ltd.  
DO: 111200, 3<sup>rd</sup> Floor,  
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Valid from: 21.08.2009 to 20.08.2010.

... Appellant

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Shraddha Heritage,  
Mumbai Pune Road, Pimpri,  
Pune 411 018 (Owner of the  
M/Car No. MH-14-BK-6156

... Respondents

.....

Mr. H.G. Misar a/w Mr. Shubham H. Misar for the Appellant/Applicant in  
CAF/1689/2018.

Mr. T.J. Mendon for the Respondent Nos. 1 to 5 and Applicant in  
CAF/1690/2018.

.....

**CORAM : R.D. DHANUKA, J.**

**RESERVED ON : 25<sup>th</sup> NOVEMBER, 2019**

**PRONOUNCED ON : 7<sup>th</sup> JANUARY, 2020**

**JUDGMENT :**

. By this First Appeal filed under Section 173 of the Motor Vehicles Act, 1988, the appellant, one of the opponent before the Tribunal has impugned the judgment and award dated 3<sup>rd</sup> May, 2017 passed by the Motor Accident Claims Tribunal (MACT), Mumbai in Claim Application No. 735 of 2010 thereby directing the appellant (Insurer) and the respondent no.6 (opposite party), who was owner of the offending vehicle to pay jointly and severally an amount of Rs.13,97,000/- to the respondent nos. 1 and 5 (original applicants) with interest @ 9% p.a. from the date of filing of the application till realization inclusive of “no fault liability” compensation amount. By consent of appellant and the respondent nos.1 to 5, the First Appeal is heard finally at the admission stage. Some of the relevant facts for the purpose of deciding this First Appeal are as under :-

2. The appellant was one of the opposite party before the Tribunal. The respondent nos. 1 to 5 were the original applicants. The respondent no.1 is widow of Mr. Hanumant Yadav (hereinafter referred as “the said deceased” for short). The respondent nos.2 and 3 are the sons of the said deceased. The respondent nos. 4 and 5 are the father and mother of the said deceased respectively. The respondent no.3 was minor at the time of filing the claim application.

3. It was the case of the respondent nos. 1 to 5 that on 21<sup>st</sup> February, 2010 at around 23:00 hours, the said deceased was crossing Sion-Panvel Road at the end of the Mankhurd Bridge, Mumbai. The motor car bearing registration no. MH-14-BK-6156 came from Sion towards Panvel side with high and excessive speed and gave dash to the deceased, who succumbed to those injuries on the same day. The respondent nos. 1 to 5 being legal heirs/representatives of the said deceased filed Claim Petition bearing No. 735 of 2010 before the MACT, Mumbai against the respondent no.6 (owner of the offending vehicle) and the appellant herein. The owner of the offending vehicle did not appear before the Tribunal. The appellant however opposed the said claim by filing written statement and denied the entire claim. The Tribunal framed 3 issues and passed the judgment and award dated 3<sup>rd</sup> May, 2017 directing the appellant and the respondent no.6 to pay the sum of Rs.13,97,000/- with interest @ 9% p.a. from the date of filing of application till entire realization of the amount.

4. The respondent nos. 1 to 5 examined the respondent no.1 as a witness who was cross-examined by the learned counsel for the appellant. The said witness also produced certified copies of FIR, Spot Panchanama, Inquest Panchanama, Cause of Death Certificate and Insurance Policy.

5. Mr. H.G. Misar, learned counsel for the appellant invited my attention to the some of the findings rendered by the Tribunal and would submit that

the appellant had not impleaded the driver of the offending vehicle as a party to the claim application. The Tribunal thus ought to have rejected the said claim application on the ground of non joinder of necessary party. Learned counsel relied upon the judgment of this Court in case of ***Shakuntla Shridhar Shetty v/s. State of Maharashtra, 1976 A.C.J. 368 (Bom)*** and more particularly on paragraphs 21 and 30 of the said judgment in support of this submission.

6. In so far as quantification of claim awarded by the Tribunal is concerned, learned counsel invited my attention to the paragraph 12 of the impugned judgment and award and would submit that income of the said deceased at Rs.7,000/- considered by the Tribunal was not based on any evidence. He submits that the respondent no.1 who was examined as a witness by the respondent nos. 1 to 5 was not an eye witness. The respondent nos. 1 to 5 were receiving family pension and thus there was no financial loss caused to the respondent nos. 1 to 5. The Tribunal thus ought to have considered this fact into consideration while allowing the claim for compensation made by the respondent nos. 1 to 5. It is submitted by the learned counsel that the constable who had prepared the spot panchanama was not examined as a witness by the respondent nos. 1 to 5.

7. It is submitted that the initial burden was only on the respondent nos. 1 to 5 to prove that the driver of the offending vehicle was solely responsible

for the said accident and that the driving was rash and negligent, which burden the respondent nos. 1 to 5 failed to discharge. He submits that the entire judgment and award granting compensation in favour of the respondent nos. 1 to 5 is based on FIR placed on record finding the negligence of the driver of the offending vehicle.

8. In so far as the quantification of claim awarded by the Tribunal is concerned, learned counsel invited my attention to the findings rendered by the Tribunal in paragraph 12 of the impugned judgment and award and would submit that the respondent nos. 1 to 5 had not examined the employer of the said deceased in support of the salary received by the said deceased from the employer on the date of the death of the said deceased. He submits that since there was no evidence of the salary received by the said deceased on the date of accident, the Tribunal could not have considered the monthly income at Rs.7,000/- on hypothetical basis.

9. Learned counsel for the appellant invited my attention to clause 6 of the claim application filed by the respondent nos. 1 to 5 and would submit that even according to the said claim application, the monthly salary of the said deceased was at Rs.4,830/- and Rs.5,500/- per month by way of pension. He submits that the Tribunal however has considered the monthly income at Rs.7,000/- as against the monthly income at Rs.4,830/- as claimed by the respondent nos. 1 to 5 in the claim application. He submits that the

family pension received by the said deceased could not have been considered by the Tribunal while awarding compensation at Rs.7,000/- p.m. which was obviously inclusive of part of the said family pension.

10. Learned counsel for the appellant placed reliance on the judgment of Madhya Pradesh High Court in case of ***Madhya Pradesh State Road Transport Corporation v/s. Vaijanti and others, 1995 ACJ 560*** and in particular paragraphs 12 and 13 and would submit that driver of the offending vehicle was necessary party and in any event out to have been examined as a witness by the respondent nos. 1 to 5.

11. Mr. T.J. Mendon, learned counsel for the respondent nos. 1 to 5 on the other hand submits that the respondent no.6 who was impleaded as the opposite party himself was driving the said offending vehicle and was the owner of the said vehicle which was ensured with the appellant. He submits that there is thus no substance in the submission of the learned counsel that the driver of the offending vehicle was not impleaded. In support of this submission, learned counsel placed reliance on paragraph 15A of the claim application and also the Police papers and would submit that it is clear that the respondent no.6 i.e. the original opponent himself was the owner of the offending vehicle and was driving the said offending vehicle.

12. Learned counsel also placed reliance on the application filed by the

appellant under Section 170 of the Motor Vehicles Act, 1988 seeking permission to contest the claim on any of the ground without prejudice to the provisions contending Section 149(2) of the Motor Vehicles Act, 1988. He invited my attention to the averments of the appellant in paragraph 7 of the written statement denying that the driver of the offending vehicle was driving in rash and negligent manner. The Tribunal had granted leave in favour of the appellant to defend the claim in the said application. He submits that the appellant did not make any attempt to examine the original opponent i.e. owner-cum-driver of the said offending vehicle.

13. Learned counsel for the respondent nos. 1 to 5 placed reliance on the judgment of this Court in case of ***Oriental Insurance Co. Ltd. v/s. Sangita Dattatraya Jamdada and Ors., 2006 ACJ 971*** and in particular paragraphs 4 to 7 and would submit that merely because the police constable who had prepared the spot panchanama was not examined as a witness, those documents could not be ignored by the Tribunal. The panchanama, FIR and other related documents produced by the respondent nos. 1 to 5 were admitted in evidence without any objection raised by the appellant and were rightly referred and relied upon by the Tribunal in the impugned judgment and award. It is submitted that the appellant however did not lead any evidence and also did not dispute the FIR, Panchanama and other documents produced by the respondents nos 1 to 5.

14. Learned counsel placed reliance on the judgment of Supreme Court in case of **New India Assurance Co. Ltd.v/s. Yadu Sambhaji More and others, 2011 ACJ 584 (SC)** and in particular paragraphs 13 and 14 and would submit that after considering Section 165 of the Motor Vehicles Act, the Supreme Court held that if there was use of motor vehicle which was involved in the accident, claim was maintainable under Section 140 of the Motor Vehicles Act.

15. Learned counsel for the respondent nos. 1 to 5 placed reliance on the judgment of Supreme Court in case of **Bimla Devi and Ors. v/s. Himachal Road Transport Corporation and Ors., (2009) 13 SCC 530** and in particular paragraph 14 in support of the submission that even if the witness who was examined by the respondent nos. 1 to 5 might not be aware to the details as to how the accident took place, the Tribunal cannot ignore the First Information Report which had been lodged in relation to the accident. He submits that the Tribunal thus rightly relied upon the FIR, Spot Panchanama, Inquest Panchanama and other related documents while holding that the driver of the offending vehicle was solely responsible for the said accident. He submits that the respondent nos. 1 to 5 were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. The respondent nos. 1 to 5 had examined the witness and had produced large number of documents. The initial burden cast upon the respondent nos. 1 to 5 was thus

discharged and shifted upon the appellant. The appellant however did not establish the negligence of the said deceased on the date of the accident.

16. Learned counsel for the respondent nos. 1 to 5 placed reliance on the judgment of Supreme Court in case of **Vimal Kanwar and others v/s. Kishore Dan and others, 2013 ACJ 1441** and would submit that the family pension which was received by the said deceased was not a pecuniary advantage within the periphery of the Motor Vehicles Act and is not liable to be deducted for computation of compensation.

17. Learned counsel for the respondent nos. 1 to 5 also placed reliance on the judgment of Supreme Court in case of **Helen C. Rebello and others v/s. Maharashtra State Road Transport Corporation and another, 1999 ACJ 10** and in particular paragraph 37 in support of the submission that family pension earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death cannot be deducted while computing compensation. He submits that wife of the said deceased would get 50% pension out of what was paid by the employer to the said deceased.

18. Learned counsel for the respondent nos. 1 to 5 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 (SC)** and in particular paragraph

8.7 and would submit that the respondent no.1 being widow, the respondent nos. 2 and 3 being children and respondent nos. 4 and 5 being parents of the said deceased would be entitled to consortium under the head of filial consortium in the sum of Rs.40,000/- each, which may be considered by this Court in favour of the respondent nos. 1 to 5.

19. Learned counsel for the respondent nos. 1 to 5 placed reliance on an unreported judgment of this Court delivered on 22<sup>nd</sup> August, 2019 in case of **Asha Maruti Alhat and Ors. v/s. Ratnakar Pralhad Nikumbh and Ors.** in First Appeal No. 659 of 2017 and in particular paragraph 13 in support of the submission that after adverting to the judgment of Supreme Court in case of **Magma General Insurance Co. Ltd.**(supra), this Court had allowed compensation of Rs.40,000/- towards loss of parental consortium to the parents of the said deceased and the sum of Rs.40,000/- to the respondent no.1 widow towards loss of spousal consortium and respondent nos. 2 and 3 who are children of the said deceased would be entitled to Rs.40,000/- each towards loss of parental consortium.

20. Learned counsel also placed reliance on the judgment of this Court in case of **Asha Maruti Alhat and Ors.** (supra) in support of the submission that though the respondent nos. 1 to 5 have not filed any cross-objection, this Court in the judgment after adverting to the judgment of Supreme Court in case of **Ramla v/s. National Insurance Co. Ltd., AIR (2019) SCC 2014** has

allowed additional claim though there was no cross-objection filed by the original claimant.

21. Mr. H.G. Misar, learned counsel for the appellant in rejoinder relied upon paragraph 13 of the judgment of the Madhya Pradesh High Court in case of ***Madhya Pradesh State Road Transport Corporation v/s. Vaijanti and others, 1995 ACJ 560*** and would submit that since the driver of the offending vehicle was not examined by the claimant in that matter, it was held by the Madhya Pradesh High Court that driver of the offending vehicle and the driver of the truck were equally responsible.

22. In so far as the judgment of Supreme Court in case ***Bimla Devi and Ors.*** (supra) relied upon by the learned counsel for the respondent nos. 1 to 5 is concerned, it is submitted that the facts before the Supreme Court in the said judgment were totally different. The accident was not disputed by the appellant in that matter. He relied upon the judgment of Supreme Court in case of ***Vimal Kanwar and others*** (supra) and submits that in this case the respondent nos. 1 to 5 had not disclosed the agreement if any between the employer of the said deceased showing terms and conditions of employment and pension. In support of this submission, learned counsel invited my attention to the averments made by the respondent nos. 1 to 5 in paragraph 6 of the claim application. Learned counsel for the appellant relied upon the judgment of this Court in case of ***Oriental Insurance Co. Ltd.*** (supra).

23. Learned counsel for the appellant relied upon the judgment of Supreme Court in case of ***Magma General Insurance Co. Ltd.*** (supra) on the ground that only in case of death of a minor child or unmarried son or daughter, the parents are entitled to the loss of consortium under the head of filial consortium and not otherwise. He submits that in this case the said deceased was admittedly married and had children. The respondent nos. 1 to 5 thus would not be entitled to award of filial consortium.

### **REASONS AND CONCLUSION**

24. A perusal of the record indicates that the respondent nos. 1 to 5 had examined the respondent no.1 as a witness before the Tribunal. The said witness produced on record the certified copies of the FIR, spot panchanama, inquest panchanama, cause of death certificate and insurance policy. The complaint was prepared by the Police constable Mr. Pramod Sakhare on behalf of the State, since he had visited the spot after receiving information about the accident. On the basis of the FIR, an offence/crime no. 53/2010 under Section 304(a) and 279 of the Indian Penal Code was registered against the driver of the offending vehicle.

25. The Tribunal considered various documents produced by the witnesses examined by the respondent nos.1 to 5 including spot panchanama

and held that the tyre marks of the offending vehicles were noticed upto the distance of 10 feet on the said road which showed that the offending vehicle was in a very high speed. The said driver of the offending vehicle failed to exercise a proper care and caution. It is not in dispute that the appellant did not examine any witness. The initial burden was on the respondent nos. 1 to 5 who were the applicants before the Tribunal which burden was discharged and was shifted upon the appellant to prove that the accident did not occur as sought to be canvassed by the respondent nos. 1 to 5. Though the driver of the offending vehicle was a party as respondent before the Tribunal, the appellant did not examine the said party as its witness before the Tribunal. In my view, the Tribunal thus rightly held that there was no evidence to show that in what manner the said deceased who was a pedestrian contributed any negligence to the said accident.

26. In so far as the quantum of claim awarded is concerned, it was brought on record that the said deceased had retired from army and was getting pension from the Central Government. He was also working as a security guard in the Guards Services Private Limited in Mumbai for the salary of Rs.4,961/- p.m. Though no evidence was led by the respondent nos. 1 to 5 to prove that the said deceased was in the employment of the said Guards Services Private Limited, the respondent nos. 1 to 5 had produced the Army Service Record and Pension Certificate during the course of recording evidence. The Tribunal thus considered the monthly income of the

said deceased at Rs.7,000/- p.m.

27. In my view, there is no substance in the submission of the learned counsel for the appellant that the Tribunal could not have considered the monthly income of the said deceased at Rs.7,000/- p.m. The respondent nos. 1 to 5 had already produced the proof to show that the said deceased was working as a security guard in the Guards Services Private Limited, Mumbai. The respondent nos. 1 to 5 had also produced the Army Services Record and Pension Certificate. In my view, the Tribunal thus after considering the evidence placed on record by the respondent nos. 1 to 5 had rightly considered the income of the said deceased at Rs.7,000/- p.m.

28. In so far as the submission of the learned counsel for the appellant that the driver of the offending vehicle was not impleaded as party-respondent before the Tribunal is concerned, in my view this submission of the learned counsel is contrary to the documents produced by the respondent nos. 1 to 5 from record. The respondent no.1 who was owner the offending vehicle, himself was driving the offending vehicle. A perusal of the application filed by the appellant under Section 170 of the Motor Vehicles Act, 1988 seeking permission to contest the claim itself would indicate that the original opponent no.1 was not only owner of the offending vehicle but was also driving the said offending vehicle. It was for the appellant to examine the respondent no.6 (original opponent no.1) to prove that the said

deceased was negligent and not the driver or owner of the offending vehicle.

29. In so far as the submission of the learned counsel for the appellant that since the Police Constable who had prepared the spot panchanama was not examined as a witness, the police papers could not have been considered by the Tribunal is concerned, this Court in case of ***Oriental Insurance Co. Ltd.*** (supra) has held that since there was no dispute raised as regards the certified copy of the FIR, spot panchanama, etc. produced by the original claimants along with claim petition raised by the insurance company and were admitted in evidence and since permission was granted in favour of the insurance company to take all defences and to contest the claims on merits, the insurance company not having led any oral evidence, it was clear that the appellant insurance company did not contest the claim as far as issue of negligence is concerned. There were clear averments made in the application in relation to the negligence of the driver of the offending vehicle. The driver and owner of the offending vehicle did not file any written statement. This Court accordingly rejected the contention raised by the insurance company that the claim was not admissible for want of proof. The principles of law laid down by the this Court in case of ***Oriental Insurance Co. Ltd.*** (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

30. Supreme Court in case of ***New India Assurance Co. Ltd.v/s. Yadu***

***Sambhaji More and others*** (supra) after considering Section 165 of the Motor Vehicles Act has held that if there was use of motor vehicle which was involved in the accident, claim was maintainable under Section 140 of the Motor Vehicles Act, 1988.

31. Supreme Court in case of ***Bimla Devi and Ors.*** (supra) has held that though the claimant was not available at the place of occurrence and therefore might not be able to know the exact details as to how the accident took place but the fact that the First Information Report has been lodged in relation to an accident could not have been ignored. For the purposes of determining the issue whether the offending vehicle in question was involved in the accident or not, the Court was required to apply the principle underlying burden of proof in terms of provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the State Government. The Supreme Court held that the Tribunal had rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied.

32. The Supreme Court held that the High Court should have taken into consideration the respective stories set forth by both the parties. The principles of law laid down by the Supreme Court in the said judgment clearly apply to the facts of this case. Though the respondent no.1 who was examined as a witness was not personally present at the time of accident, the said witness had sufficiently proved the involvement of the offending vehicle by producing various other documents including FIR, spot and inquest panchanama and other evidence on which there was no cross-examination conducted by the appellant. I do not find any infirmity in the findings thus rendered by the Tribunal based on the documentary and oral evidence led by the respondent nos. 1 to 5 before the Tribunal.

33. In so far as the submission of the learned counsel for the appellant that the Tribunal could not have considered the pension amount, if any received by the said deceased during his life time as part of the monthly income for the purposes of considering the claim for compensation claimed by respondent nos. 1 to 5 is concerned, Supreme Court in case of **Vimal Kanwar and others** (supra) has adverted to the judgment in case of **Helen C. Rebello and others** (supra) in which it has been held that the provident fund, pension and insurance and similarly any cash, bank balance, shares, fixed deposits etc. are all pecuniary advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned only on amount of accidental death. Such amount

is secured and is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event i.e. accident which may not take place at all. It is held by this Court in the said judgment that family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. There is no correlation between the two.

34. Supreme Court in case of ***Helen C. Rebello and others*** (supra) has held that the receipt of the provident fund is a deferred payment out of the contribution made by an employee during the tenure of the service. Such employee or his heirs are entitled to receive the said amount irrespective of the accidental death. The said amount is secured and is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event i.e. accident, which may not take place at all. Similarly, the family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. The deceased contributes his own money for which he receives the amount has no correlation to the compensation contributed as against the tortfeasor for his negligence on account of the accident. It is held that the compensation payable under the Motor Vehicles Act is statutory while the amount

receivable under the Life Insurance Policy is contractual.

35. In my view, there is thus no substance in the submission of the learned counsel for the appellant that the Tribunal could not have considered the pension earned by the said deceased while computing the annual income of the said deceased in paragraph 12 of the impugned judgment and award for deriving the loss of dependency. The principles of law laid down by the Supreme Court in case of ***Vimal Kanwar and others*** (supra) and in case of ***Helen C. Rebello and others*** (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

36. In so far as the reliance placed by the learned counsel for the appellant on the judgment of Madhya Pradesh High Court in case of ***Madhya Pradesh State Road Transport Corporation*** (supra) is concerned, the driver of the offending vehicle was not examined by the claimant in that matter. It was held by the Madhya Pradesh High Court that the driver of the offending vehicle and the driver of the truck were equally responsible. The facts before the Madhya Pradesh were totally different and thus the said judgment is clearly distinguishable in the facts of this case and would not assist the case of the appellant.

37. In so far as the judgment of this Court in case of ***Shakuntla Shridhar Shetty*** (supra) relied upon by the learned counsel for the appellant in support

of the submission that claim was bad for non joinder of necessary party and thus the claim application filed by the respondent nos. 1 to 5 ought to have been dismissed on that ground is concerned, in my view, the said judgment of this Court would not apply to the facts of this case, even remotely. The driver of the offending vehicle was the owner of the said offending vehicle and was already impleaded as opponent no.1 before the Tribunal. The claim application was not bad for non joinder of necessary party. The learned counsel for the appellant could not distinguish the judgment of Supreme Court in case of **Magma General Insurance Co. Ltd.** (supra) which is pressed in service by the learned counsel for the respondent nos. 1 to 5 to seek compensation. Driver of the offending vehicle is not necessary but may be proper party.

38. There is no merit in the submission of the learned counsel for the appellant that in absence of any separate appeal or cross-objection not filed by the respondent nos. 1 to 5, this Court cannot enhance the claims not awarded by the Tribunal or new claims which are held permissible by the Supreme Court and this Court under various heads of compensation. This Court has already held in case of **United India Insurance Company Limited v/s. Smt. Kunti Binod Pande and Ors., (2019) SCC OnLine Bom 5606** that there is no bar to enhance or grant new claim which are not granted by the Tribunal in absence of any separate appeal or cross-objection filed by the original claimants to award 'just compensation'.

39. In so far as the claim for filial compensation made by the respondent nos. 1 to 5 across the bar is concerned, in my view, learned counsel for the appellant is right in his submission that the judgment of Supreme Court in case of ***Magma General Insurance Co. Ltd.*** (supra) would apply to the facts of this case. The said deceased was married at the time of his death and thus the said compensation under the head of filial consortium cannot be granted in favour of the respondent nos. 4 and 5 who were the parents of the said deceased.

40. In view of the principles of law laid down by the Supreme Court in case of ***Magma General Insurance Co. Ltd.*** (supra), in addition to the compensation allowed by the Tribunal, the respondent nos. 4 and 5 being parents of the said deceased would be entitled to compensation of Rs.40,000/- each as and by way of loss of parental consortium. The respondent no.1 being widow of the said deceased would be entitled to compensation at Rs.40,000/- as and by way of spousal consortium. The respondent nos. 2 and 3 are the children of the said deceased would be entitled to Rs.40,000/- each towards loss of parental consortium. The respondent nos. 1 to 5 would be also entitled to an amount of Rs.25,000/- towards loss of estate and Rs.15,000/- towards funeral expenses of the said deceased. The amount awarded by the Tribunal in paragraph 15 of the judgment and award is thus substituted by these compensation.

41. I therefore pass the following order :-

- (a) The appellant is liable to pay the sum of Rs.16,37,000/- to the respondent nos. 1 to 5 with interest @ 9% p.a. from the date of filing of the application till entire realization of the amount inclusive of 'no fault liability' compensation amount as under:-
  - (i) Respondent no.1 is awarded Rs.6,06,800/- with accrued interest @ 9% p.a.
  - (ii) Respondent no.2 is awarded Rs.2,57,550/- with accrued interest @ 9% p.a.,
  - (iii) Respondent nos. 3 to 5 are awarded Rs.2,57,550/- Rs.2,57,550/- and Rs.2,57,550/- respectively with accrued interest @ 9% p.a. inclusive of 'no fault liability' compensation amount.
- (b) The respondent nos. 1 to 5 would be allowed to withdraw the amount deposited by the appellant with the M.A.C.T., Mumbai as awarded by the Tribunal and modified by this judgment. If there is any shortfall in the amount deposited by the appellant, the appellant shall deposit the balance amount within two weeks from the date of computation of such shortfall amount. If there is any surplus in the amount deposited by the appellant, the Tribunal shall refund the surplus amount to the appellant.

- (c) If there is any deficit in payment of Court fees, in view of order passed by this Court enhancing the amount of compensation awarded by the Tribunal and modified by this Court, the said Court fees, if any shall be paid by the respondent nos. 1 to 5 within two weeks from the date of computation of the deficit by the M.A.C.T.
- (d) It is made clear that the respondent nos. 1 to 5 would be entitled to withdraw the amount deposited by the appellant, only upon payment of such deficit amount of Court fees if any.
- (e) Judgment and award dated 3<sup>rd</sup> May, 2017 passed by the M.A.C.T., Mumbai is substituted in aforesaid terms.
- (f) First Appeal is disposed off in aforesaid terms. In view of the disposal of the First Appeal, Civil Application No. 1689 of 2018 does not survive and stands disposed off accordingly. No order as to costs.
- (g) The parties as well as M.A.C.T., Mumbai to act on the authenticated copy of this order.

***(R.D. DHANUKA, J.)***