

WP(MD)No.4505 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 28.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

WP(MD)No.4505 of 2016
and
WMP(MD)No.4085 of 2016

Vasuki

: Petitioner

Vs.

- 1.The Secretary to Government,
Health Department,
Government of Tamil Nadu,
Fort St.George, Chennai – 600 009.
- 2.The Joint Director of Health Services,
DMS Office Campus,
Teynampettai,
Chennai – 600 018.
- 3.The Joint Director of Medical Services,
DMS Office Campus,
Teynampettai, Chennai – 600 018.
- 4.The District Collector,
Tuticorin District,
Tuticorin.
- 5.The Dean,
Tuticorin Government Medical College Hospital,
Palayamkottai Road, Tuticorin.



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6.Dr.D.Shobana

: Respondents

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PRAYER: Writ Petition filed under Article 226 of the Constitution of India seeking issuance of a Writ of Mandamus directing the respondents pay Rs.25,00,000/- (Rupees Twenty Five Lakh only) towards compensation to the petitioner for the medical negligence caused to the petitioner resulting in life time financial constrains caused to the petitioner to bring up her third child.

For Petitioner : Mr.S.Srinivasa Raghavan

For Respondents : Mr.T.Vilavankothai
Additional Government Pleader
for R.1 to R.5

ORDER

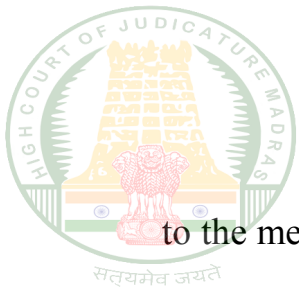
The petitioner before this Court is a house wife and her husband is an Agricultural cooli. The petitioner gave birth to two children and after her second delivery on 19.07.2013 in the fifth respondent Hospital, the petitioner underwent Purperal Sterilization by Tubectomy on 23.07.2013, in order to avoid further pregnancy. The surgery was performed by the sixth respondent and the petitioner was discharged from the Hospital on 29.07.2013. However, the petitioner was conceived again in the month of March, 2014 and gave birth to a third child on



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06.01.2015. Thereafter, the petitioner again underwent the same procedure to prevent future pregnancy. With a grievance that the petitioner underwent another surgery and has to rear up another child due to the medical negligence of the respondents 5 & 6, she has made representations to the respondents seeking compensation. Since there was no proper response, she has moved the instant writ petition for a mandamus directing the respondents to grant compensation for the negligence in performing the Family Planning Operation.

2.Learned Counsel appearing for the petitioner submitted that the petitioner was already having two children. During her second delivery at the fifth respondent Hospital, she was given assurance that Puerperal Sterilization by Tubectomy is a fool-proof methodology to avoid fresh pregnancy. Believing the version of the Doctors that there is no chance of fresh conception after the successful surgery performed by the sixth respondent in the fifth respondent Hospital, the petitioner and her husband entered into matrimonial obligations. However, shockingly, the petitioner got conceived again and immediately, the petitioner and her husband reported to the respondents 5 & 6. They have directed the petitioner to abort the child, but the petitioner refused to abort the child in the womb, since it is a sin. The petitioner delivered the third child on 03.01.2015, due



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to the medical negligence of the respondents 5 & 6 and she had undergone another surgery by same methodology. Thereafter, she had not conceived once again, which proves that the first surgery was unsuccessful. Therefore, the respondents are vicariously and jointly liable for the lapses committed and prayed for compensation.

3.Learned Additional Government Pleader appearing for the respondents, by referring to the counter affidavit filed by the fifth respondent, submitted that the petitioner was explained about the Family Planning Operation, its pros and cons, success rate and post-operative complications, etc. Only after getting the consent from the petitioner and her family members, the petitioner was conducted with the sterilization operation. The petitioner also gave an undertaking before the operation to the effect that she knows about the operation and that the Doctors and the Hospital authorities are not responsible and that she would inform the Hospital authorities within two weeks if she does not get her menstruation after undergoing the operation and she agrees to abort the fetus and that she will not claim any compensation. Having agreed to the terms, the petitioner is estopped from making any claim for compensation.



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4.He further submitted that the petitioner did not obey the Doctor's advise to inform the Hospital authorities within two weeks, if she does not get her menstruation and it is not known as to whether the petitioner has strictly followed the prescriptions and advice given by the Hospital authorities. In any event, as per the Scheme, the petitioner can claim only a sum of Rs.30,000/- and therefore, he prayed for dismissal.

5.This Court paid it's anxious consideration to the rival submissions and also perused the available materials.

6.The Hon'ble Supreme Court, *in State of Haryana and Others v. Santra* [2000 (3) SCC 520], has observed as follows:-

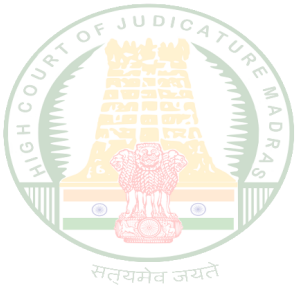
“Medical Negligence plays its game in strange ways. Sometimes it plays with life; sometimes it gifts an 'Unwanted Child' as in the instant case where the respondent a poor labourer woman, who already had many children and had opted for sterilization, developed pregnancy and ultimately gave birth to a female child in spite of sterilization operation which, obviously, had failed.”



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7. This observation made by the Hon'ble Supreme Court squarely applies to the case on hand. The facts of the case are not in dispute. The petitioner underwent Puerperal Sterilization by Tubectomy on 23.07.2013 after her second delivery. The surgery was performed by the sixth respondent Doctor in the fifth respondent Hospital. The discharge summary issued by the Hospital and the information obtained by the petitioner under Right to Information Act prove the same.

8. The petitioner's contention is that they were already blessed with two children and the birth of new child put her and her husband to a burden of rearing up the child and also to bear all expenses including maintenance of the child, food, clothes, education and marriage. Therefore, she underwent the sterilization operation and she was made to believe that after the operation, she would not conceive again. But, things went sideways and she got conceived and ultimately, gave birth to a third child, despite the operation. Therefore, it cannot be brushed aside that without there being any negligence or carelessness on the part of the Doctor who performed the sterilization operation on the petitioner, she gave birth naturally.

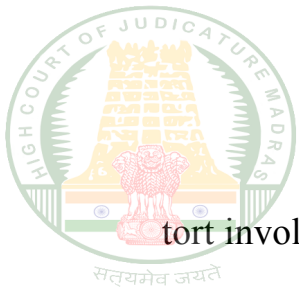


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9. In fact, after the third delivery, the petitioner underwent the very same procedure for the second time and after the same, she was not conceived. Therefore, the act of the Doctor, who performed the sterilization operation on the petitioner for the first time, can be held that the Doctor did not perform the duty to the best of her ability and with due care and caution and due to the said fact, the petitioner was made to suffer mental pain and agony and burden of financial liability.

10. Similar such case came up for consideration before this Court in the Principal Seat in *Dhanam v. Secretary to Government, Health & Family Welfare Department, Chennai and Others* [CDJ 2022 MHC 7836], wherein, this Court has held that the petitioner is entitled to the compensation appropriately in respect of her third child, who miserably became her 'unwanted child'.

11. Learned Additional Government Pleader, by referring the Government Order in G.O.Ms.No.150, Health & Family Welfare Department, dated 28.05.2014, submitted that as per the scheme, the petitioner is entitled to a compensation of Rs.30,000/-. He further submitted that there was no element of



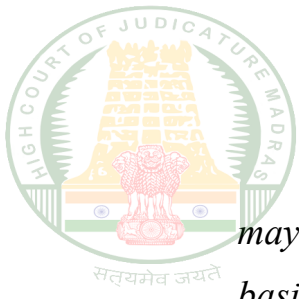
tort involved nor had the petitioner suffered any loss, which could be compensated in terms of money.

12. This contention of the respondents was also addressed by this Court in

Dhanam's case (supra) and was answered as follows:-

“10. Negligence is a `tort'. Every Doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. Under the English Law as laid down in "Bolam v. Friern Hospital Management Committee" (1957) 2 All ER 118, a doctor, who acts in accordance with a practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view.

11. In two decisions rendered by the Hon'ble Supreme Court, viz., "Dr. Laxman Balakrishna Joshi vs. Dr. Trimbak Bapu Godbole & Anr. AIR 1969 SC 128 and A.S. Mittal vs. State of U.P. AIR 1989 SC 1570, it was laid down that when a Doctor is consulted by a patient, the former, namely, the Doctor owes to his patient certain duties which are (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to give; and (c) a duty of care in the administration of that treatment. A breach of any of the above duties

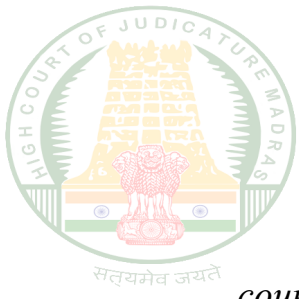


may give a cause of action for negligence and the patient may on that basis recover damages from his Doctor.

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12. The word 'duty' connotes the relationship between one party and another, imposing on the one an obligation for the benefit of that other to take reasonable care in the first instance. Viewed from this angle, when the petitioner approached the 3rd respondent for sterilization, it was with clear objective not to bear any more children. It was therefore, the duty of the respondents to ensure that operation is successful. In fact, the duty of the medical practitioner arises from the fact that he does something to human being which is likely to cause physical damage unless it is done with proper care and skill.

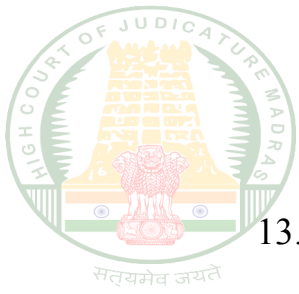
13. In the instant case, the petitioner was not suffering from any disease for treatment of which she had gone to hospital authorities. She is a normal healthy person. She had approached the hospital authorities as she wanted to prevent birth of unwanted child. There was no question of error of judgment in performing the operation properly, it could have been simply a case of success. If in spite of this operation, she conceived and has given birth to a child, which establishes that it is clear case of something amiss while performing an operation and one can hopefully deduce that standard of reasonable care expected of the doctor was not taken.



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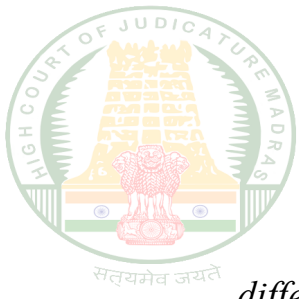
14. *It may be mentioned at the cost of repetition that in the counter affidavit the respondents have not at all stated that instead of taking reasonable care in performing sterilization operation and in spite operation being successful, there could be a conception. The respondents blamed the petitioner only to the extent she did not approach the hospital immediately after the stoppage of her menstrual periods so that the same could have been rectified. Therefore, the failure of the sterilization operation was not seriously disputed by the respondents and for such failure, the petitioner was even offered Rs. 30,000/- as per the Scheme. This Court fails to understand as to how the negligence on the part of the Medical Officer who performed the sterilization operation on the petitioner, could be made good by just awarding Rs.30,000/- irrespective of the status of the petitioner who does not wish to have child any more because the petitioner was already blessed with two female children and due to her poor financial ability and her incapacity to maintain the third child all along.*

15. *In such circumstances, the 3rd child is considered as “unwanted child” which had virtually taken birth only due to negligence on the part of the 3rd respondent in performing sterilization operation on the petitioner. Therefore, once the child was declared as unwanted child to the family of the petitioner, now the State has to bear the expenses in bringing up the “unwanted child” and it becomes the obligation of the State.”*



13. Therefore, this Court is not inclined to accede the submission made by the learned Additional Government Pleader. Family Planning is a National Programme being implemented through various Government Hospitals and Health Centres. The implementation of the programme is directly in the hands of the Government, including the Medical Officers. The Medical Officers entrusted with the implementation of the Family Planning Programme cannot, by their negligent acts in not performing the complete sterilization operation, sabotage the scheme of national importance. The people of the country who co-operate by offering themselves voluntarily for sterilization reasonably expect that after undergoing the operation, they would be able to avoid further pregnancy and consequent birth of additional child. As such, the petitioner also offered herself voluntarily for sterilization operation, however, things went sideways due to improper performance of the Doctor in conducting the sterilization operation on the petitioner, by which, she gave birth to the third child.

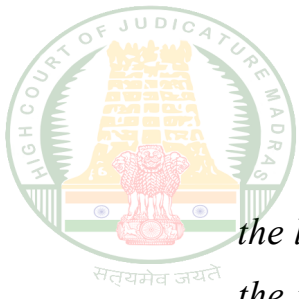
14. In *Santra's* case (supra), the Hon'ble Supreme Court has held that there was negligence on the part of the Doctors and ultimately, the State Government was responsible for the negligence. The Hon'ble Supreme Court has ultimately upheld the compensation ordered by the Court below, by observing as follows:-



"34. From the above, it would be seen that the Courts in the different countries are not unanimous in allowing the claim for damages for rearing the unwanted child born out of a failed sterilisation operation. In some cases, the Courts refused to allow this claim on the ground of public policy, while in many others, the claim was offset against the benefits derived from having a child and the pleasure in rearing that child. In many other cases, if the sterilisation was undergone on account of social and economic reasons, particularly in a situation where the claimant had already had many children, the Court allowed the claim for rearing the child.

... ..

37. Ours is a developing country where the majority of the people live below the poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The principles on the basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages cannot be strictly applied to Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to



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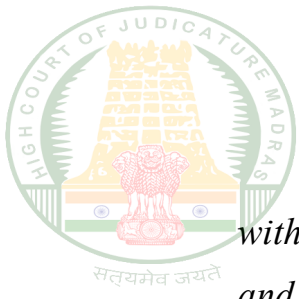
the labour class, who earn their livelihood on a daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence.

... ..

42. Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up family planning as an important programme for the implementation of which it has created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation."

15. By referring this decision, this Court, in **Dhanam's** case (supra), has ordered for compensation as follows:-

"19. In view of the above discussion, this Court of the view that the petitioner is entitled to the compensation and keeping in view the economic and social background of the petitioner and other relevant circumstances, ends of justice would be met in providing the compensation of Rs.3,00,000/-. In addition to this, on attaining the age of five years, the respondents are directed to admit the 3rd child of the petitioner in a Government or private school. She would be provided



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with free education, i.e., no fee would be charged and all the school fee and other fees paid, shall be refunded by the respondents; all her expenses on books, stationary, uniforms and other miscellaneous educational expenses, would also be met by the respondents. Further, the respondents shall pay Rs. 1.2 lakhs per year to meet her needs for food and proper up-bringing till she completes her graduation or attaining 21 years, whichever is earlier, calculated @ Rs.10,000/- per month, amount under this head would be approximately Rs.1.2 lakhs. Further, the benefits granted by the Government under the female child scheme shall also be extended to the petitioner.”

16.Following the same and considering the economic and social background of the petitioner and other circumstances, this Court is passing the following order:-

The petitioner is entitled for a compensation of Rs.3,00,000/-. The respondents shall provide free education to the third child of the petitioner, either in a Government School or in a Private School. The fees already paid, if any, shall be refunded and all the expenses on books, stationary, uniforms and other miscellaneous educational expenses shall also be met by the respondents. Further, the respondents shall pay a sum of Rs.1,20,000/- per year [Rs.10,000/- per month] to



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meet the child's need for food and proper up-bringing till he completes

his graduation or attaining 21 years, whichever is earlier.

With the above directions, this writ petition stands disposed of. No costs.

Consequently, connected miscellaneous petition stands closed.

Internet : Yes
Index : Yes / No
NCC : Yes / No
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28.04.2023

To

- 1.The Secretary to Government,
Health Department,
Government of Tamil Nadu,
Fort St.George, Chennai – 600 009.
- 2.The Joint Director of Health Services,
DMS Office Campus,
Teynampettai,
Chennai – 600 018.
- 3.The Joint Director of Medical Services,
DMS Office Campus,
Teynampettai, Chennai – 600 018.
- 4.The District Collector,
Tuticorin District,
Tuticorin.



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5. The Dean,
Tuticorin Government Medical College Hospital,
Palayamkottai Road, Tuticorin.



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B.PUGALENDHI, J.

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