

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 24TH DAY OF JULY 2015/2ND SRAVANA, 1937

W.P.(C).No.9742 of 2009 (K)

PETITIONER(S):-

1. JALAJA SREENIVASAN, W/O.K.SREENIVASAN, AGED 52 YEARS,
ADVOCATE,
RESIDING AT SREE VIHAR, AZAD ROAD, KALOOR,
KOCHI-682 017.
2. SREEKANTH, S/O.K.SREENIVASAN, AGED 28 YEARS,
RESIDING AT SREE VIHAR, AZAD ROAD,
KALOOR, KOCHI-682 017.
3. REJIKANTH, S/O.K.SREENIVASAN, AGED 27 YEARS,
RESIDING AT SREE VIHAR, AZAD ROAD,
KALOOR, KOCHI-682 017.
4. SUJITH, S/O.K.SREENIVASAN, AGED 24 YEARS,
RESIDING AT SREE VIHAR, AZAD ROAD,
KALOOR, KOCHI-682 017.

BY ADVS.SRI.K.RAMAKUMAR (SENIOR ADVOCATE)
SMT.SMITHA GEORGE

RESPONDENT(S):-

1. STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.
2. THE PRINCIPAL SECRETARY TO
DEPARTMENT OF HEALTH AND FAMILY WELFARE,
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.
3. THE DIRECTOR OF HEALTH SERVICES, THIRUVANANTHAPURAM.
4. THE SUPERINTENDENT, GOVERNMENT HOSPITAL, ERNAKULAM.
5. THE SUPERINTENDENT,
MEDICAL COLLEGE HOSPITAL, KOTTAYAM.
6. THE DISTRICT MEDICAL OFFICER, ERNAKULAM.

R1 TO R6 BY GOVERNMENT PLEADER SRI.S.JAMAL.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
07-07-2015, THE COURT ON 24-07-2015 DELIVERED THE FOLLOWING:-

APPENDIX

PETITIONERS' EXHIBITS:-

NIL.

RESPONDENT'S EXHIBITS:-

EXT.R2(a) TRUE COPY OF THE ORDER ISSUED BY THE GOVERNMENT
DATED 14.07.2011.

vku/-

[true copy]

K. Vinod Chandran, J

W.P.(C).No.9742 of 2009-K

Dated this the 24th day of July, 2015

JUDGMENT

The 1st petitioner herein is an Advocate practising in this Court and the other petitioners are her children. The writ petition raises once again the issue of public law remedy in instances where the State and its officers had been negligent in causing injury to the citizens.

2. The cause of action for the above case is the tragic incident of the 1st petitioner's husband being fatally injured in a motor accident. It is to be noticed that the petitioners had filed a claim for damages arising out of the road traffic accident under Section 166 of the Motor Vehicles Act, 1988, which stands allowed by award of the Motor Accidents Claims Tribunal, Ernakulam, dated 09.05.2012 in O.P.(MV).No.1498 of 2009. That however will not interdict invocation of the public law remedy as against the private law remedy, as held in ***Sube Singh v. State of Haryana [(2006) 3 SCC 178]***.

3. The 1st petitioner's husband, while returning home in the night of 14.02.2009, was hit by an autorickshaw and was left to bleed on the road side. After about 15 minutes, the Flying Squad of the Police took the injured person to the General Hospital, Ernakulam. The allegations in the writ petition are with respect to the negligence, insofar as affording proper treatment to the injured at the General Hospital, Ernakulam and then at the Medical College Hospital, Kottayam; to which he was transferred from the General Hospital, Ernakulam. Admittedly till the next day morning when the 3rd petitioner met his injured father at the Medical College Hospital, Kottayam, the family did not know about the accident.

4. The allegation in the writ petition is with respect to the injured having not received immediate medical attention at the General Hospital, Ernakulam and there being no Neuro Surgeon in that hospital, at that point of time. The petitioners, in the writ petition, contend that the injured did not receive any medical attention until 4.00 a.m. for reason of the injured having not been accompanied by anybody. Subsequently, it is alleged, the injured was shifted in an Ambulance, to the Medical College Hospital,

Kottayam, that too negligently. It is stated that, when the 3rd petitioner met his father at the Medical College Hospital, Kottayam, he was admitted to Ward No.7; but was left without any care. In any event, at the request of the 3rd petitioner, the injured was taken to Lakeshore Hospital, Cochin and allegations are made, on the basis of the apprehensions expressed by the doctors at the Lakeshore Hospital, as to the manner in which the transfer of the injured person was effected. An immediate surgery is said to have been carried out at the Lakeshore Hospital and the injured is said to have succumbed to the injuries suffered in the accident, on 19.03.2009, almost a month later to the accident.

5. A counter affidavit is seen filed only in 2014. At that point of time, definitely no details could be placed before Court as to what actually transpired on the night of 14.02.2009 in the General Hospital, Ernakulam. It is also to be mentioned that the writ petition filed in 2009 was never moved after notice was issued, till 2012 and then again till 2015. The counter affidavit states that, the injured had a head injury and the facilities available in the General Hospital were not sufficient. It is also stated that sincere and honest efforts, to save the life of the injured, was made and

since facilities were lacking in the General Hospital, the patient was referred to the Medical College Hospital. The injured was taken to the Medical College Hospital in an Ambulance, accompanied by a Hospital Attendant. In such circumstance, the only inference is that the injured was given first aid at the General Hospital, Ernakulam and facilities for further treatment and expert care not being available, even without the junction of the family, the injured was transferred to the Medical College Hospital in an Ambulance, accompanied by a Hospital Attendant.

6. A writ petition [W.P.(C).No.6068 of 2009-S] was also filed by the Indian Federation of Woman Lawyers, Kerala Branch, projecting the particular incident of a member's husband having succumbed to injuries without being given proper care and generally the lack of facilities in the General Hospital. This Court also called for the Judges Papers of W.P.(C).No.6068 of 2009.

7. The writ petition field by the Federation was posted before the Judge designated to deal with the matters as directed by the Hon'ble Supreme Court in ***Sheela Barse v. Union of India and Another* [(1995) 5 SCC 654]**. The instant writ petition was not posted along with the said case. In any event, this Court having

called for the Judges Papers of W.P.(C).No.6068 of 2009, looked at the reliefs prayed for therein. The Federation sought for posting of a Neuro Surgeon at the General Hospital and installation of necessary diagnostic equipments to meet a contingency. An additional relief was sought for, by way of amendment, for damages to be granted to the 1st petitioner herein. In the said case, a statement was filed by the Under Secretary, Health and Family Welfare Department on 29.12.2009 itself; but, however, on the general allegations with respect to lack of a Specialist Doctor and the necessary equipments, with which alone the writ petition was concerned then, prior to the amendment.

8. The learned Senior Counsel for the petitioners has placed reliance on a number of decisions to buttress the contentions raised under the public law remedy, which are referred to hereunder. ***Parmanand Katara v. Union of India* [AIR 1989 SC 2039]** considered the issue of the Medical Practitioners' duty to give medical care as juxta-positioned with the procedure of putting in motion the criminal prosecution. Therein the issue projected was the delay in providing medical care in medico-legal cases on multifarious reasons of lack of jurisdiction, non-completion of

police formalities, inherent fear of harassment in the ensuing criminal prosecution and so on and so forth. The Hon'ble Supreme Court emphasised the paramount importance of preserving human life and extorted medical practitioners to rise above the mundane formalities and so to do, even if the injured is an alleged criminal. The Doctor, positioned at a Government Hospital, was held to be one charged with the obligation of the State to preserve the life of its citizens. The States were cautioned against bringing in legislation or regulations interfering with the discharge of this obligation. The guidelines framed by the high-powered committee headed by the Director General of Health Services was made a rule of Court. Herein, there is no ground urged that there was any delay caused for reason only of the injured having been brought to the hospital as a medico-legal case.

9. *Nilabati Behera v. State of Orissa* [(1993) 2 SCC 746] was with respect to allegations of custodial death raised by the mother of the deceased. Admittedly the deceased was taken into custody and on the next day, was found dead on the Railway track, with multiple injuries, both ante-mortem and post-mortem. The State as also the officers who had the duty to guard the

detenu were arraigned as parties. The State merely took up a defence of the accused having escaped from the custody. The jurisdictional District Judge was directed to hold an enquiry, in which enquiry, evidence was led and it was found that the unnatural death was caused while in custody and by reason of the multiple injuries, which revealed the deceased having been subjected to merciless beating. The Hon'ble Supreme Court found that the State had a duty to explain the injuries on the body of the deceased, failing which the only inference possible would be of custodial death. The Supreme Court, in such circumstances, invoked the public law remedy and said so:

"It may be mentioned straightaway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings".

10. In ***Sanjay Gupta v. State of U.P.* [(2015) 5 SCC 283]**, the incident was a fire in a consumer show which took the life of many and maimed and injured still more. While awaiting the report of a Commission, appointed by the Supreme Court itself, the question of interim compensation by the State was considered. Statutory violations in the grant of permission by the authority and negligence in not taking due care in the conduct of the exhibition was found from the factual aspects placed on record. It was on such clear finding on the facts that the State was directed to give additional compensation to the legal representatives of the deceased as also those injured seriously and minimally.

11. ***Vipin P.V. v. State of Kerala* [2013 (1) KHC 267 (DB)]** was a case in which a lawyer suffered injuries when a running motor-cycle was attempted to be stopped by the police with force, by holding out a baton in front of the running vehicle, causing serious injuries to the driver. The said fact was admitted by the respondent-State. It was argued that the force employed was reasonable, since the rider refused to stop the vehicle despite the police squad on patrol duty, seeking to intercept the vehicle, to

examine the papers of the vehicle; which contention was negated by the Division Bench.

12. ***Safia v. State of Kerala [2015 (2) KHC 810]*** was again a case where this Court had awarded an amount of Rupees Two Lakhs to the petitioner as damages, being the amount assessed by the Advocate Commissioner, for demolition of a building by the contractor of Public Works Department who was engaged for widening of a road. The demolition had no legal sanction and was an admitted fact.

13. ***State of Kerala v. Santha [2015 (1) KLD 174 (DB)]*** arose from a decree in a suit for damages, the cause of which was a failed sterilization operation at the Government Hospital. Evidence was led and negligence was found on appreciation of the same.

14. ***Shyam Balakrishnan v. State of Kerala [2015 (3) KHC 84]*** was also on the admitted arrest of a person and deprivation of personal liberty, on a mere suspicion. This Court found that the police officer had exercised the power of arrest under the Code of Criminal Procedure without due diligence and without any factual foundation.

15. This Court is unable to arrive at any such conclusion from the facts stated in the above writ petition. The allegation made by the petitioners that the doctors and the other staff at the General Hospital, Ernakulam were negligent in providing proper medical care is not even a hearsay. The petitioners had no direct knowledge of what happened at the General Hospital, Ernakulam; nor have they stated as to how they came to know about the deprivation of the medical care at that Hospital. Admittedly the General Hospital, at that time, did not have a Neuro Surgeon and the injured brought to the hospital had a head injury. It was the Flying Squad of the Police who took the injured to the General Hospital at Ernakulam. The jurisdictional Station House Officer has not been impleaded herein; nor has the Resident Medical Officer of the General Hospital, on duty on the fateful night, impleaded.

16. The Superintendent, Government Hospital, Ernakulam and the Superintendent, Medical College Hospital, Kottayam have been impleaded as the 4th and 5th respondents and they definitely have responsibility for the actions of the Resident Medical Officer. However, if at all any negligence had been

occasioned, then those officers who had been on duty at the relevant time, would have to be impleaded and given an opportunity to answer the allegations. None of them have been so impleaded in the writ petition.

17. The General Hospital, Ernakulam, admittedly, at that point of time, did not have a Neuro Surgeon. That alone cannot result in a finding of negligence. The injured was taken to the General Hospital and was provided with 'First Aid'. Despite the injured not being accompanied by any family, the General Hospital had, on their own accord, transferred the injured to the Medical College Hospital, Kottayam in an Ambulance, accompanied by an Attendant of the General Hospital.

18. From the Medical College Hospital, Kottayam, the petitioners had taken the injured to a private hospital at Cochin, where he was treated for a month, after which the patient succumbed to his injuries. The allegations of negligence have been raised broadly against the Minister and the Principal Secretary to Department of Health and Family Welfare, Government of Kerala for not having posted a Neuro Surgeon in the General Hospital.

19. But for making an allegation that the injured was not given proper medical care at the General Hospital, Ernakulam or the Medical College Hospital, Kottayam, no substantiation is afforded to show that, if at all; such alleged lack of medical care resulted finally in the death of the injured. It is an admitted position that the injured had been given expert treatment in a private hospital in Cochin, the details of which have not been disclosed herein. The deceased had also succumbed to the injuries after about a month, of treatment. In such circumstance, this Court is unable to find that the public law remedy could be invoked to provide succor to the petitioners. This Court, with a heavy heart; but, however, for reason of no substantiating materials available for the allegations to be presumed to be taken as proved, is compelled and constrained to dismiss the writ petition. Parties are left to suffer their respective costs.

Sd/-

K.Vinod Chandran
Judge.

vku/-

[true copy]