

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 13.12.2017

Judgment pronounced on: 21.12.2017

CORAM

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

S.A.No.1727 of 1998

1. The State of Tamil Nadu rep.
by its Secretary,
Ministry of Health and Family
Welfare, Fort St, George,
Chennai - 9.
- 2.The District Collector,
Periyar District
Erode.
- 3.The District Medical Officer,
Government General Hospital,
Erode. Appellants/Appellants/Defendants

Vs.

- 1.Sivaruthrappa
- 2.Kamalamma
- 3.Minor. Jadaruthirasamy
rep. by his Guardian
Sivaruthirappan. Respondents/Respondents/Plaintiffs

Prayer : Second Appeal is filed under Section 100 of the Civil Procedure Code, against the Judgment and Decree passed by the Second Additional District Judge, Erode, in A.S.No.255 of 1997 dated 13.02.1998 against the Judgment and Decree passed in O.S.No.525 of 1993 dated 30.09.1996 on the file of the Principal Sub-Judge, Erode, Periyar District.

For Appellants : Mr.Jayaramaraj.T
Government Advocate (C.S.)

For Respondents : Mr.V.Raghavachari

J U D G M E N T

This second appeal has been filed by the defendants against the Judgment and Decree passed in A.S.No.255 of 1997 on the file of the II Additional District Judge, Erode, dated 13.02.1998 confirming the Judgment and Decree passed in O.S.No.525 of 1993 on the file of the Principal Subordinate Judge, Erode, dated 30.09.1996.

2. The averments made in the plaint are in brief as follows:

The second plaintiff is the wife of the first plaintiff. The second plaintiff, on 07.02.1987, undergone a family planning, (puerperal sterilization) operation in the Thanthai Periyar Head Quarters Hospital, Erode. But on 18.09.1991, to the surprise of all, the second plaintiff gave birth to the third plaintiff because of the negligence on the part of the doctors in performing the operation resulted in the birth of the third plaintiff. Since the doctors, who have performed the operation are employees of the Tamil Nadu Government, the defendants 1 to 3 are vicariously liable for all the commissions and omissions of the persons, who performed the family planning operation to the second plaintiff.

3. During the pregnancy, the second plaintiff suffered both physically and mentally. Further the plaintiffs 1 and 2 have to maintain and educate the third plaintiff. Hence, the plaintiffs received a notice under Section 80 of Code of Civil Procedure claiming a compensation of Rs.50,000/- from the defendants 1 to 3. After receipt of the notice, the third defendant alone has sent a reply with false averments. Hence, the plaintiffs forced to file the suit.

4. The averments made in the written statement filed by the third defendant and adopted by the defendants 1 and 2 are in brief as follows:

It is true that on 07.02.1987, a family planning operation was performed to the second plaintiff at Government Head Quarters Hospital, Erode. The operation was successful. No assurance was given that in case of failure of the family planning, the Government would give the compensation to the second plaintiff. There would be a chance of failure of 0.5% and the consequences of such failure can promptly be taken care of by the pregnant woman by undergoing abortion. But the second plaintiff did not approach the defendants after becoming pregnant. Therefore, the defendants prayed to dismiss the above suit.

5. The trial court, based on the aforesaid pleadings, framed the necessary issues and tried the suit. During trial, on the side of the plaintiffs, the plaintiffs 1 and 2 examined themselves as PWs.1 and 2 and marked Exs.A1 to A7 as Exhibits. On the side of the defendants, one witness was examined as DW1 and two documents were marked as Exs.B1 and B2.

6. The learned Subordinate Judge, after considering the materials placed before her, found that there was a negligence on the part of the doctor, who has performed the sterilization to the plaintiff and accordingly, decreed the suit directing the defendants to pay a compensation of Rs.40,000/- with interest at the rate of 12% from the date of suit till the date of realisation and also directed the defendants to pay proportionate costs to the plaintiffs. Aggrieved by the same, the defendants have preferred an appeal in A.S.No.255 of 1997 on the file of the II Additional District Judge, Erode.

7. The learned II Additional District Judge has confirmed the findings of the trial court. However, he modified the Judgment and Decree of the Trial Court to the extent that the defendants should pay a compensation of Rs.35,000/- within a period of one month, failing which, they should pay interest at the rate of 12% and costs. As against the same, the defendants have filed the above second appeal.

8. At the time of admitting the second appeal, this court has formulated the following substantial question of law:

" Whether the Judgment and Decree of the courts below are sustainable in law, which are given without appreciating the entire evidence available on record."

9. Heard both sides.

10. Learned counsel for the appellants/defendants contended that the respondents/plaintiffs have not proved the negligence on the part of the doctor, who performed the sterilization operation. He further contended that the second plaintiff gave birth to the third plaintiff, 3 years and 9 months after the operation. So in the natural course, the fallopian tubes would have united and as a result, the second plaintiff would have conceived and for that, no negligence can be attributed to the doctor, who performed the operation. In support of the said contention, he relied upon the following decisions:

(i) State of Punjab Vs. Shivram and Others (2005) 7 SCC 1 : AIR (2005) SC 3280.

(ii) State of Haryana and Others Vs. Raj Rani (2005) 7 SCC 22.

11. The learned counsel for the respondents/plaintiffs, on the contrary, contended that the DW1, who performed the sterilization operation to the second plaintiff, has admitted in her cross-examination that there was a circular with regard to how to perform sterilization operation, but she has not produced the said circular. He further contended that DW1 also admitted that with regard to the method of operation performed to the second plaintiff, a record has been maintained, but the said record also has not been produced before the court and therefore, an adverse inference has to be drawn against the defendants. He further contended that in the similar set of facts, this court in the case of District Collector and 2 others Vs. Saraswathi in S.A.(MD) No.129 of 2006 has held that the defendants are liable to pay compensation to the plaintiffs.

12. It is the admitted case of the parties that the second respondent/second plaintiff was admitted in the third appellant's hospital on 06.02.1987 and the sterilization operation was conducted by the doctors of the third appellant hospital on 07.02.1987 and thereafter, she was discharged from the hospital on 13.02.1987. After the completion of the surgery, it was informed to the second respondent/second plaintiff that the surgery has been successfully completed. The fact that the second respondent/second plaintiff got conceived thereafter and delivered the third plaintiff on 18.09.1991 also not in dispute. The plea raised on behalf of the appellants is that there was no guarantee of 100% success in the family planning operation and there is a chance of failure of 0.5%. Another plea is that since the child was born 3 years 9 months after the operation, in the natural course, the fallopian tube might have been re-united and resulted in pregnancy.

13. A perusal of the deposition of DW1 would show that there was a circular in respect of how to perform family planning operation and also a record with regard to the method of operation conducted to the second plaintiff. But the aforesaid circular and the record have not been produced before the court. If they have been produced before the court, the court would have a chance to verify whether the surgery was conducted to the second plaintiff as per the guidelines issued in the aforesaid circular.

14. It is also to be pointed out that it appears, that DW1 gave evidence before the court without referring to any documents. Admittedly, she has performed the family planning surgery to the second plaintiff on 07.02.1987, whereas she gave evidence before the trial court nearly after nine years, i.e., on 25.01.1996. DW1, being a doctor serving in the Government Hospital, she would have performed hundreds of surgeries. But without referring to any document how she could

give evidence about what was the procedure followed at the time of performing the surgery to the PW2. The defendants have not produced any document to verify whether the oral evidence of DW1 was true. Therefore, as rightly contended by the learned counsel for the respondents/plaintiffs, an adverse inference has to be drawn against the defendants.

15. In the decisions cited by the learned counsel for the appellants viz., State of Punjab Vs. Shivram and Others (supra) and State of Haryana and Others Vs. Raj Rani (supra), the Hon'ble Supreme Court has held that the Doctor can be held liable only in cases where the failure of the operation attributable to his negligence and not otherwise. In the case on hand, as already pointed out that the defendants did not produce the circular through which guidelines have been issued with regard to the performance of family planning and the record which has been maintained in the hospital with regard to the procedures followed at the time of performing surgery to the second plaintiff. Hence, an adverse inference has to be drawn against them. As such, it has to be presumed that the negligence was on the part of the Doctor, who performed the sterilization operation to the second plaintiff. Therefore, the aforesaid decisions will not help the case of the appellants.

16. In the similar set of facts, this court in The District Collector and 2 others Vs. Saraswathi S.A.(MD)No.129 of 2006 following the decision of the Hon'ble Supreme Court of India in State of Haryana Vs. Santra, 2000 ACJ 1188, has held that the very failure of the operation itself would amount to negligence and it is not incumbent on the plaintiff to specifically prove the negligence any further.

17. The Hon'ble Supreme Court of India in, State of Haryana Vs.Santra, (Supra) has observed in paragraph Nos.37, 43 and 44 as follows:

"37. Ours is a developing country where 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 the 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 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.

...

43. The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilisation operation cannot be accepted in view of the law settled by this Court in *N. Nagendra Rao & Co. v. State of Andhra Pradesh*, AIR 1994 SC 2663; *Common Cause v. Union of India*, (1999) 6 SCC 667 and *Achutrao Haribhau Khodwa v. State of Maharashtra*, 1996 ACJ 505 (SC). The last case, which related to the fallout of a sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a government hospital. The theory of sovereign immunity was rejected.

44. Santra, as already stated above, was a poor lady who already had 7 children. She was already under considerable monetary burden. The unwanted child (a girl) born to her has created additional burden for her on account of the negligence of the doctor who performed the sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the State Government to enable her to bring up the child at least till she attains puberty."

18. In this case also, the plaintiffs are Tribes and they are poor people and therefore, they are entitled to get compensation. The unwanted child (third plaintiff) born to the plaintiffs 1 and 2 has created additional burden for them on account of the negligence of the Doctor who performed the sterilisation operation and therefore, the plaintiffs 1 and 2 are entitled to claim damages from the State Government to bring up the third plaintiff atleast till he attains majority.

19. On coming to the quantum of the compensation, though the plaintiffs have claimed Rs.50,000/- as compensation, the trial court has awarded Rs.40,000/- only and the said amount was further reduced to Rs.35,000/- by the First Appellate Court. So, it cannot be said that the compensation awarded by the First

Appellate Court is an exorbitant one. The findings of the courts below are based on the facts, so, the said findings cannot be set aside in the Second Appeal. Accordingly, the substantial question of law is answered.

In the result, the Second Appeal is dismissed confirming the Judgment of the First Appellate Court. Considering the facts and circumstances of the case, the parties are directed to bear their own costs.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

gv

To

1. The Second Additional District Judge,
Erode
2. The Principal Sub-Judge,
Erode,
Periyar District.
3. The Section Officer, V.R. Section,
High Court, Madras. (2 copies)

+1cc to Mr.V.RAGHAVACHARI, Advocate, S.R.No. 91322
+1cc to the Government Pleader, S.R.No. 91822

Pre delivery Judgment in
S.A.No.1727 of 1998

VG I (CO)
TR(27/04/2018)

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