

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

RESERVED ON : 29.04.2019

PRONOUNCED ON : 30.07.2019

CORAM

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THE HONOURABLE MRS.JUSTICE NISHA BANUSECOND APPEAL (MD) No.728 of 2016andC.M.P.(MD).No.11593 of 2016

1. The Dean,
Govt. Rajaji Hospital,
Madurai - 625 020.

2. The Secretary to the Government of Tamil Nadu,
Department of Medical & Family Planning,
Secretariat,
Chennai -9.

... Appellants/Respondents/Defendants

Vs.

1P.Pitchai Meena (died) ... 1st respondent/Appellant/ Plaintiff

2.P.Saravanapriya

3.P.Satheesh Kumar (minor)

4.P.Yogarani (minor)

5.K.Pandiyarajan ... Respondents 2 to 5/
LRs of the deceased plaintiff

(The respondents 2 to 5 brought on record as LRS of the sole respondent as per the order of this Court dated 01.03.2016 made in M.P.(MD).Nos.1 to 3 of 2013 in S.A.(MD)No.SR39036 of 2012)

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree, dated 09.12.2011, passed in A.S.No.34 of 2009 by the Additional District cum Fast Track Court No.II, Madurai, reversing the judgment and decree, dated 28.01.2009, passed in O.S.No.515 of 2006 by the Principal Subordinate Court, Madurai.

For appellants : Mr.J.Gunaseelan Muthaiah,
Addl. Government Pleader

For respondents 2 to 5 : Mr.S.A.Ajmal Khan

JUDGMENT

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This second appeal has been filed by the judgment and decree dated 09.12.2011 passed by the first appellate Court in A.S.No.34 of



2009, reversing the judgment and decree, dated 28.01.2009, passed by the trial Court in O.S.No.515 of 2006.

2. The first respondent herein / plaintiff by name P.Pitchai Meena had filed the suit in O.S.No.515 of 2006 for declaration that the plaintiff is a pauper and for mandatory injunction directing the appellants/defendants to pay a sum of Rs.3,07,700/- as compensation.

3. According to the plaintiff, she had been living in utter poverty and her husband is working as Coolie. After 2nd delivery, as per the advice of the Doctors working under the first respondent, she had underwent family planning operation on 08.04.1997 and she was discharged on 16.04.1997 by intimating that she could not become pregnant further. On the contrary, she became pregnant and gave birth to a female child on 05.07.2003 in a private hospital at Melur and she underwent family planning surgery in the said hospital by spending Rs.7,700/-. As the further pregnancy of the plaintiff was due to the negligence of the officials of the first defendant in conducting the operation, she filed the suit claiming Rs.3 lakhs as compensation. As she spent Rs.7,700/- for another operation, she claimed totally Rs.3,07,700/- as compensation

4. According to the first defendant, after the child birth, the plaintiff had taken treatment for sterilization. Though she was advised to take necessary precautions after the treatment also, she has failed to observe the advise of the concerned medical officer. Therefore, the first defendant is not liable to pay the compensation.

5. On the side of the plaintiff, the plaintiff herself was examined as PW1 and Exs.A1 to A8 were marked. On the side of the defendants, one Dr.Ambigai Meena was examined as DW1 and Exs.B1 and B2 have been filed.

6. After going through the oral and documentary evidence, the trial Court has dismissed the suit. Challenging the same, the plaintiff filed appeal in A.S.No.34 of 2009. The first appellate Court, after reappraising the oral and documentary evidence, has allowed the appeal, thereby directed the respondents to pay Rs.1.5 lakhs as compensation together with 9% p.a interest from the date of institution of the suit till the date of decree and afterwards 6% p.a. interest till realisation of the said amount to the plaintiff with costs. Aggrieved by the judgment and decree passed by the first appellate Court, the defendants have filed this second appeal. It is seen from the record that during the pendency of this appeal, the plaintiff died and her legal heirs were impleaded as respondents 2 to 5 in this appeal.

7. This second appeal was admitted on the following substantial questions of law:

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1) Whether the decree and judgment of the Appellate Court in A.S.No.34 of 2009 reversing on



the file of the Principal Subordinate Court in O.S.No.515 of 2006 dated 28.01.2009 sustainable in the eye of law or not?

2) Whether the first appellate Court had taken into consideration of material aspect in the case of medical negligence or not?

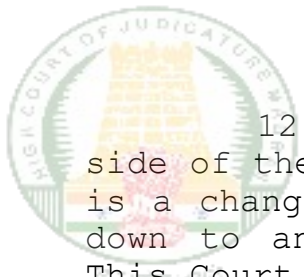
3) Whether the first appellate Court has taken into consideration of the guideline formulated by the Hon'ble Apex Court in the case of medical negligence or not?"

8. The learned Additional Government Pleader appearing for the defendants / appellants submitted that the plaintiff has not categorically proved the negligence of the officials of the defendants and since the plaintiff has not properly followed the precautionary methods advised by the doctors, she became pregnant, for which the defendants are not liable to pay the compensation. The trial Court has rightly dismissed the suit. But, the first appellate Court, without considering the said aspects, has erroneously allowed the appeal and directed the defendants to pay compensation to the tune of Rs.1.5 lakhs. Thus, he prayed to set aside the judgment and decree passed by the first appellate Court and to confirm the judgment and decree of the trial Court.

9. The learned counsel appearing for the respondents submitted that the factum of family planning operation and consequential delivery of children has not been disputed by the defendants. The very failure of the family planning operation would amount to negligence and therefore, the defendants are vicariously liable to be pay the compensation. The trial Court has erroneously dismissed the suit. The first appellate Court, after appreciating the materials available on record, has rightly allowed the appeal, thereby awarded compensation of Rs.1.5 lakhs. Thus, he prayed to dismiss this appeal.

10. Heard the learned counsel appearing for both sides and perused the records carefully.

11. The facts that the plaintiff underwent sterilization operation and that after sterilization operation, she gave birth to a female child are not in dispute. It is also not in dispute that the plaintiff had been living below poverty line. As a welfare measure the Government suggests sterilization operation, which is undergone by women based on the assurance given by the Government that it would be successful. But, unfortunately, in the case on hand, it ended in failure, thereby the plaintiff became pregnant. Though the failure was not deliberate, it cannot be stated that there was no negligence on the part of the officials of the defendants. The very failure of the operation itself would amount to negligence and hence, it is not incumbent on the part of the plaintiff to specifically prove the negligence any further.



12. In this case, the Doctor, who has been examined on the side of the defendants as DW1, has stated in her evidence that there is a change of recanalization of fallopian tube, which was cutting down to an extent of 1.c.m. to 2 c.m. during the sterilization. This Court is of the view that it is only a probability suggested by DW1 and it cannot be assumed to be true, because no evidence has been produced on the side of the defendants substantiating the same. Though the learned Additional Government Pleader appearing for the defendants submitted that due to failure of the plaintiff to follow the precautionary methods, she became pregnant, DW1 himself admitted in her evidence that in the discharge summary, there is mention about advice given to the plaintiff. It would further strengthen the factum of negligence on the part of the officials of the defendants. Therefore, the contention of the learned Additional Government Pleader cannot be accepted.

13. In similar circumstances, in the decision in **State of Haryana Vs. Santra**, reported in **2000 ACJ 1188**, the Hon'ble Supreme Court has held as follows:

"37. Ours is a developing country where majority of the people live below the poverty line. On account of 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 sterilization operation in other countries either on account of public policy or on account of pleasure in having a child being off set 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 sterilization operation cannot be accepted in view of the law settled by this Court in *N.Nagendra Rao & Co. Vs. State of Andhra Pradesh*, AIR 1994 SC 2663; *Common Cause v. Union of India*, (1996) 6 SCC 667 and *Achutrao Haribhau Khodwa v. State of Maharashtra*, 1996 ACJ 505(SC). The last case, which related to the fall



out of a sterilization 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 seven 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 sterilization 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.

45. Having regard to the above facts, we find no merit in this appeal which is dismissed but without any order as to costs."

(emphasis supplied)

14. In view of the above and by applying the vicarious liability, the first appellate Court has rightly directed the appellants/defendants to pay Rs.1,50,000/- as compensation with 9% interest p.a. from the date of institution of the suit till the date of decree and thereafter, 6% p.a. till realization of the said amount to the plaintiff. This Court does not find any reason to interfere with the judgment passed by the first appellate Court. Thus, the question of law are answered against the appellants/defendants.

15. In the result, this second appeal is dismissed. The appellants/defendants are directed to deposit entire compensation amount, less the amount already deposited, with accrued interest and costs, as directed by the first appellate Court, within a period of eight weeks from the date of receipt of a copy of this judgment. On such deposit, the respondents 2 to 5 / LRs of the plaintiff shall equally divide the same. The 5th respondent shall withdraw his share. The share of the minor respondents shall be deposited in any one of the nationalized bank, till they attain majority. The 5th respondent being father and natural guardian of the minors shall withdraw the interest derived from the said deposits once in three months and use the same for the welfare of the minors. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar

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To

1. The Additional District Judge,
FTC No.II, Madurai.
2. The Principal Subordinate Judge,
Madurai.
3. The Record Keeper,
V.R. Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai.

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judgment made in
S.A. (MD) No.728 of 2016
30.07.2019

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