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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.01.2022

CORAM

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

W.P.No.22349 of 2018

Tmt. Dhanam

...Petitioner

..Vs..

1.The Secretary to Government,
Health & Family Welfare Department,
For St.George,
Chennai - 600 009.

2.The Director of Medical Education,
and Family Welfare Department,
Kilpauk, Chennai.

3.The Registered Medical Officer,
Kanyakumari Government Medical College Hospital,
Asaripallam, Nagercoil,
Kanyakumari District.

4.The Deputy Director,
Medical Rural Development and Family Welfare Centre,
Kanyakumari at Nagercoil.

...Respondents

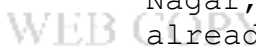
PRAYER : Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, to direct the respondents 1 and 2 to grant compensation to the petitioner for the negligence in performing the Family Planning Operation by the 3rd respondent within a time stipulated by this Court.

For Petitioner : Mr.S.P.Sudalaiyandi

For Respondents : Mr.M.Shajahan
Special Government Pleader for R1
Mr.E.Sundaram,
Government Advocate for R2 to R4

ORDER

This Writ Petition has been filed, praying to issue a Writ of Mandamus, to direct the respondents 1 and 2 to grant compensation to the petitioner for the negligence in performing



2. According to the petitioner, she was residing at Tamil Nagar, Aralvaimozhi Post, Kanyakumari District and she was already blessed with two female children. While giving birth to second child, the petitioner had undergone Tubectomy operation under the supervision of 3rd respondent, who also issued Sterilisation Certificate to the petitioner. On 5.4.2017, the 3rd respondent examined the petitioner and found that she was conceived since the Tubectomy operation got failed and the 3rd respondent also endorsed the same in the patient case sheet of the petitioner. Hence, on 18.07.2017, the petitioner sent a detailed representation to the respondent, seeking compensation of Rs.10,00,000/- and pursuant to her representation, she also appeared for enquiry on 30.08.2017 before the 3rd respondent and in the meanwhile, she gave birth to a girl baby on 29.09.2017. The grievance of the petitioner is that since she begotten three children, she lost the benefit under Government Scheme provided for female children and thereby, the daughters of the petitioner were deprived of the benefits and they are put to financial hardship since the petitioner and her husband are not in a position to bear the expenses towards maintenance, education and marriage of the children. Despite the representation since no response was forthcoming, the petitioner has come forward with the present Writ Petition, seeking compensation for the negligence on the part of the 3rd respondent.

3. A counter affidavit has been filed on behalf of the 4th respondent, wherein, while denying the averments made in the writ petition, it is stated that the petitioner was explained about the family planning operation and its pros and cons, viz., about chances of failure and post operative complications, etc. and after getting the consent from the petitioner as well as her family members, the petitioner was conducted LSCS with Sterilization operation. The petitioner also gave undertaking before undergoing the family planning operation to the effect that she knows about the family planning operation which may fail some time for which, the doctors and hospital authorities are not responsible and there is danger to her health to some extent if she undergoes family planning operation and that she would inform to the hospital authorities within two weeks if she does not get her menstruation after undergoing the operation and she agrees to abort the fetus at free of cost in the hospital, and that she receives the compensation as per the Scheme in case of failure of operation etc. Therefore, having agreed to the terms, the petitioner is estopped from making any claim for compensation towards negligence on the part of the 3rd respondent, which cannot be sustained. Further, 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 whether the petitioner has strictly followed the prescriptions and advice given by the hospital authorities. The petitioner has not approached the hospital authorities within 90 days from the date of knowledge of failure of family planning operation. However, as per the Scheme, the petitioner can claim only for a sum of Rs.30,000/- only. It is also stated that by knowing full well about the risk involved in the family planning operation, the petitioner had given consent to undergo the operation and therefore, she cannot make any accusation against the authorities. With these averments, the 4th respondent sought for dismissal of the Writ Petition as devoid of merits.

4. Heard the learned counsel for the petitioner and the learned Government Advocate appearing for the respondents and perused the entire materials available on record.

5. The observation made by the Hon'ble Supreme Court in the case of "State of Haryana and others versus Smt. Santra" reported in 2000 (3) Supreme 520 will squarely apply to the fact-situation prevailing in the present Writ Petition as well, which reads as under:

"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."

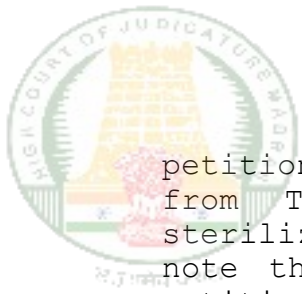
6. The learned counsel appearing for the petitioner would submit that the sterilization operation was performed on the petitioner on 05.04.2014 and a certificate to that effect was also issued to her under the signatures of the Medical Officer, Kanyakumari Government Medical College Hospital, Asaripallam, Nagercoil. He pointed out that the petitioner was assured that sterilization operation had been performed successfully upon her and she would not conceive a child in future. But despite the operation, she conceived. The petitioner came to know this when she approached the 3rd respondent on 05.04.2017 for general check up since she was suffering from Thyroid problem and after examining her, the 3rd respondent informed the petitioner that she is pregnant since her sterilization operation was not successful and he also made an endorsement to that effect on the petitioner's case sheet. Later, on 29.09.2017, the petitioner gave birth to a female child. The learned counsel would also



submit that the petitioner was already blessed with two female children and the birth of new female child put her and her husband to a burden of rearing up the child as also to bear all the expenses involved in the maintenance of the child, including the expenses towards her food, clothes, education and marriage. Further, since she was blessed with three children, the benefits under the Government Scheme for female children would also be deprived of. It was in these circumstances, the learned counsel submitted that the petitioner made a representation, claiming compensation of Rs.10,00,000/- to the respondents and since the same evoked no response from the respondents, the petitioner approached this Court and hence, he prayed that this Court to grant appropriate compensation to the petitioner.

7. The claim of the petitioner was resisted by the respondents by taking up technical pleas relating to non-maintainability of the writ petition on various grounds, stating that there was no negligence on the part of the Medical Officer of the Kanyakumari Government Medical College Hospital, Asaripallam, Nagercoil. The learned Government Advocate contended that the sterilization performed upon the petitioner was done carefully and successfully and there was no negligence on the part of the Doctor who performed that operation. He also submitted that before undergoing the sterilization operation, the petitioner was explained about pros and cons of the operation and having understood the same, the petitioner has given an undertaking that in case the operation was not successful, she would not claim any damages. Therefore, the learned Government Advocate would point out that the petitioner was estopped from raising the plea of negligence or from claiming damages for an unsuccessful sterilization operation from the State, which was not liable even vicariously for any lapse on the part of the Doctor who performed the operation. The learned Government Advocate would also submit that in similar Writ Petitions, this Court has not entertained the similar claim as sought for in the present writ petition and held that the extent of negligence and quantum of compensation cannot be decided in the Writ Petition. Therefore, the learned Government Advocate prays this Court to dismiss the Writ Petition.

8. Having heard the learned counsel for the petitioner and the learned Government Advocate for the respondents, I find considerable force in the contention raised by the learned counsel for the petitioner. It is not in dispute that despite sterilization operation, the petitioner got conceived and gave birth to a female child. 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. In fact, the 3rd respondent has endorsed on 05.04.2017 after examining the



petitioner who visited the hospital for check up as suffering from Thyroid, that the petitioner was pregnant and the sterilization operation was not successful. It is pertinent to note that at the time of undergoing Tubectomy operation, the petitioner was made to believe that after the operation, she would not conceive. Therefore, the act of the medical officer, who conducted sterilization operation, can be held that he did not perform his duty to the best of his ability and with due care and caution and due to the above said act, the petitioner was made to suffer mental pain and agony and burden of financial liability. In such circumstances, this Court is of the view that the petitioner is entitled to the compensation appropriately in respect of her 3rd child, who is miserably became her 'unwanted child'.

9. However, the learned Government Advocate would submit that the negligence of the Medical Officer in performing the unsuccessful sterilization operation upon the petitioner would not bind the State Government and the State Government is not liable vicariously for any damages to the petitioner. He also contended that in the matter of unsuccessful operation, the Government already brought a scheme by issuance of G.O.Ms.No.150 Health & Family Welfare (R2) Department dated 28.05.2014 and as per the said scheme, the petitioner is entitled to 30,000/-. He pointed out that there was no element of "tort" involved in it nor had the petitioner suffered any loss which could be compensated in terms of money.

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.



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.

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.

16. Family Planning is a National Programme. It is being implemented through the agency of various Govt. Hospitals and Health Centres. The implementation of the Programme is thus directly in the hands of the Govt. officers, including Medical Officers involved in the family planning programmes. 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 cooperate by offering themselves voluntarily for sterilisation 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, the fate turns against her due to improper performance of the 3rd respondent in conducting the sterilization operation on the petitioner, by which, she gave birth to unwanted child. Therefore, this Court is of the view that the petitioner is certainly entitled to the compensation. However, taking into consideration the poor financial status of the petitioner who was already burdened with two female children and also lost the benefits under the scheme of the Government in respect of family consisting two female children, this Court feels it appropriate to award compensation including future cost of the child's upbringing upto the age of 21 years or until her graduation, on a consideration of public policy.

17. When the petitioner did not want third child as she and her husband had no economic means to bring up another child as already having two female child and when the third child was born because of failure of sterilization operation conducted on the petitioner by the respondents, who are the instrumentalities of the State, it becomes bounden duty of the state to meet the expenses for bringing up this child.

18. In a decision reported in the case of "State of Haryana versus Santra" ((2000) 5 SCC 182=2001-2-LW 58), while dealing with a case of birth of a child in spite of tubectomy operation. The Supreme Court held that there was negligence on the part of the Doctors and ultimately, the State Government was responsible for the negligence. The award of compensation by the Court below was upheld by the Supreme Court. Ultimately, it was observed:-



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"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 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



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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."

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 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.

20. With the above direction, this Writ Petition is disposed of. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

suk
To

1.The Secretary to Government,
Health & Family Welfare Department,
For St.George,
Chennai - 600 009.

2.The Director of Medical Education,
and Family Welfare Department,
Kilpauk, Chennai.



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3.The Registered Medical Officer,
Kanyakumari Government Medical College Hospital,
Asaripallam, Nagercoil,
Kanyakumari District.

4.The Deputy Director,
Medical Rural Development and Family Welfare Centre,
Kanyakumari at Nagercoil.

+lcc to Mr.S.P.Sudalaiyandi, Advocate Sr.4236

+lcc to the Government Pleader Sr.4905 and 4911

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