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S.A.Nos.139 to 141 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 26.04.2022

DELIVERED ON: 05.07.2022

CORAM

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

S.A.Nos.139 to 141 of 2017
and

C.M.P.Nos.3005 to 3007 of 2017

S.A.No.139 of 2017:-

- 1.Tamil Nadu State Government,
Through the District Collector,
Thiruvarur.
- 2.The Joint Director,
Health Works Department,
Government District Head Quarters,
Thiruvarur.
- 3.The Chief Medical Officer,
Government Hospital,
Mannargudi Town and Taluk.
- 4.Dr.Chitra,
Assistant Medical Officer,
Government Hospital,
Mannargudi Town and Taluk.

: Appellants

vs.

Deivanai

: Respondent



S.A.Nos.139 to 141 of 2017

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, to set side the judgment and decree, dated 08.09.2016 made in A.S.No.11 of 2010 on the file of the Principal District Court, Thiruvavarur, confirming the judgment and decree, dated 30.09.2005 made in O.S.No.18 of 2004 on the file of the Subordinate Court, Thiruvavarur.

S.A.No.140 of 2017:-

- 1.Tamil Nadu State Government,
Through the District Collector,
Thiruvavarur.
- 2.The Joint Director,
Health Works Department,
Government District Head Quarters,
Thiruvavarur.
- 3.The Chief Medical Officer,
Government Hospital,
Mannargudi Town and Taluk.
- 4.Dr.Chitra,
Assistant Medical Officer,
Government Hospital,
Mannargudi Town and Taluk.

: Appellants

vs.

Jayalalitha

: Respondent

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, to set side the judgment and decree, dated 08.09.2016 made in A.S.No.12 of 2010 on the file of the Principal District Court, Thiruvavarur, confirming the judgment and decree, dated 13.10.2005



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made in O.S.No.32 of 2004 on the file of the Subordinate Court,
Thiruvavarur.

S.A.No.141 of 2017:-

- 1.Tamil Nadu State Government,
Through the District Collector,
Thiruvavarur.
- 2.The Joint Director, Health Works Department,
Government District Head Quarters,
Thiruvavarur.
- 3.The Chief Medical Officer,
Government Hospital, Mannargudi Town and Taluk.
- 4.Dr.Chitra,
Assistant Medical Officer,
Government Hospital,
Mannargudi Town and Taluk. : Appellants

vs.

Selvi : Respondent

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, to set side the judgment and decree, dated 08.09.2016 made in A.S.No.13 of 2010 on the file of the Principal District Court, Thiruvavarur, confirming the judgment and decree, dated 30.12.2005 made in O.S.No.18 of 2004 on the file of the Subordinate Court, Thiruvavarur.

For Appellants :Mr.P.Harish
Government Advocate (Civil side)
For Respondent : Mr.T.Gobinath
(in all cases)



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COMMON JUDGMENT

A common substantial question of law is raised in all the above second appeals and therefore, these appeals are disposed of by this common judgment, as the facts and issues involved in these Second Appeals are also one and the same.

2.Heard Mr.P.Harish, learned Government Advocate (Civil side) appearing for the appellants and Mr.T.Gobinath, learned Counsel for the respondent in all these appeals.

3.The defendants in the suits are the appellants in the above second appeals. The respondent in S.A.No.139 of 2017 is the plaintiff in O.S.No.18 of 2004 on the file Subordinate Court, Thiruvavarur. The respondent in S.A.No.140 of 2017 is the plaintiff in O.S.No.32 of 2004 and the respondent in S.A.No.141 of 2017 is the plaintiff in O.S.No.70 of 2004. All the three suits were filed by the plaintiffs as against the appellants herein claiming a sum of Rs.1,50,000/-, as damages/compensation for medical negligence.



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4.It is the common case of the plaintiffs that they begotten two or three children and thereafter, they underwent sterilization operation (Tubectomy) to avoid further pregnancy due to their family circumstances. All the plaintiffs were admitted at Mannargudi Government Hospital. The sterilization operation (Tubectomy) was done in the case of the respondent in S.A.No.139 of 2017 on 08.07.1997. Similarly, the sterilization operation (Tubectomy) was done in the case of the respondent in S.A.No.140 of 2017 on 19.12.1997. In the case of the respondent in S.A.No.141 of 2017, she underwent sterilization operation (Tubectomy) on 20.01.2000. However, to their dismay, the plaintiffs got pregnant subsequently within one year and gave birth to a female child.

5.From the facts, it is seen that the respondent in S.A.No.139 of 2017 gave birth to a female child on 05.12.1999. In the case of the respondent in S.A.No.140 of 2017, she gave birth to a female child on 23.07.2001 and in the case of the respondent in S.A.No.141 of 2017, she gave birth to a female child on 15.02.2003. Therefore, it is the common case of the



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plaintiffs/respondents in each second appeal that they have already two or three children and that they were living in a poor financial condition. Their decision to go for sterilization operation (Tubectomy) was on account of their financial constraints. It is their common case that the pregnancy was due to medical negligence and therefore, each one claimed a sum of Rs.1,50,000/- as damages/compensation. It is pertinent to mention that the surgery was performed by a Lady Doctor, who is the fourth defendant in all the three suits.

6.The appellants/defendants in their written statement filed before the Trial Court had stated that the plaintiffs in the respective suits had not followed the advise given by the fourth defendant and that the pregnancy was not due to surgical failure or negligence or carelessness on the part of the fourth defendant. It is also stated in the written statement that the plaintiffs have not taken care to follow the medical advise and therefore, the suits are liable to be dismissed on the ground that there was no negligence on the part of the fourth defendant, who have conducted the operation. It is the specific stand of the Government that the



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plaintiffs/respondents have an opportunity to abort the child. However, they refused to do it, even though it was informed to them that such abortion will be done at free of cost.

7.The Trial Court, after going through the entire evidence on record, found that the defendants did not file any documents or let in any evidence to prove that all necessary steps had been taken properly. The Trial Court also found that the defendants did not produce materials to show that all procedures were duly and meticulously followed in the case of the plaintiffs. Holding that the medical negligence is proved, the Trial Court awarded a sum of Rs.1,00,000/- as compensation to each of the plaintiff in the three suits. Aggrieved by the judgment and decree of the Trial Court, the appellants preferred A.S.No.11 of 2010 as against the judgment and decree in O.S.No.18 of 2004, A.S.No.12 of 2010 as against the judgment and decree in O.S.No.32 of 2004 and A.S.No.13 of 2010 as against the judgment and decree in O.S.No.70 of 2004.

8.All the appeals were heard by the learned Principal District Judge, Thiruvavarur. All the appeals were dismissed by the



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lower appellate Court. As against the judgment and decree of the learned Principal District Judge, Thiruvarur, the above second appeals have been preferred by the defendants in the suits.

9.In all the second appeals, the following common substantial question of law was framed:

“Whether the appellants are liable to pay compensation in respect of birth of a child to the respondent after sterilization operation, in the light of the judgment rendered by the Hon'ble Supreme Court of India in *State of Punjab vs Shiv Ram and others [(2005) 7 SCC 1 : AIR 2005 SC 3280]*.”

10.A Three Member Bench of Honourable Supreme Court in the case of *State of Punjab vs Shiv Ram and others [(2005) 7 SCC 1 : AIR 2005 SC 3280]*, has decided a similar case, where, a suit for recovery of damages to the tune of Rs.3,00,000/- was filed by the husband and wife on account of a female child having been born to them in spite of the fact that the wife having been undergone a Tubectomy operation performed by a lady surgeon, who is also impleaded as a defendant in the suit.



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10.1.A similar defence was also taken by the defendants in the suit. A Medical Officer of the hospital was examined, who deposed that medical science recognises failure of sterilization operation (Tubectomy) to the extent of 0.3% to 3%. Several documents from the extracts of different text books of gynaecology in support of the statement of the defendants were produced before the Trial Court.

10.2.Learned Advocate General appearing for the State of Punjab submitted before the Honourable Supreme Court that the appellants State was not very serious about paying of sum of Rs.50,000/- to the plaintiffs admitting that the plaintiffs are poor persons. Further arguments were advanced by the State that the State was interested in having the legal issue resolved, as the decrees are being passed against the State either by the Consumer Forum or by Civil Court.

10.3.The Honourable Supreme Court went further to lay down the law to be applied. After elaborately considering what is



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negligence, the Honourable Supreme Court has considered the text books on gynaecology and the various methods, by which, the sterilization operation (Tubectomy) is being done. Even though pregnancy after female sterilization is rare, the Honourable Supreme Court found that it happens. The most common reason is because the woman was already pregnant at the time of sterilization (Tubectomy). From what is produced before the Honourable Supreme Court, it is also seen that pregnancy after female sterilization (Tubectomy) is also possible due to medical negligence, particularly, by imperfect occlusion of the tube, which may result an unwanted pregnancy. The chance is particularly high in laparoscopic methods. If a Gynaecologist fails to place ring on any one of the tubes due to improper visualization, it is advised that the Doctor must inform the patient and her husband, and some other contraceptive method should be advised.

10.4.It is also seen that occlusion of the wrong structure(s), e.g., round ligament is a common, indefensible error, which may particularly happen, if the surgeon is inexperienced. This is more frequent in laparoscopic methods, where, even



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confirmation of structure of biopsy is difficult, in case of doubt.

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10.5. After a long discussion about the medical science by considering the texts, the Honourable Supreme Court has held as follows:

“17. We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy Bolam's test. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100 % exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee.

18. The cause of failure of sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by x-ray examination, or by pathological examination of the materials removed at a subsequent operation of re-sterilisation. The discrepancy between operation notes and the result of x-ray films in respect of the number of rings or clips or nylon sutures used for occlusion of the tubes, will lead to logical inference of negligence on the part of the gynaecologist in case of failure of sterilisation operation. (See: Law of Medical Negligence and Compensation by R.K. Bag, Second Edition, p.139)

19. Mrs. K. Sarada Devi, the learned counsel appearing for the plaintiffs-respondents placed reliance on a 2-Judge Bench decision of this Court in State of Haryana & Ors. v. Smt. Santra, JT 2000 (5) SC 34, wherein this Court has upheld the decree awarding damages for medical negligence on account of the lady having



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given birth to an unwanted child on account of failure of sterilization operation. The case is clearly distinguishable and cannot be said to be laying down any law of universal application. The finding of fact arrived at therein was that the lady had offered herself for complete sterilization and not for partial operation and, therefore, both her fallopian tubes should have been operated upon. It was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in these circumstances, that a case of medical negligence was found and a decree for compensation in tort was held justified. The case thus proceeds on its own facts.

20. The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. A reference to the provisions of the Medical Termination of Pregnancy Act, 1971 is apposite. Section 3 thereof permits termination of pregnancy by a registered medical practitioner, notwithstanding anything contained in the Indian Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation II appended to sub-section (2) of Section 3 provides - "Explanation II. Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

And that provides, under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.



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21.The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.

22.For the foregoing reasons, we are of the opinion that the judgments and the decrees passed by the High Court and courts below cannot be sustained. The trial court has proceeded to pass a decree of damages in favour of the plaintiffs-respondents solely on the ground that in spite of the plaintiff-respondent No.2 having undergone a sterilization operation, she became pregnant. No finding has been arrived at that will hold the operating surgeon or its employer - the State, liable for damages either in contract or in tort. The error committed by the trial court, though pointed out to the first appellate court and the High Court, has been overlooked. The appeal has, therefore, to be allowed and the judgment and decree under appeal have to be set aside.

11. Therefore, the ultimate conclusion of the Honourable Supreme Court was that there is no specific finding in the order of the Trial Court that the surgeon is liable for damages either in contract or in tort and that therefore, the judgment and decree passed by the Courts below challenged before the Supreme Court was held unsustainable, as no finding regarding negligence. Even thereafter, the Honourable Supreme Court suggested that State Governments should think of devising and making provisions for a



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welfare fund or taking up with the insurance companies a proposal for devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims, where, a child is born to woman, who has undergone a successful sterilisation operation (Tubectomy), as in the present case.

12.In the present case, there is a specific allegation that the plaintiffs got pregnancy immediately after sterilisation operation (Tubectomy) due to medical negligence. The fourth defendant has given evidence as DW-1 in every suit to the effect that the plaintiffs have put their signatures in the declaration form and that she asked the plaintiffs to check herself for every fifteen days for a period of first six months. It is further stated by her during evidence that it was due to their negligence, they conceived. Further, she stated that there is a chance of failure of one out of 1000 sterilisation operations and therefore, the defendants are not liable to pay damages or compensation.

13.The evidence of the fourth defendant in the suits that she advised the plaintiffs in each case to see her once in every



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fifteen days for atleast six months after the operation, has no relevance. After going through the evidence of plaintiffs and DW-1, the Trial Court has given a definite finding that due to medical negligence, the plaintiffs in each case got pregnant after sterilization operation (Tubectomy) and that the defendants are liable to pay damages for a sum of Rs.1,00,000/- as compensation.

14.After relying upon the judgment of Honourable Supreme Court in the case of ***State of Punjab vs Shiv Ram and others [(2005) 7 SCC 1 : AIR 2005 SC 3280]***, the lower appellate Court also rendered a finding that the plaintiffs' pregnancy in each case was due to surgical failure. The lower appellate Court further held that the burden lies on the defendants to prove that there was no negligence. The only document, which was produced by the appellants is Ex-B1, which is only the consent letter of plaintiffs before undergoing sterilization operation (Tubectomy).

15.When failure of sterilization operation (Tubectomy) is also possible due to medical negligence, the question arises



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whether the plaintiffs in these cases have proved medical negligence. This Court in the case of ***Vijaya vs The Commissioner, Corporation of Chennai and others***, reported in ***2004-3-L.W.201***, held as follows:

"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."

16. In the case of ***Keith Allenby vs H***, reported in ***(2013) 2 SCC 1***, the Honourable Supreme Court held as follows:

"53. If, however, the purpose of the medical treatment is to prevent pregnancy from occurring and by reason of medical error that purpose is not achieved, it does not seem to us that, just because the pregnancy then occurs as a biological process, there should be no cover for the consequences. The development of the foetus following impregnation occurs because of the medical error, just as in the case of the undetected tumour. It causes significant physical changes to the woman's anatomy, which of course occur naturally but still cause discomfort and, at least ultimately, pain and suffering. If a disease or infection consequential on medical misadventure can be classified by the statute as a personal injury, it does not involve any greater stretching of language to similarly include a pregnancy which has



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the same cause. We should add that it can make no difference that the direct cause of the pregnancy is an act of sexual intercourse which occurs separately from the negligently performed operation. The pregnancy is still caused by the surgeon's negligence, and would not have happened without that negligence. It is the same in a case of negligent treatment by a health professional falling under s 32(6), where the transmission of the infection occurs separately from the failure to properly treat the patient who passes on the infection, and is directly caused by the proximity of the patient and the person to whom the infection is passed. Another example would be where a medical practitioner negligently carries out a vaccination procedure sought by a patient who later catches from a third person the very disease against which he or she wished to be protected."

17.In all the above appeals, it is admitted that the three plaintiffs in the respective suits are the persons, who had undergone sterilization operation (Tubectomy) between 08.07.1997 and 20.01.2000. The learned Government Advocate produced before this Court a statistics to show that the fourth appellant had conducted sterilisation operation (Tubectomy) and out of 655 cases, there were only four number of failures between April 1997 and March 2000.

18.From the records, it is indicated that after April 2000, there is no failure insofar as the sterilisation operation (Tubectomy) performed by the fourth appellant. The chart clearly

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indicates that the fourth appellant has learnt and could catch up accuracy in her performance after 2000. The fact that there is no failure in her career from April 2000 gives an indication that it is possible for a Gynaecologist to show 100% success in sterilization operation (Tubectomy).

19.Even though this Court framed the question of law referring to the judgment of Honourable Supreme Court, the grounds raised by the appellants do not indicate that the findings of the Trial Court as well as the lower appellate Court on the basis of facts are vitiated due to perversity or due to omission to consider any material documents or evidence. The plaintiffs, who have undergone sterilisation operation (Tubectomy) between 1997 and 2000 have reported failure and the specific case of the plaintiffs cannot be ignored.

20.In this case, the Trial Court has only awarded a sum of Rs.1,00,000/- to each of the plaintiff, as compensation for the loss or sufferings due to the pregnancy immediately after the sterilization operation (Tubectomy). This Court is unable to



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interfere with the findings of the Courts below on facts. Therefore, all the appeals are dismissed and the judgment and decree of the Courts below are confirmed. However, after perusing the records and the statistics, this Court is of the view that the fourth appellant has done meritorious service, which cannot be ignored even by the State. Hence, while confirming the judgment and decree of the Courts below, this Court directs the State Government not to initiate any proceedings against the fourth appellant on account of the burden of State to pay the compensation to the plaintiffs, who are respondents in these appeals. No costs. Consequently, connected miscellaneous petitions are closed.

Index :Yes/No

05.07.2022

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To

1.The Principal District Judge, Thiruvarur.

2.The Subordinate Judge, Thiruvarur.

3.The District Collector,
Tamil Nadu State Government,
Thiruvarur.

4.The Joint director,
Health Works Department,

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Government District Head Quarters,
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S.S.SUNDAR, J.

cmr

Common Judgment made in
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