



S.A.No. 1285 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.03.2023

CORAM

THE HONOURABLE MR. JUSTICE V. LAKSHMINARAYANAN

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Santhi

... Plaintiff/Respondent/Appellant

Vs.

1. The District Medical Officer
Government General Hospital
Thiruvannamalai Town.
2. The District Family Welfare Officer
District Head Quarters
Government General Hospital
Thiruvannamalai District.
3. The Director, State Welfare
Department, having its office at
Egmore, Chennai.
4. The Collector
Thiruvannamalai District
Thiruvannamalai.
5. Dr.S.Vasanth,
Assistant Surgeon
Working at Government
Hospital, Thiruvannamalai.
6. Dr.S.Sundari,



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Assistant Surgeon
Working at Govt. General Hospital
Thiruvannamalai District

... Defendants/Appellants/Respondents

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Decree and Judgment passed in A.S.No. 83 of 2006 on the file of Principal Subordinate Judge at Thiruvannamalai dated 17.12.2007, reversing the Decree and Judgment passed in O.S.No. 205 of 2004 dated 21.02.2005, on the file of Principal District Munsiff at Thiruvannamalai.

For Appellant : M/s. R.T.Sundari

For Respondents : Mr. B.Thamil Nidhi
Additional Government Pleader

JUDGMENT

The plaintiff in O.S.No. 205 of 2004 on the file of the Subordinte Judge, Tiruvanamalai, is the appellant before this Court.

2. The plaintiff submits that she is an agricultural coolie and has two daughters to be maintained in additional to her husband. She hails from a poor family and has to eke out a living only by resorting to coolie work.



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The plaintiff submits that after the birth of the second female child, she underwent Laproscopic operation at Tiruvannamalai Government Hospital under the control of the District Medical Officer, Tiruvannamalai, who is the first defendant. She was admitted and operated upon on 15th August 1991. After a brief period of treatment, she was discharged from the hospital. Sometime in September 1991, she suffered from severe abdominal pain and therefore, she was admitted to the hospital and discharged again. In December 1991, her husband took her to one, Dr.Saiprasanna and the Doctor informed, to the shock and surprise of the plaintiff that she was pregnant. According to the plaintiff, she became pregnant only on account of the fact that Laproscopic operation had not been conducted in a proper manner and therefore, came forward with a suit for claiming damages for a sum of Rs.1,00,000/-.

3. The first defendant did not agree to the averment made in the plaint and filed a written statement hotly contesting the case. This statement was adopted by the other defendants. The bare facts of the case is that on 15.08.1991, the plaintiff was admitted and underwent Laproscopic surgery. According to them, the plaintiff did not report any menstrual



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problems after the operation and did not come for periodical medical check up and had willingly carried on with her pregnancy. They would further submit that, family planning operations are being done with special care as such operations are of national interest. They would further submit that the said special care which was endowed to all people was endowed to the plaintiff also. They would further submit that in every surgery, there is a given rate of failure and it is unfortunate that in this particular case, the victim was the plaintiff. They would further submit that to avoid any suits being filed, the Doctors are in habit of obtaining signature in a prescribed form those who are operated upon. They denied the allegation that the plaintiff is a poor person and stated that the Tahsildar gave a report that the plaintiff's husband is having a house and is getting an annual income of Rs.6,000/-. The matter was taken up for trial by the learned Special Judge, Tiruvannamalai.

4. On behalf of the plaintiff, Santhi/ the plaintiff was examined herself as PW-1 and she marked Exs. A-1 to A-3. On the side of the defendants, Sundari and Senthamiz Selvi were examined as DW-1 and DW-2 respectively and they marked Exs. B-1 to B-4. The learned trial Judge



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took note of the fact that the plaintiff delivered a premature child after a gestation period of 8 months. The trial Court framed the following issues for consideration:-

“(i) Whether the plaintiff is entitled to get relief as prayed for:

(ii) To what relief?

*Additional issues framed on
09.04.2003;*

*1) Whether there is a contributory
negligency on the part of plaintiff?*

*2) Whether there is a negligence on
the part of defendants?”*

5. After detailed examination, the Court came to a conclusion that since the child was delivered within 8 months of being conceived, it does not give any credence to the defendants that the child is a fully grown baby and therefore could have been conceived even before the operation. In



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order to reach the conclusion, the learned Trial Judge found that the laproscopic operation had taken place on 15.08.1991 and the conception had been taken place only thereafter. She returned a finding that if not failure of the operation, the plaintiff would not conceived at all. Therefore, the learned Trial Judge rejected the argument of contributory negligence.

6. On appeal to the Principal Subordinate Judge at Thiruvannamalai, the learned Judge found that there is no evidence to show that the baby was born on 18.04.1992 and that it was a premature baby. Therefore, he held there is a possibility that there might have been a sexual contact between the plaintiff and her husband before the sterilisation operation. He would say that there is a possibility of child in the womb even on the date of sterilisation itself and that relying upon the evidence of DW-1 that had there been a sexual contact a date prior to the surgery, there is no possibility of confirming the same at the time of the operation. He would rely upon the Judgment of the Supreme Court reported in ***[State of Haryana Vs. Raj Rani]*** 2005 (4) M.L.J, 131, stating that the person claiming compensation has to prove negligence and without negligence, the plaintiff is not entitled to any compensation. The Lower Appellate



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Court would further say that if the plaintiff found the child to be a burden, she need not have proceeded further and could have aborted the child instead of keeping the pregnancy and giving birth to child.

7. The learned counsel for the respondent would vehemently contended that the issue is covered by the Judgment of the Hon'ble Supreme Court in ***2005 7 SCC 1 [State Of Punjab vs Shiv Ram & Ors]***. He would state that the doctors are not negligent and if at all anybody is responsible for the appellant to be pregnant, it is the appellant herself. She has further not produced any evidence to show that she had kept away from her husband prior to undergoing laproscopy operation and that every operation has inherent failure and the present suit is one such case. He further stated that the appellant should have gone for regular check up. Hence, negligence cannot be placed on the doors of the doctor.

8. I have carefully considered the pleadings, evidence as well as the Judgment of the trial Court and the Lower Appellate Court.

9. The appeal was admitted on the following substantial questions of law:-



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“a) Whether the plaintiff/appellant is not entitled to compensation due to negligent act of not properly conducting laproscopic operation?; and

b) Whether the First Appellate Court is right in rejecting the claim of compensation without assigning acceptable reasons?”

10. I have heard M/s. R.T.Sundari, learned counsel appearing for the appellant and Mr. B.Thamil Nidhi, learned Additional Government Pleader appearing for the respondents.

11. I am unable to accept the view taken by the Lower Appellate Court. The Lower Appellate Court did not consider the fact that the laproscopic operation does not mean that a couple should not indulge in sexual intercourse. The purpose for which a laproscopic operation undergone is that a family does not want to have any more children and at the same time, continue their sexual relationship. The idea of undergoing the operation is that the couple can continue with their sexual relationship and still be safe from the burden of bringing up a child. The view of the learned Judge that the appellant ought to have been aborted the child is shocking to say the least. It does not settle in with the social remarks of the country, which



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does not encourage abortion. Having given birth to two children and coming from an agricultural coolie background, the learned Judge should have viewed it in a rather sympathetic way.

12. The view taken by this Court in S.A.(MD).No. 129 of 2006 supports my view. His Lordship had held that the very failure of the operation itself will amount to negligence and it is not incumbent on the part of the respondent/plaintiff to specifically prove the negligence. The view taken by Hon'ble Mr. Justice M.M.Sundresh (as His Lordship then was) has been approved in S.A.Nos. 48 & 49 of 2018 dated 06.02.2018 by the Hon'ble Mrs. Justice Pushpa Sathyanarayana. The relevant portions of the said Judgment are extracted hereunder:-

“10. In the above said judgement, it has been held that the basis of liability of a professional in tort is negligence. Unless that negligence is established, the primary liability cannot be fastened on the medical practitioner. Unless the primary liability is established, vicarious liability on the State cannot be imposed. In the



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instant case, the Courts below have held that it is only due to the medical negligence and error, the plaintiff conceived and got her fourth child, which according to them, is an unwanted pregnancy. Though it is generally stated that the sterilization is permanent, the failure rates are also on the higher side. It is stated that the failure may be due to age factor of the woman, and the effectiveness also depends on the skill of the provider. In the instant case of the plaintiff, the procedure for sterilization was successful for more than ten years and only after ten years, the plaintiff had become pregnant which went undetected till the advance stage of pregnancy. Considering the background of the plaintiff, who is a wife of a coolie and who had already given birth to three female children and had voluntarily gone for sterilization got conceived after ten (10) years, negligence cannot be attributed either to the Doctor, who performed the procedure, or to the plaintiff for not taking the recommended precautions. The plaintiff had detected the pregnancy only during her advanced stage by which time, the same could not be terminated



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and she was forced to deliver the child. Even according to the medical science, there cannot be 100% guarantee for the women sterilization, as there are cases, where, even after the operation, women have become pregnant and delivered child. Hence, either the Surgeon or the employer cannot be held liable for compensation on account of, either unwanted pregnancy or unwanted child. If the conception is immediate, may be the negligence could be attributed to the surgeon, who performed the same. In such circumstances, it has to be seen whether Courts below were right in awarding compensation.

11. Admittedly, the plaintiff and her husband, who is a collie, have got three female children and they are illiterate. The appellants are not private bodies, but it is the State and their duty Doctor. The State may not be aggrieved, as there is no better service than to serve the poor and needy. The plaintiff had undergone the surgery with utmost faith in the hospital, in which, she had undergone the surgery. When her believe and faith was



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shaken by the unwanted pregnancy, she could not blame the appellants. The profession of a Doctor only aims at serving the humanity.”

13. In so far as the submissions of the learned Additional Government Pleader is concerned, I am of the view that this issue had been raised before Hon'ble Mrs. Justice Pushpa Sathyanarayana and it was not accepted. What had been rejected & buried by this Court once, need not be resurrected again. Therefore, though the arguments of the learned Additional Government Pleader are attractive at the first blush, I am unable to accept the same.

14. In the light of the clear and categorical view, I am unable to sustain the view of the Lower Appellate Court and accordingly, it is reversed.

15. In fine, the Second Appeal is allowed. The Judgment and decree of the Court of the Principal Subordinate Judge at Thiruvannamalai, in A.S.No. 83 of 2006 dated 17.12.2007 is reversed and the Judgment and Decree in O.S.No. 205 of 2004 dated 21.02.2005, on the file of Principal District Munsiff at Thiruvannamalai, is restored. No costs.



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16. The learned Additional Government Pleader is requested to bring a draft for a sum of Rs.50,000/- in favour of the appellant on 12.06.2023.

This is to obviate the appellant from filing an execution petition which might only be a further financial deterrence especially for a person belonging to lowest layer of the society.

17. Post the matter on 12.06.2023 for compliance.

31.03.2023

Index :Yes/No

Internet:Yes/No

vsg

To

1. Principal Subordinate Judge at Thiruvannamalai.

2. Principal District Munsiff at Thiruvannamalai.



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V. LAKSHMINARAYANAN , J.

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