



WP(MD)No.5091 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **04.10.2023**

CORAM

THE HONOURABLE **MR.JUSTICE N.ANAND VENKATESH**

W.P.(MD)No.5091 of 2020

and

W.M.P.(MD)No.4438 of 2020

Rakku

...Petitioner

/Vs./

- 1.State of Tamil Nadu Rep By
The Principal Secretary,
Health and Family Welfare Department,
Fort St.George, Chennai.
- 2.The District Collector,
Viruthunagar District.
- 3.The Chief Health Officer,
Primary Health Centre,
158, West Car Street,
Viruthunagar District.
- 4.The Deputy Medical Officer,
Primary Health Centre,
Viruthunagar District.
- 5.The Dean,
Rajaji Government Hospital,
Madurai.



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6.The Block Medical Officer,
Primary Health Centre,
Narikudi, Viruthunagar District.

7.The Deputy Director of Health
Service and Family Welfare,
Office of the Deputy Director of
Health Service and Family Welfare,
Viruthunagar, Viruthunagar District.

...Respondents

PRAYER:- Petition - filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the respondents to pay fair and reasonable amount of compensation for the negligent surgery performed by the respondent No.7 Hospital, consequently to direct the respondent No.1 to take action against the Respondent No.6 and 7 officials who are responsible for the negligent surgery to the petitioner within the time stipulated by this Court.

For Petitioner : Mr.R.Alagumani

For Respondents : Mr.R.Ragavendran

Government Advocate

ORDER

This writ petition has been filed for issuance of writ of mandamus, directing the respondents to pay compensation on the ground of negligence while performing Tubectomy, as a result of which the petitioner gave birth to a boy child, namely Ingaran.



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2. The facts involved in the present case have been captured in the earlier order passed by this Court on 11.03.2020 and for proper appreciation, the same is extracted hereunder:-

“The writ petition is filed under the unfortunate circumstances. The petitioner / Rakku, W/o.Kasiviswanathan is aged about 35 years and is residing at Mettu Street, Periyar Nagar, Avaniyapuram, Madurai.

2.The writ petition has been filed in the nature of mandamus seeking compensation for negligence in surgery, which was performed by the 6th respondent / the Block Medical Officer, Primary Health Center, Narikudi, Virudhunagar District. On 17.04.2014, the petitioner had subjected herself to undergo family planning operation performed by the 6th respondent. Unfortunately, the petitioner had conceived again and consequently, seeks compensation. She also seeks medical termination of pregnancy.

3.In the affidavit filed in support of the petition, it had been stated that the petitioner had married Kasiviswanathan on 28.01.2007 and they have been blessed with three daughters and one son. It has been stated that on 17.04.2014, the petitioner decided to undergo family planning surgery in the 6th respondent hospital. Surgery was conducted. The operation failed. The



petitioner has now conceived again.

4.In view of the fact that the petitioner sought medical termination of pregnancy, this Court sought the assistance of Mrs.J.Padmavathi Devi, learned Special Government Pleader to examine whether the petitioner could avail professional counselling in this regard. The learned Special Government Pleader after getting assistance, Mr.K.Samidurai, Advocate, had in turn sought the help of Dr.Sharmila Siraj, Consultant Psychiatrist, Ahana Hospital, to counsel the petitioner.

5.The learned Doctor has submitted a report to this Court stating that after much effort spent, the petitioner agreed to have her 5th child. She further stated that the petitioner should be given compensation for the agony suffered by her on a day to day basis.

6.The learned counsel for the petitioner states that the petitioner has health issues. Her husband has also medical problems. Their first daughter aged about 12 years, is now studying 7th standard in a private school, the second daughter aged about 11 years, is studying 5th standard in a private school and their third daughter aged about 8 years, is studying 1st standard in the Government school and their son aged about 5 years, is studying 1st standard in Avaniyapuram Government School.

7.The learned Special Government Pleader would submit that she would take up the issue with the District Collector, Virudhunagar District, to ensure there is



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continuity in the education of the children. This Court shall take up the responsibility of this family, since they voluntarily opted for family planning surgery which was conducted and failed.

8.Since the petitioner's family is now permanently residing at Mettu Street, Periyar Nagar, Avaniyapuram, Madurai, the District Collector, Madurai may also examine the possibility of giving financial support to the family and also to provide the husband any employment even temporary with the Government. The report of the Consultant Psychiatrist submitted to this Court shall form part of the records.

9.Call on 30.03.2020.”

3. Heard Mr.R.Alagumani, learned counsel appearing for the petitioner and Mr.R.Ragavendran, learned Government Advocate appearing for the respondents.

4. The issue involved in this writ petition is squarely covered by two earlier orders passed by this Court in WP.No.22349 of 2018, dated 25.01.2022 and WP(MD)No.4505 of 2016, dated 28.04.2023. In both these writ petitions, compensation was sought for the negligence in performing family planning operation which resulted in birth of the child.



5. The relevant portions in the order passed in WP(MD)No.4505 of 2016, dated 28.04.2023 are extracted hereunder:-

8.The petitioner's contention is that they were already blessed with two children and the birth of new child put her and her husband to a burden of rearing up the child and also to bear all expenses including maintenance of the child, food, clothes, education and marriage. Therefore, she underwent the sterilization operation and she was made to believe that after the operation, she would not conceive again. But, things went sideways and she got conceived and ultimately, gave birth to a third child, despite the operation. Therefore, 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.

9.In fact, after the third delivery, the petitioner underwent the very same procedure for the second time and after the same, she was not conceived. Therefore, the act of the Doctor, who performed the sterilization operation on the petitioner for the first time, can be held that the Doctor did not perform the duty to the best of her ability and with due care and caution and due to the said fact, the petitioner was made to suffer mental pain and agony and burden of financial liability.

*10.Similar such case came up for consideration before this Court in the Principal Seat in **Dhanam v. Secretary to***



Government, Health & Family Welfare Department, Chennai and Others [CDJ 2022 MHC 7836], wherein, this Court has held that the petitioner is entitled to the compensation appropriately in respect of her third child, who miserably became her 'unwanted child'.

11. Learned Additional Government Pleader, by referring the Government Order in G.O.Ms.No.150, Health & Family Welfare Department, dated 28.05.2014, submitted that as per the scheme, the petitioner is entitled to a compensation of Rs. 30,000/-. He further submitted that there was no element of tort involved nor had the petitioner suffered any loss, which could be compensate in terms of money.

12. This contention of the respondents was also addressed by this Court in **Dhanam's** case (*supra*) and was answered as follows:-

“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



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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



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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."

13. Therefore, this Court is not inclined to accede the submission made by the learned Additional Government Pleader. Family Planning is a National Programme being implemented through various Government Hospitals and Health Centres. The implementation of the programme is directly in the hands of the Government, including the Medical Officers. 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 co-operate by offering themselves voluntarily for sterilization 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, things went sideways due to improper performance of the Doctor in conducting the sterilization operation on the petitioner, by which, she gave birth to the third child.



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*14. In **Santra's** case (supra), the Hon'ble Supreme Court has held that there was negligence on the part of the Doctors and ultimately, the State Government was responsible for the negligence. The Hon'ble Supreme Court has ultimately upheld the compensation ordered by the Court below, by observing as follows:-*

"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 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."

15. By referring this decision, this Court, in **Dhanam's** case (*supra*), has ordered for compensation as follows:-

"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, stationery, 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."

16. Following the same and considering the economic and social background of the petitioner and other circumstances, this Court is passing the following order:-

The petitioner is entitled for a compensation of



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Rs.3,00,000/-. The respondents shall provide free education to the third child of the petitioner, either in a Government School or in a Private School. The fees already paid, if any, shall be refunded and all the expenses on books, stationary, uniforms and other miscellaneous educational expenses shall also be met by the respondents. Further, the respondents shall pay a sum of Rs.1,20,000/- per year [Rs.10,000/- per month] to meet the child's need for food and proper up-bringing till he completes his graduation or attaining 21 years, whichever is earlier.”

6. There must be some consistency in the orders passed in cases of this nature and hence, I am inclined to fall in line with the two earlier orders that have been referred to supra. Considering the facts and circumstances of the case and also the economic and social background of the petitioner, this Court holds that the petitioner is entitled for compensation of a sum of Rs.3,00,000/- (Rupees three lakhs only)

7. It is brought to the notice of this Court that the compensation of Rs.30,000/- was paid to the petitioner in line with G.O.Ms.No.119, Health and Family Welfare (R1) Department, dated 30.05.2013. In view of the same, this amount shall be given credit and the balance amount shall be paid as compensation to the petitioner.



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8. There shall be a further direction to the respondents to provide free education to the fifth child of the petitioner, namely Ingaran, either in a Government School or in a Private School. The respondents shall pay a sum of Rs.1,20,000/- (Rupees one lakh and twenty thousand only) per year (Rs. 10,000/- per month) to meet the child's need for proper up-bringing till the child completes his graduation or till attaining 21 years, whichever is earlier.

9. This writ petition is disposed with the above directions. No costs. Consequently, connected miscellaneous petition is closed.

04.10.2023

NCC : Yes/No
Internet : Yes/No
Index : Yes/No
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N.ANAND VENKATESH, J.

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Order made in
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