

(2014) 11 KL CK 0229

In the High Court Of Kerala

Case No : A.S. Nos. 57 of 1998 and 263 of 2003

State of Kerala

APPELLANT

Vs

Santha and Others

RESPONDENT

Date of Decision : 11-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 11, Order 33 Rule 11(b), Order 41 Rule 33, 96

Constitution of India, 1950 — Article 38, 39, 41, 45, 47

Citation : (2015) 1 KHC 216

Hon'ble Judges : T.B. Radhakrishnan, J; Babu Mathew P. Joseph, J

Bench : Division Bench

Advocate : Noble Mathew, Senior Government Pleader, Advocates for the Appellant; K.G. Balasubramanian, Advocates for the Respondent

Judgement

T.B. Radhakrishnan, J.—Important issues relating to failed sterilisation surgeries conducted in Government hospitals or under Government programmes are the focal issues for decision in these appeals, which arise from the decree and judgment in a suit for damages instituted by an economically marginalised woman who underwent a mini lap sterilisation surgery in a Government hospital, and, thereafter, bore a fourth child, much against the firm belief she entertained, on the basis of the assurance given by the Government through its proclamations and by the doctor, that she would not conceive after that surgical sterilisation process. We proceed referring to the parties, going by their status before the Court of first instance.

2. During the course of hearing of these appeals, we had enquired about the affairs of the plaintiff's fourth progeny, begotten after the allegedly failed procedure. By affidavit sworn to by the plaintiff later, it is stated that, unfortunately, that child, Vishnu, died on 15/05/2008, owing to cardiac problems. In that affidavit, she has also attributed the fate of the child as relatable to the unwanted fourth pregnancy and has further stated the mental agony of the parents on the loss of that child.

3. Heard Adv. K.G. Balasubramanian on behalf of the plaintiff and the learned Government Pleader Adv. Noble Mathew and the learned Government pleader who appeared thereafter, for the State.

4. In setting up her case in that regard, apart from attributing negligence to the doctor, the plaintiff pleaded about the confidence that she had reposed on materials like pamphlets, issued by the Government, propagating such sterilisation as an error-free mode of population control. The Court below allowed the claim in part and granted her a decree, as against the first defendant, State of Kerala, holding it vicariously liable for the negligence of the doctor.

5. Though a defendant, the doctor who conducted the surgery has not appealed against the impugned verdict; may be because the Court below did not decree the suit as against that person. The first defendant - State's appeal is AS No. 57 of 1998. Plaintiff sought leave to appeal, as an indigent, on the question of adequacy of damages awarded by the Trial Court. On being granted leave to do so, her appeal is on file as AS No. 263 of 2003.

6. The arguments on behalf of the plaintiff, in support of the findings by the Court below on the issue of liability of the first defendant - State, are twofold. Supporting the impugned decree, to the extent granted in favour of the plaintiff, and pleading for enhancement of the quantum of damages, her learned counsel, firstly argued that there is no ground to interfere with the finding of the Court below on the issue of negligence of the doctor and the vicarious liability of the State in that regard; more particularly because, the doctor who is primarily liable has not appealed against the findings as to negligence. Second; of more importance; is the argument on behalf of the plaintiff that she and her husband, belonging to the economically and socially marginalised sector of the society, reposed absolute faith and confidence in the declarations made by and on behalf of the State Government that the surgical procedure administered to the plaintiff ensured foolproof success in preventing future pregnancy, and, therefore; notwithstanding any question of negligence being pleaded and proved as against the doctor who carried out the procedure, the State is liable to compensate on the failure of such surgery. It is pointed out that this is so, as part of State liability and, founded on doctrines emanating on a wholesome and meaningful application of the Constitution of India, over and above the doctrine of promissory estoppel or any principle akin thereto; and, independent of, tortious liability and resultant vicarious liability. The third limb of the arguments on behalf of the plaintiff is that the damages to be awarded in such a case has to be commensurate and coextensive with the financial burden that the plaintiff and her husband could be deemed to carry, and, have carried, to bring up the child born to them after the failed mini lap sterilisation surgery procedure.

7. On behalf of the first defendant - State, the argument is that such mini lap surgery is not a foolproof one, of cent percent certainty, as is implicit in the well-established scientific doctrines and principles relevant in that regard, evidenced by the testimony of the witnesses who testified on behalf of the defendants, and,

hence, the impugned decree is wholly unsustainable in law and on facts.

8. Plaintiff, a coolie, a wage earner by counting the fruitful days of available labour, obviously belongs to the economically marginalised and challenged category of the Indian society. She cannot but be treated as one belonging to the resultant socially challenged sector as well. She, a mother of three, conceived for the fourth time in 1985. She and husband sought medical advice from a Government hospital. Their requirement was to adopt family planning measures to secure the marital life and reduce economic liability. Second defendant, the doctor, conducted medical termination of pregnancy of the conceived foetus and performed mini lap sterilisation surgery on her. The plaintiff again conceived and delivered her fourth child, a boy, on 10th July, 1987. He would have been 18 years of age by July, 2005. Going by the events after the impugned decree, that boy, Vishnu, unfortunately, died on 15th May 2008, owing to cardiac problems, going by his mother's affidavit.

9. In its erudite judgment in that regard, the Court below, applying the doctrine of *res ipsa loquitur*, held the defendants liable as they could not prove that the failure of the sterilisation surgery conducted on the plaintiff was not on account of negligence or lack of care on the part of the doctor who conducted that procedure. There being no conflict of pleas as between the defendants, the Court below granted the decree for damages as against the first defendant - State - on ground of vicarious liability with reference to the acts and omissions of the second defendant, undisputedly, a Government servant.

10. Plaintiff pleaded and tendered evidence as PW 1 that the second defendant conducted mini lap sterilisation on her and that the said procedure failed and she became pregnant again, causing serious prejudice, injury and agony to her. According to her, the subsequent pregnancy was due to failure of the mini lap procedure as against the assurance given by the defendants that such sterilisation is an effective method of family planning and a foolproof method of preventing pregnancy. She attributed such failure of the mini lap operation to the negligence of the second defendant who conducted that surgery. According to her, when she conceived in 1986, after the mini lap surgery, she approached the second defendant, who then behaved to her in an irresponsible and rude manner and therefore, she went to the Government Hospital, Irinjalakuda, from where her fourth child was delivered; following which, she underwent a further bilateral tubectomy.

11. We have examined the documentary and oral evidence on record vis-a-vis the findings in the impugned judgment, in the light of the arguments advanced on behalf of the plaintiff and the State.

12. Exts. A7, A8, A9 and A10 were issued on behalf of the State during the period 1980 to 1985, assuring the credibility and foolproof nature of mini lap sterilisation procedure. Therefore, that is the standard of the result of the surgical procedure that was offered to the plaintiff by the first defendant - State

Government - as the establishment and the second defendant doctor as a servant of that Government.

13. If one were to go for a surgical procedure on the particular assurance as to its credibility, the bare minimum that is required is that the procedure so expounded and extended has to be deemed to be foolproof, to the extent of its such professed nature. Obviously therefore, when it is demonstrated that the surgical procedure carried out on the plaintiff had failed; which is not a fact in dispute; it is an unexplained situation insofar as the plaintiff is concerned. When that happened from the matters under the control of the defendants, it was up to them to prove by cogent evidence, to the satisfaction of the Court below, that the situation is not one attributable to the second defendant; as to negligence, neglect, breach of duty and due care and caution. This is inexcusably so, when the situation bespeaks negligence; that is to say, the happening of something which is not warranted or conceived of, by the acumen and diligence expected of the second defendant and the other personnel under the control of first defendant, having particular regard to what stood professed and offered in public domain by the Government through Exts. A7 to A10. In that factual and inferential matrix in the realm of preponderance of probabilities, we are unable to dissuade from concurring with the finding of the Court below that the situation bespeaks negligence and that those responsible, had failed to discharge their legal obligation to convincingly explain the situation in hand, to the satisfaction of judicial mind. Therefore, the application of the doctrine of *res ipsa loquitur* by the Court below and the resultant findings rendered in that regard are hereby confirmed.

14. Notwithstanding the finding of negligence as affirmed herein above, we see that there are other legal aspects as well which need to be addressed. We may note that in *State of Haryana and Others Vs. Smt. Santra*, the Apex Court dilated on different aspects in relation to tortious liability, including vicarious liability arising out of medical negligence.

15. Though the aforementioned precedent thus held that claim for damages on account of medical negligence cannot be denied, we proceed to consider whether in the case in hand, the State would have any liability even independent of its vicarious liability as regards the tort of negligence committed by its servant.

16. Pitted here are, in one hand, a couple, of which the plaintiff is the female, belonging to the socially and economically challenged sector of this Nation; in the other hand, the Government machinery coupled with the scientific wisdom which cannot but be deemed to be available to it from different legitimate and reliable sources, including, the doctor in Government service, who conducted the procedure which has led to this litigation.

17. The legitimate expectations of the plaintiff in the situational scenario of her going for the surgical procedure, in absolute faith and confidence that she would be sterile after such procedure cannot but be taken cognizance of. Relying on

Exts. A7, A8, A9 and A10, the Court below held that the defendants had guaranteed the success of the mini lap surgery and had expounded such procedure as a permanent method to prevent future pregnancies. The Court below specifically noted that there was no mention in those pamphlets about the chances of failure of such surgery. Those pamphlets had carried the clear statement that mini lap surgery is a permanent and successful method of family planning and that there will not be any side effect or defect in that regard. Those pamphlets had not even mentioned about the probable chances of failure of such surgeries. The contents of Exts. A7, A8, A9 and A10 are declarations made by or on behalf of the Government. They are materials in public domain, on which a citizen is well founded in reposing confidence. Clinching evidence was therefore before the Court below to conclude that the plaintiff, innocently, bona fide, and, in absolute good faith, acted in complete and firm belief and faith in the institutional guarantee of the State Government; to which she was subject; as to the credibility and reliability of the surgical procedure that was being carried out on her. She was, thereby, implicitly surrendering to the assurance given by the State Government on behalf of the Sovereign, "The People of India", to which she is subject; but, more importantly, of which, she is a cardinal member and part; however challenged and meek she may be on the differential scales of socio-economic equations. We cannot but take it that she stood with the firm belief on the basis of the assurance and guarantee that such surgery would bring her to the biological status of inability to conceive after such procedure. That was the biological state that she wanted, owing to the challenges she was facing; economic, social, and, familial. Her economic and social circumstances, as well as the situation of her family, were not conducive for her to carry and deliver yet another child, except at the peril of depletion of the frugal economic resources of her family.

18. Plaintiff and her husband are shown to have acted on the basis of the assurances contained in the aforementioned documents of public declaration by way of pamphlets. They cannot be criticised or belittled for that. They need to be saluted for having adopted a method of family planning as offered by the Government of a State of the Nation of which the plaintiff is a citizen; for, in the ultimate analysis of the constitutional format, indisputably, the plaintiff is part of "We, the People of India"; the undisputed Sovereign.

19. The aforementioned reasons based on the materials on record are clinching to confirm the impugned decree on the ground of promissory estoppel as against the State, through the Government; adding on to the conclusion already arrived at as to its vicarious liability.

20. The aforesaid position notwithstanding, this is a case where certain larger issues of inexcusable importance in the domain of interpretation and application of the provisions of the Constitution of India and the laws in India, arise for consideration in the light of the arguments advanced, and having regard to governance and decisions in its executive domain. We proceed to address those

issues here and now, since they are of critical importance in answering the rights and aspirations of the socially and economically marginalised and voiceless progenies of this Nation, who subject themselves to governmental assistance in multifarious matters held out to them, including to control pregnancy and childbirth, either through Government hospitals, or, through family planning camps sponsored or conducted with governmental assistance or by the Government institutions directly.

21. In terms of judicial conscience, we are of the view that we need to proceed to decide on the aforementioned issues in these appeals, which are, primarily, civil appeals under Section 96 of CPC. This we do because, whatever be the jurisdictional content and quality of any statutory proceedings; the Constitution is the pinnacle, the bedrock and the guiding beacon for the sustenance, interpretation and application of any law sought to be enforced; substantive or procedural.

22. Confirmity with the Constitution of India is the indisputable seminal requirement of any decision or action by any of the limbs of governance. Any decision, in whichever jurisdiction it may be, ought to be only in consonance with; in accordance with; that primary document of governance of this Nation. This has to be ensured as the bare minimum, in recognition of the fundamental doctrines underlying the Constitution. Hence, we proceed to speak on the constitutional issues as well, because judicial process of a Nation cannot be and ought not to be anything, except in accordance with the constitutional values of that Nation, if it has a Constitution for itself. Here, we have the mother document, the Constitution of India. That shall guide, with the changing times, in terms of the aspirations of the Indian people, who are ordained to always carry with them the basic constitutional values emanating from the Constitution and acknowledging the internationally recognised human rights and values of social co-existence; yet, recognising the need to tune the legislative, executive and judicial thoughts to be in conformity with the constitutional vision emanating out of the Constitution of India.

23. Family planning programmes are conceived as institutionalised augmentation of the socioeconomic requirement as to the overall well-being of the unit called "Family". We may recall the erudite sociological exposition given to the term "Family", to mean "Father And Mother I Love You". This is what we, from the depth of our hearts, reckon as the resonance of every human child on Earth. The natural urges of parenting include the insurmountable and cardinal desire to provide to the progenies, at the least, succour against hunger. This is nothing but part of natural human instincts; even of animal instincts. In humans, further desires of the parents would be to provide appropriate clothing to drape one's person, and thereafter, a shelter to withdraw and recline, safe from the beasts, including human, lurking unsolicited. Therefore, when a couple cannot afford to provide for more children; by way of food, clothing and shelter; they would, inevitably, suffer untold and immeasurable agony, though that would remain

unexpressed in the social and public domain. Hence, any given opportunity to secure economic and societal stability of the existing family, would be most welcome to any couple, by all means. When scientific inputs and remedies are professed and extended to them, facilitating family planning, which would preserve the frontiers of their carnal needs, yet ensuring prevention of unwanted childbirth; they would welcome it. This is all the more so when such advice and aid come from reliable sources.

24. In the conspectus of governance as understood in the backdrop of the Constitution and the diverse socio-economic, linguistic, geographical, ethnic and cultural components of the Indian polity, in the common course of human conduct, utmost regard, faith and confidence would be, and are expected to be reposed by the citizens in the constitutional mechanism of governance of this Nation, including through its executive function. When governmental assistance in relation to a matter of critical importance of socio-economic welfare of the Nation and the well being of the citizen is offered and extended, the Nation also stood guaranteed as to the satisfaction of the particular socio-economic goals which prompted such a welfare programme. This mutuality between the Nation and the citizen is inherent in the cohesiveness of the written prescriptions in the Constitution of India; bound, spread out, embroiled and energised with eternal human values; to be interpreted, from time to time, envisioning the growth, the legitimate expectations and the aspirations of the great polity called the Indian People, christened, "WE, THE PEOPLE OF INDIA".

25. Courtesy of the appearing learned advocates, including the Government Pleaders; we made profitable reference to a material issued in October, 2006, by the Research Studies & Standards Division of the Ministry of Health and Family Welfare in the Government of India. That is a booklet captioned "Standards for Female and Male Sterilisation Services". Notwithstanding that we are adjudicating a statutory appeal under Section 96 of CPC, having regard to the constitutional obligation of the High Court, not only as an Appellate Court but also, contemporaneously, as the Court enjoined to interpret the Constitution of India, we are persuaded to copiously refer to the aforesaid document and rely on it, since we are of the considered view that the contents of that document deserve to be considered, as they would aid this Court to emphasise the conclusions on issues relating to the Constitution and governance, though such conclusions stand otherwise as well. We say so particularly because; we proceed to use that document issued by the Government of India as available in the public domain, to decide constitutional and legal issues relating to the economically and socially marginalised sectors of the society. The Foreword to that booklet jotted by the Secretary to the Government of India in the Ministry of Health and Family Welfare records, among other things, that the national population policy, 2000, specifies unmet need for contraception as a priority area to be addressed urgently; the surveys conducted in India indicate that only 48% of the eligible couples adopt any contraceptive method to plan their family and, sterilisation is the most accepted method, contributing to nearly 75% of all the

methods accepted. Clause 1.6.3 of that booklet deals with the issue of failure of operation leading to pregnancy. That clause enjoins that such failure may be due, either to technical deficiency in the surgical procedure or spontaneous re-canalization. Going by that document, the client (patient), is susceptible to chances of re-canalization and failure-of such surgery due to technical deficiency. But, who is to bear the brunt and burden of such a situation?

26. The cohesiveness of the provisions of Parts III, IV and IVA of the Constitution of India is such that the fusion of great ideals and principles enshrined as Fundamental Rights, Directive Principles of State Policy and Fundamental Duties excludes any labyrinthine complexity in their understanding and application. India is a developing country. The vast majority of her people live below the poverty line. Her rich resources could not, so far, come to their real rescue. Reasons may be many. No doubt, ever-increasing population is a major reason that hinders the progress of the poor Indian masses. The contextual public policy of this Nation is population control and augmentation of food and other resources. This is not merely for the good of the individuals or the family as a unit. It is part of public policy professed and developed by the Government as part of governance. That is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. 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 had created mass awakening for the use of various devices including sterilisation operation, there is responsibility on the State - See for support Santra (supra), particularly paragraphs 37 and 42 thereof as reported in SCC. Though the said judgment rested on foundations as to tortious liability for negligence, the avowed policies relating to population control have other diverse dimensions as well. The preservation of available resources for the present and future generations has to be ensured. Of equal importance is the fact that the children are given opportunities and facilities to develop in a healthy manner. The State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which, among other things, economic justice shall inform all the institutions of the national life. The State has also the constitutional obligation to raise the level of nutrition and the standard of living of the people and the improvement of public health as among its primary duties. While these salutary provisions flow out of the Constitution of India in its wholesomeness, they are also particularly provided for among the Directive Principles of State Policy as part of Articles 38, 39 and 47 thereof. Similarly, Article 41 enjoins, among other things, the constitutional goal to make effective provision for securing the right to education and to public assistance in cases of undeserved want. Childhood care and education for all children until they complete the age of six years is also a State goal in terms of Article 45 among the Directive Principles. Remember, citizenship is firstly by birth. The constitutional module in which the citizens are placed is such that they have an active role in ensuring the future of the Nation. The

cream of the constitutional goals, including the Fundamental Duties of the citizens, are such that when a citizen lives up to that constitutional expectation, that person would turn to be a vehicle on which the Constitution can safely carry the Nation to its goals. Article 51A enumerates the Fundamental Duties. It shall be the duty of every citizen of India, among other things, to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement and a parent or guardian is to provide opportunities for education to his child. This is among the dictates of the Constitution of this Nation to the citizenry. Though it would have been natural for the economically and therefore socially marginalised couple which led the plaintiff to offer herself for the sterilisation process, it cannot be ignored that she was induced by the Government through its propaganda, as part of the national need for population control and thereby to empower the wholesome growth of this Nation. Therefore, where the person involved undergoes the procedure of sterilization on the advice in public domain that it is a foolproof method, natural failure of a sterilization procedure; even one not amounting to medical negligence; would also fall under State liability in the context of balancing the equations between Fundamental Duties, Directive Principles of State Policy and Fundamental Rights, when the societal interest also gets involved while ensuring the sterilization of a person in cases of this nature. In this constitutional conspectus, in cases like the one in hand, there is a constitutional responsibility for the Nation to support the victims of such a situation. This responsibility arises out of the sufferance of the individual citizen for the common good. This is the constitutional responsibility of a socialist democratic republic where common good and welfare guides. It, therefore, is a constitutional responsibility of the Nation. It gives rise to rights in favour of such victims. When such constitutional responsibility remains undischarged, it amounts to breach of legal duty to compensate. As a corollary, it results in a legal liability, which is absolute in nature. The liability in this regard will rest absolutely on the State, in the legal perspective, in accordance with the Constitution of India and the laws. The liability to make good the damage in such a situation would, therefore, fall as liability on the State, notwithstanding that no element of negligence by the doctor who performed the surgical procedure is established. The citizen in sufferance, the victim, would thus be entitled to sue for enforcement of such liability of the State.

27. Onto the question of quantum of damages, it needs to be noted that the plaintiff had to bring up her fourth child born due to the failure of the mini lap surgery. According to her, she was in financial need to provide food and clothing and other basic support for that child, including for his education and medical support, as and when needed. The Court below considered different such aspects and granted an amount of Rs. 64,800/- as damages and a sum of Rs. 10,000/- as damages for pain, mental agony and suffering. Thus, a total amount of Rs. 74,800/- was granted. We are of the view that on a fair estimate, this amount is inadequate. Obviously, determination of the amount payable as damages in such

a case cannot be on the basis of any hard and fast rule. There cannot be any cut and dried formula to quantify such amount. On the totality of the facts and circumstances, we are of the view that an amount of Rs. 500/- per month, also foreseeing the escalation and expenditure, can be made the basis for determination of damages other than for pain, mental agony and suffering. We accordingly fix such damages at Rs. 1,08,000/- (Rs. 500 x 12 x 18). It would only be just and reasonable to grant an amount of Rs. 15,000/- (Rupees fifteen thousand only) to the mother for the pain, mental agony and suffering. We may here pause, also to recall that Vishnu, plaintiff's fourth progeny whom she bore as a result of the failed mini lap surgery is no more. She had to suffer that loss and agony, as well. Hence, total amount of damages due is Rs. 1,23,000/-.

28. The additional amount being granted as per this appellate decree should reasonably carry interest at 9% per annum from 02/08/1988, the date on which the plaintiff applied for leave to sue as an indigent. This is so because, when a suit is instituted with permission to sue as an indigent, the date of institution of the suit relates back to the date of institution of the application to sue as an indigent. Therefore, it is only appropriate that any order for payment of interest will have to be treated to run from the date of the institution of the application seeking leave to sue as an indigent when the Court decides to grant interest from the date of institution of the lis. The Court below has erroneously limited the interest it awarded to run only from 11/06/1990, the date on which the lis was registered as a suit, that is, after the plaintiff's application to sue as an indigent was granted. The impugned decree also has, therefore, to be modified pre-dating the grant of interest at 6% per annum on the amount awarded by the Court below to run from the date of institution of the application for leave to sue as indigent. Appellant will be entitled to interest at the rate of 6% per annum on the amount of Rs. 74,800/-, as awarded by the Court below, payable from the date of institution of the application for leave to sue as indigent before the Court below, till realisation. Having regard to the nature of the litigation and the economically marginalised sector to which the plaintiff belongs, we hold that she is eligible to be exempted from paying court-fee in the Court of first instance and in this appeal in view of Order XXXIII Rule 11 of CPC as amended by notification dated 13/01/1999. See for support, Joseph Vs. Kerala State Electricity Board, . That modification to the impugned judgment and decree can be made in favour of the plaintiff in exercise of power under Order XLI Rule 33 CPC. In exercise of authority as aforementioned, the direction contained in the impugned judgment and decree ordering realisation of court-fee from the plaintiff is vacated. No court-fee shall be recovered from her.

In the result,

1. The plaintiff is allowed to recover an amount of Rs. 48,200/- (Rupees forty eight thousand and two hundred only) with interest thereon at 9% per annum from 02/08/1988, the date of institution of POP No. 81 of 1988 of the Sub Court, Irinjalakuda, till realisation, with costs fixed at Rs. 3,000/- (Rupees three

thousand only), in addition to the amount granted by the Court below.

2. The plaintiff is allowed to recover interest on the amount of Rs. 74,800/- (Rupees seventy four thousand and eight hundred only) at the rate of 6% per annum as awarded by the Court below, payable from 02/08/1988, the date of institution of POP No. 81 of 1988 of the Sub Court, Irinjalakuda, till realisation.

3. The plaintiff is exempted under Order XXXIII Rule 11(b) read with Order XLI Rule 33 CPC from payment of court-fee in the Court below and before this Court. No court-fee shall be payable by the appellant-plaintiff in relation to either the suit or this appeal and no amount shall be recovered from her towards court-fee. It is so directed in supersession of any direction to the contrary as may be contained in the impugned decree and judgment.

4. AS No. 263 of 2003 filed by the plaintiff is allowed in part as above. AS No. 57 of 1998 filed by the State is dismissed.