IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 30.11.2010

CORAM

THE HONOURABLE MR. JUSTICE M. VENUGOPAL

A.S.No.907 of 2004
and
C.M.P.No.13016 of 2004

1.Union of India
represented by Chief Secretary,
Pondicherry.

2.Medical Superintendent,
Government General Hospital,
Karaikal.

3.Dr.Jothi Boblee James,
Specialist Grade II,
Maternity Hospital,
Pondicherry. ... Appellants/Defendants

Vs

Revathy ... Respondent/Plaintiff

PRAYER: Appeal filed under Section 96 of Civil Procedure Code as against the Judgment and Decree dated 20.09.2002 in O.S.No.61 of 2001 passed by the Learned Additional District Judge, Pondicherry at Karaikal.

For Appellants : Mrs.N.Mala
Government Pleader (Pondicherry)

For Respondent : Mr.T.Susindran

JUDGMENT

The Appellants/Defendants have preferred the present Appeal as against the Judgment and decree dated 20.09.2002 in O.S.No.61 of 2001 on the file of Learned Additional District Judge, Pondicherry at Karaikal.

2.On an appreciation of oral and documentary evidence on record, the trial Court viz., Learned Additional District Judge, Pondicherry at Karaikal while passing the Judgment in O.S.No.61 of 2001, dated

20.09.2002 has among other things observed that 'the Respondent/Plaintiff has aggrieved to undergo tubectomy operation on the assurance of the Third Appellant/Third Defendant that if the said operation is performed again the Respondent/Plaintiff will get beget a child and as such under the supervision of the Third Appellant/Third Defendant has undergone the Tubectomy operation and has also further observed that if the Third Appellant/Third Defendant under Medical Team has performed the operation on the Respondent/Plaintiff with care and caution then there is no possibility for the Respondent/Plaintiff to become pregnant and to deliver the child and therefore because of the Doctors carelessness and negligence the Respondent/Plaintiff has become pregnant and delivered a child and consequently awarded a sum of Rs.25,000/- to the Respondent/Plaintiff towards Pain and Sufferings, granted a sum of Rs.25,000/- towards mental agony and for up-bringing of the child and for marriage and other maintenance expenses awarded a sum of Rs.1,00,000/-, then in all the Respondent/Plaintiff has been awarded with a sum of Rs.1,50,000/- as compensation and the said amount has been directed to be paid by the Appellants/Defendant 1 to 3 jointly and severally. Further, the First Appellant/First Defendant has been directed to pay the aforesaid amount of compensation on behalf of the Second and Third Appellants/Second and Third Defendants together with interest @12% per annum from the date of filing of the Plaint till date of payment along with costs etc., and accordingly, passed a Decree to that effect.

3.Before the trial Court, three Issues have been framed for trial in the main suit for adjudication.

4.On the side of the Respondent/Plaintiff witness PW1 has been examined and Ex.A.1 to Ex.A.13 have been marked. On the side of the Appellants/Defendants witness DW1 has been examined and Ex.B.1 to Ex.B.4 have been marked.

5.The Appellants/Defendant being aggrieved against the Judgment and Decree dated 20.09.2002 in O.S.No.61 of 2001 passed by the trial Court have projected the present Appeal before this Court.

6.The point that arises for consideration in this Appeal is

> Whether the Appellants 1 and 2/Defendants are vicariously liable for the payment of restricted compensation of Rs.3,00,000/- on account of the Third Appellant/third Defendant's direct responsibility in regard to the negligent performance of the tubectomy operation upon the Respondent/Plaintiff on 03.03.1998 at General Hospital, Kariakal?.

7.The contentions, discussions and findings on Point Nos.1 and 2:

According to the Learned Government Pleader (Pondicherry) appearing for the Appellants submits that the trial Court has failed

to appreciate that the stand of the Government is that there is 0% of failure of case undergone in respect of a Tubectomy operation due to natural course which is an extraordinary case and this does not mean that the Doctor who performed the Tubectomy operation has been at fault nor there has been any negligence or carelessness.

8.It is the contention of the Learned Government Pleader (Pondicherry) for the Appellants that after Delivery on the person who has undergone Tubectomy operation there is a possibility of natural failure in the case of the certain percentage which cannot be attributed to any act of negligence and the treatment in respect of the Respondent/Plaintiff has been completed as per the requirements and obviously in that event there is no scope for negligence.

9.The Learned Government Pleader (Pondicherry) for the Appellants urges before this Court that the Respondent/Plaintiff has not adduced any evidence to show that there has been any act of negligence on the part of the Doctor while performing the operation and moreover, the trial Court has incorrectly determined the random sum as compensation in respect of mental agony, Pain and Sufferings, Future Maintenance of the child and in any event, the award of Rs.1,50,000/- as compensation is unjustified one without any factual or legal basis.

10.Lastly, it is the contention of the Learned Government Pleader (Pondicherry) for the Appellants that there is a difference between the natural failure in sterilization process and failure on account of negligence in performing operation which aspect has not been appreciated by the trial Court in real and proper perspective and therefore prays for allowing the appeal in the interest of justice.

11.In response, the Learned Counsel for the Respondent/Plaintiff submits that the trial Court on a careful scrutiny of the oral evidence of PW1, DW1 and also upon analysing the documents filed on either sides has come to the clear conclusion that only because of the carelessness and negligence of the Doctors in regard to the performance of the conduct of Tubectomy operation, the Respondent/Plaintiff has become pregnant and delivered a child and accordingly, granted a sum of Rs.1,50,000/- as compensation together with interest @ 12% per annum from the date of Plaint till date of realisation etc., to be paid by the Appellants/Defendant 1 to 3 jointly and separately and that the First Appellant/First Defendant has been directed to pay for on behalf of the Appellants 2 and 3 and the well considered Judgment of the trial Court need not be interfered with by this Court sitting in Appeal.

12.At this stage, it is necessary for this Court to make an useful reference to the averments made by the Respondent/Plaintiff in

the Plaint. In the Plaint, the Respondent/Plaintiff has stated that her husband is a Toddy Tapper, earning a very meagre income totally insufficient to satisfy his needs and however having the children an unavoidable one. She has given birth to two female children namely Meena, born on 14.08.1996 and Soundarya, born on 24.02.1998 and also has registered their birth before the Registering Authority. Further, she has given birth to the second Female child Soundarya on 24.02.1998 after getting herself admitted in the General Hospital, Karaikal in Maternity Ward as an inpatient No.2456. On the advice of the Second and Third Appellants/Second Defendant and Third Defendant she has decided to undergo sterilization by going in for a Tubectomy operation (P.S) so that the future birth of the children can be avoided in the assured manner.

13.That apart, the Respondent/Plaintiff has also averred in the Plaint that she has undergone the Tubectomy operation on 03.03.1998 at General Hospital, Karaikal by the third Appellant/Third Defendant personally as head of the Department and with the assistance of the other Doctors and Staff and further she has been asked to undergo Post Operative Care and treatment on 09.03.1998, she has been discharged and a necessary discharge slip to that effect has been issued to her.

14.The stand of the Respondent/Plaintiff is that after the discharge from the Hospital, by the acquired normal health, the Doctors at General Hospital, Karaikal has advised to undergo normal living and to her dismay she conceived to deliver the third child despite the performance of sterilization performed. However in July 1999, she has conceived a child as confirmed by the Doctors at General Hospital at Kariakal who advised that the child in the womb has been at the advance stage of pregnancy beyond the limit of going in for abortion etc.

15.According to the case of the Respondent/Plaintiff, she has given birth to third female child named Moogambigai on 16.12.1999 and the said birth has been registered with the Karaikal Municipality. Again, she has undergone the operation of Tubectomy / Sterilization (P.S) on 21.2.1999 and on full cure of wounds she has been discharged on 28.12.1999.

16.The core contention to be forwarded on the side of the Respondent/Plaintiff is that the Respondent/Plaintiff begetting the third child after sterilization is the result of clear negligence and the failure of operation itself is prima facie proof of negligence and improper performance of operation due to lack of required precision assured and required to be performed. Therefore though she has quantified the compensation claimed in the Plaint at Rs.5,00,000/-(Rupees Five Lakhs only) in all she has restricted her claim only to Rs.3,00,000/-(Rupees Three Lakhs only).

17.In the written statement filed by the Third Appellant/Third

Defendant it is among other things mentioned that there is no compulsion in regard to the use of Family Planning and the people are at liberty to use the same or keep off from it and in the instant case, the Respondent/Plaintiff decided to under Tubectomy operation (puerperal sterilization) voluntarily and has given her consent to the said operation and her husband namely G.Gajendiran has also signed in the consent declaration and in fact no assurance has been given to the Respondent/Plaintiff either on her behalf or on behalf of other Defendants to that effect that she can go about enjoying the marital life without risk of being conceived. Moreover, the Third Appellant/Third Defendant has pleaded in the Written Statement that it is a fact she has a supervisory role as Head of the Department but she has no hand in the actual and physical tubectomy operation on the Respondent/Plaintiff conducted on 03.03.1998 and after the post operative treatment, the Respondent/Plaintiff has been discharged in a sound health condition etc.

18.In this connection, this Court pertinently points out that the Third Appellant/Third Defendant in her statement in Para 3 has averred as follows:

> "3.In a book captioned as 'The Essentials of Contraceptive Technology' published by Johns Hopkins Population Information Program, published of Population Reports of 1997 Edition under Chapter-9 'Female Sterilization' at Pages 9-4 and 9-5.
> The relevant portion is as follows very effective and permanent:
>
> In the first year after the procedure 0.5 pregnancies per 100 women (1 in every 200 women)
>
> Within 10 years after the procedure 1.8 pregnancies per 100 women (1 in every 55 women).
>
> The technique usually followed is modified pomeroy's Technique which is universally acclaimed to be safer, still the percentage of failure of cases in Tebectomy operations is estimated at 0.5 per 100 women. This is due to the process of natural recanalisation which occurs in the fallopian tubes in natural extraordinary cases. This does not mean that the doctor who did the Tebectomy operation was at fault, negligent and careless. The negligence so called often as medical negligence, must have a direct nexus to the actual act of Tebectomy operation and the plaintiff's bounden duty to prove the element of negligence positively particularly in what aspect of phase of the Tebectomy operation. Just because the plaintiff has suffered another pregnancy after the Tebectomy operation, the courts of law should not be invited to infer a case of Medical negligence on the part of the Doctor who did the Tebectomy operation. In this case the Tebectomy operation was not done by this Defendant."

19.Also, the Third Appellant/Third Defendant in the Written Statement has stated that she has been transferred from Karaikal to Pondicherry in June 1999 and she has not been aware as to whether the Respondent/Plaintiff has been pregnant and in an advanced state of pregnancy etc. Further, she has not personally aware as to whether the Respondent/Plaintiff has given birth to a third Female child on 16.12.1999 because of the fact that she has not been serving at Government Hospital, Karaikal at that point of time.

20.Finally, the Third Appellant/Third Defendant also in the Written Statement has mentioned that speculative claims made by the Respondent/Plaintiff in regard to the future needs or development cannot be countenanced etc.

21.The evidence of PW1 (Respondent/Plaintiff) is to that effect that on 16.12.1999 she has been admitted for delivery for the third child after the sterilization failure and has given birth to a female child name Moogambigai on the very same day and on 22.01.1999 she has undergone an operation of Tubectomy/Sterilization and after full cure of wounds she has been discharged on 28.12.1999 and moreover, the Third Appellant/Third Defendant by not personally attending the operation on her allowed a Junior Doctors who are not so efficient and thereby allowed negligence in the conduct of the operation upon her on 03.03.1998 and made a suffer by begetting another child and which made her to undergo sterilization for the second time etc. It is the further evidence of PW1 (Respondent/Plaintiff) that she has quantified the Education, Food and Medical facilities at Rs.3,00,000/- in respect of the Third child and towards marriage expenses she has claimed a sum of Rs.1,00,000/- and further has claimed a sum of Rs.1,00,000/- for the mental agony, suffering in physical strain for two operations and delivery etc. and has made a claim for Rs.5,00,000/- in aggregate.

22.In short, the evidence of PW1 (Respondent/Plaintiff) is that the Third Appellant/third Defendant's subordinate Doctors have not conducted the operation properly and also that the third Appellant/third Defendant totally failed to supervise the operation upon the Plaintiff as to whether the operation has been properly performed or not and therefore all the Appellants/Defendant are liable to pay a compensation claimed by her.

23.DW1 (Third Appellant/Third Defendant) in her evidence has deposed that the Respondent/Plaintiff has come for admission to the Hospital on 20.02.1998 for the purpose of delivery and she has undergone Tubectomy operation on 03.03.1998 and at the time she has been the head of the Unit No.2 and that the Tubectomy operation has been carried out by well trained Assistant under her supervision the child delivered by the Plaintiff is a Female child and that she has been transferred to Karaikal to Pondicherry in June 1999 and she is not aware of the developments or event that has taken place, after transfer to Pondicherry in so far as Respondent/Plaintiff is

concerned.

24.According to the evidence of DW1 she and other Doctors have not given any assurance to the Respondent/Plaintiff that there is no risk of being conceived if the Plaintiff goes about the marital life with a spouse after Tubectomy operation and she has not given any assurance to the Respondent/Plaintiff and moreover she has no direct participation in the tubectomy operation on the Respondent but only as a supervisory role.

25.Also, the evidence of DW1 (Third Appellant/Third Defendant) is to the effect that the Tubectomy operation performed upon the Respondent/Plaintiff by the trained Assistant under her supervision is known as 'Modified Pomeroy's Technique' which is recognised nationally and internationally as a safer technique and under this technique, the two fallopean tubes are identified, tied separately cut and the ends are crushed and the two ends are separated in order to avoid recanalisation and that the recanalisation of the fallopean tubes despite precautions takes place due to natural healing process.

26.Continuing further, DW1 (Third Appellant/Third Defendant) goes on to add that it is an accepted fact that such failure occurs and the rate of such failure is calculated at 0.5% and she denied the averment made in the Plaint that the later conception and delivery after tubectomy operation has been due to the negligence, carelessness, want of due skill and also that during the said operation proper care of diligence besides skillfulness have been paid to such patients that medical care and expert supervision and therefore, the claim of the Respondent/Plaintiff for compensation against her and the Appellants/Defendants is baseless and hence the suit is liable to be dismissed.

27.At this stage, it is appropriate for this Court to make a significant mention that DW1 (in her examination) has categorically stated that after the operation of P.S on the Respondent/Plaintiff she has instructed her that even after the operation by normal living the chances of conceiving a child is not ruled out and there has a format in the case sheet for the signature of the patient that if she comes for voluntary treatment and another clause for the signature of the motivator, if there is a motivator and they used to fill the form only if there is a motivator and not when the patient comes voluntarily but they will get the signature in the form with the caption consent for operation and moreover there is no explicit entry in the case sheet that she has been informed about the chance of getting the child, But the consent for the operation is self explanatory and includes all the complications including failure rate for the P.S. Operation etc.

28.That apart DW1 (Third Appellant/Third Defendant) in her cross examination has stated that her name or signature is found on the

operation note as a person who conducted or supervise the operation in Ex.B.3 and she denies that the signature of the Respondent/Plaintiff and her husband have been obtained without making them know about the implications and not for the purpose of Statistics.

29.In support of the contention that just because the Respondent/Plaintiff has become pregnant and delivered a child after undergoing a sterilization operation/Tubectomy operation , the operating Doctor or the person who conducted supervision of the operation cannot be held liable for damages/compensation on account of undesired pregnancy or unwanted child, the Learned Counsel for the Appellants/D1 to D3 submits that in a tortious claim is sustainable legally only if there is negligence on the part of the Doctor/Surgeon who performs the surgery and in the present case, the Respondent/Plaintiff has not proved negligence either on the part of the Third Appellant/Third Respondent are the trained Assistant who performed the operation on the supervision of Third Defendant etc., and therefore, the claim made by the Respondent/Plaintiff in the suit is to be negatived.

30.The Learned Counsel for the Appellants/Defendants cites the decision of the Honourable Supreme Court State of Punjab v. Shiv Ram and Others 2006-1-L.W.331, at Pages 332 and 333 wherein it is held as follows:

> "The plaintiffs have not alleged that the lady surgeon who performed the sterilization operation was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognised by medical science. It is a pure and simple case of sterilization operation having failed though duly performed.
>
> No prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative Text Books on Gynaecology and empirical researches which have been carried out recognise the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognized and accepted ones. The technique which may be foolproof is removal of uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be performed for purposes other than merely family planning.
>
> 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.

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."

31.He also relies on the decision of Honourable Supreme Court State of Haryana and Others v. Raj Rani 2006-1-L.W.580, where in it is held that

'A Doctor can be held liable only in case where the failure of the operation is attributable to his negligence and not otherwise'.

Proceeding further, in the aforesaid decision it is also held that

"The pregnancy can be for reason de hors any negligence of the surgeon and in the absence of proof of negligence a surgeon cannot be held liable to pay compensation and also the question of the State to be held vicariously liable also would not arise."

32.He also invites the attention of this Court to the Judgment of this Court in A.S.No.945 of 2005 dated 09.12.2009 between Union of India and two others v. Valarmathy, wherein this Court in Para 14 and 15 has among other things observed as follows:

"14.Considering the fact that the plaintiff/respondent herein has failed to prove that there is medical negligence, but as per recommendation made in the decision reported in 2006-1-L.W.331, State of Punjab v. Shiv Ram and others, a Family Planning Insurance Scheme has been introduced by the Government of Pondicherry and exgratia payment of Rs.30,000/- is fixed for the person who gave birth to a child after sterilization. So, the Appeal Suit is liable to be allowed and the appellants shall pay the

exgratia payment of Rs.30,000/- to the victim/respondent herein in pursuance of Family Planning Insurance Scheme.

The Points Nos.1 to 3 are answered accordingly.

15.In fine,

i.The Appeal Suit is allowed.

ii.Consequently, C.M.P.No.16758 of 2005 is closed.

iii.The Judgment of the trial Court is set aside.

iv.In trial Court, O.S.No.58 of 2001 is dismissed.

v.Both parties are directed to bear their own costs. Since the suit is filed under Order 33 Rule 1 CPC, the Government is directed to bear the Court Fee."

33.Further, the Learned Counsel for the Respondent cites the decision of this Court Dr.Alice George v. Lakshmi 2007 (1) CTC 496 at Page 500 wherein at Paras 9 and 10, it is held hereunder:

"9.The plaintiff sought for damages alleging that there was negligence on the part of the first defendant when the sterilization operation was performed on the plaintiff. The plaintiff who had already three children, underwent the family planning operation in view of her feeble health and also the poor financial condition. It is also clear that she underwent the operation only on instructions, advises and also consultation with the appellants/defendants. It was not the case of the defendants that without their advise she underwent the operation. It is quite clear from the materials available that even after the sterilization operation namely tubectomy, was performed on the plaintiff by the first defendant in the branch of the second defendant hospital, she conceived and delivered the fourth child. It was also clear that the plaintiff was advised not to take treatment for abortion since it would cause complications in her health. The only defence was that even after the sterilization operation, there was approximately 0.5% of pregnancy; and that though the family planning operation was carefully done, the plaintiff's case was one in which the pregnancy occurred after sterilization for which neither the Doctor who conducted the operation nor the hospital could be made liable. Both the Courts have clearly pointed out that before taking such a view that the plaintiff's case was one in which such pregnancy has occurred and which would fall within 0.5% of the case, a duty was cast upon the defendants to prove that the tubectomy family planning operation by Pomeroys method, was done carefully. But, the appellants/ defendant have thoroughly failed to prove the same. Both the Courts have clearly pointed out that so long as the family planning operation done by the first defendant on the plaintiff, the subsequent conception of the fourth child by the plaintiff and the delivery of the same by her are all admitted position, it is for the medical person to prove

that the operation was done carefully and without any negligence whatsoever. Having failed to do so, it cannot be inferred that it was properly done exercising care, and even then, the child was born, and even after the child was born, it could not be avoided. Once both the Courts have recorded a concurrent finding on the facts, this Court is of the considered opinion that nothing requires to make any disturbance over the same. Apart from that, the lower Courts have rightly followed the judgment of the Apex Court reported in State of Haryanan v. Santra, 2000 (3) MLJ 98, which speaks about the Doctor entering into a medical profession and a duty to act with reasonable degree of care and skill. This Court is unable to notice any question of law, much less substantial question of law to be formulated by this Court.

10.In the result, this Second Appeal fails, and the same is dismissed at the admission stage itself. No costs. Consequently, connected C.M.P. is also dismissed."

34.Before the trial Court, the Appellants 1 and 2/D1 and D2 have only adopted the written statement filed by the Third Appellant/Third Defendant and they have not filed an independent written statement.

35.Ex.A.7 is the Birth Certificate of the third child Moogambigai dated 16.12.1999 issued by the Karaikal Municipality. Ex.A.8 is the Discharge Slip in respect of the Respondent/Defendant wherein it is mentioned that she has been admitted on 08.07.1999 at 11.40AM and discharges on 09.07.1999 at 02.00PM and the Diagnosis is mentioned as P2 - PS Failure admitted for abdominal hystrobomy in sterilization (PS) done on 03.03.1998 ad in the treatment given column it is mentioned as follows in English.

"Hospital Blood arranged but patient is not willing for surgery and wants to continue pregnancy."

36.Ex.A.9 is the Discharge Slip dated 28.12.1999 in respect of the Respondent/Plaintiff. Ex.A.10 is the Respondent/Plaintiff's Lawyer's notice dated 14.11.2000 issued on behalf of the Respondent/Plaintiff husband and herself and addressed to the Third Appellant/Third Defendant and other Appellants/Defendants in and by which a compensation of Rs.3,00,000/- has been claimed with 12% interest from the date of birth of the child.

37.Admittedly, Ex.B.1 to Ex.B.4 are documents relating to the suit P.S. Operation and further that in Ex.B.3 the name of the Third Appellant/Third Defendant is not found in the operation notes as a person who either conducted or supervised the operation. In the instant case on hand, except DW1 (Third Appellant/Third Defendant)

the person who conducted the Tubectomy operation a well trained

Assistant under the supervision of the Third Appellant/third Defendant has not been examined before the trial Court.

38.In this connection, if a fact is particularly well within the knowledge of a party/individual and not easily within the knowledge of an opponent, then Fair Play, Equity and Justice require that the concerned person must prove it. It is not known as to why the trained Assistant who conducted Tubectomy operation on the Respondent/Plaintiff under the supervision of Third Appellant/Third Defendant has not been examined before the trial Court in the considered view of this Court. The concerned well trained Assistant as spoken to by DW1 (Third Appellant/third Defendant) is the best person who can speak about the conduct of tubectomy operation on the Respondent/Plaintiff on 03.03.1998 and in the present case, the best evidence is not available and the same is certainly not a favourable circumstance in favour of the appellants, as opined by this Court. The relevant and material information within the special Knowledge of the well trained Assistant who performed the Tubectomy operation on 03.03.1998 on the Respondent/Plaintiff has not been let in or provided before the trial Court in the suit. After all, all evidence is to be weighted according to the proof which it is in the Power/possession of one side to produce/let in and in the power of the other to have contradicted (Per Lord Mansfield in Blatch v. Archer (1774) 1 Cowp 53 at 65 Cross 5th Edition at P.109). Unfortunately, in the present case, the evidence of the well trained Assistant who conducted Tubectomy operation on the Respondent/Plaintiff on 03.03.1998 is not available/lacking. Certainly, it is an adverse circumstance against the Appellants.

39.At this juncture, this Court aptly points out that the special rule as per Section 106 of the Indian Evidence Act, 1872 relating to 'the burden of proof' is in case where the fact in question is specially within the knowledge of a particular person. Therefore, it is an exception to Section specially Section 101 of the Evidence Act. The term 'shall be' is very important and it points out that the fact the especially within the knowledge of the person on whom the burden lies however Section 106 of the Indian Evidence Act cannot come into operative play when the facts concerned or such as are capable of being known by others also. Even it cannot apply when the fact is such as to be capable of being known also by person other than the parties as per decision Razic v. J.S.chouhan AIR 1975 SUPREME COURT 667.

40.This Court worth recalls the American decisions namely Gleitman v. Cosgroove 227 A(2d) 689; Becker v.Schwartz, Park c. Chessin (1978) 413 NYS (2d) 895' Phillips v. U.S.A. (1980) 508 F. Supp. 537 and the opinion expressed as gisted as follows:

(1)Though what gives rise to the cause of action is not just life, but life with defects, the real cause of action is negligence in causing life;

(2)negligent advice or failure to advise is the proximate cause of the child's life;
(3)a child has no right to be born as a whole, functional being (without defect);
(4)it is contrary to public policy to give a child a right not to be born except as a whole functional being and to impose on another a corresponding duty to cause death of an unborn child with defects;
(5)it is impossible to measure the damages for being born with defects, because the life of a child born with defects cannot be compared with his non-existence as human being; and
(6)accordingly by being born with defects a child suffers no injury cognizable by law"

41.In Emeh v. Kensington and Chelsea and Westminster Area Health Authority (1984) 3 All ER 1044 CA: (1985) QB 1012: (1985) 11 ACC (BJ) 1:(1985) 2 WLR 233: 128 Sol Jo 705 CA preferred the approach of Peter Pain, J as more reasonable and awarded damage for pain, suffering and loss of amenity which will have to be given to the cogenitally abnormal child over the years and Slade, J. delivering the Judgment in the Court of appeal held in Paragraph 68 as follows:

"If a woman wishes to be sterilised and in a legal way causes herself to be operated on for that purpose, I can, for my part, see no reason why, under public policy, she should not recover such financial damage as she can prove she has sustained by the surgeon's negligent failure to perform the operation properly, whether or not the child is healthy."

42.Therefore, the changed view is that if as a result of Doctor's negligence an unplanned child is born to the parents, then the Doctors is liable for all expenses which may reasonably be incurred in the education and upkeep of the child having regard to the child's condition in life."

43.The Learned Government Pleader (Pondicherry) for the Appellants/defendants refers to the Book Titled 'The Essentials of Contraceptive Technology' published by Johns Hopkins Population Information Program, published of Population Reports of 1997 Edition Chapter 9 wherein under the caption 'Deciding About Female Sterilization' at Page 9-4 and 9-5, it is mentioned as follows:

"How effective ?

Very effective and permanent_
In the first year after the Procedure: 0.5 pregnancies per 100 women (1 in every 200 women).
Within 10years after the procedure: 1.8 pregnancies per 100 women (1 in every 55 women).
Effectiveness depends partly on how the tubes are blocked, but all pregnancy rates are low.

Postpartum tubal litigation is one of the most effective female sterilization techniques. In the first year after the procedure _0.05 pregnancies per 100 women (1 in every 2,000 women). Within 10 years after the procedure_ 0.75 pregnancies per 100 women (1 in every 133).

Advantages and Disadvantages

ADVANTAGES

- Very effective.
- Permanent. A single procedure leads to lifelong, safe, and very effective family planning.
- Nothing to remember, no supplies needed, and no repeated clinic visits required.
- No interference with sex. Does not affect a woman's ability to have sex.
- Increased sexual enjoyment because no need to worry about pregnancy.
- No effect on breast milk.
- No known long-term side effects or health risks.
- Minilaparotomy can be performed just after a woman gives birth. (Best if the woman has decided before she goes into labor.)
- Helps protect against ovarian cancer.

DISADVANTAGES

- Usually painful for several days after the procedure.
- Uncommon complications of surgery:
  -Infection or bleeding at the incision.
  -Internal infection or bleeding.
  -Injury to internal organs.
  -Anesthesia risk:
- With local anesthesia alone or with sedation, rare risks of allergic reaction or overdose.
- With general anesthesia, occasional delayed recovery and side effects. Complications are more severe than with local anesthesia. Risk of overdose.
- Very rarely, death due to anesthesia overdose or other complication.
- In rate cases when pregnancy occurs, it is more likely to be ectopic than in a woman who used no contraception.
- Requires physical examination and minor surgery by a specially trained provider.
- Compared with vasectomy, female sterilization is:
  -Slightly more risky.
  -Often more expensive, if there is a fee.
- Reversal surgery is difficult, expensive, and not available in most areas. Successful recersal is not guaranteed. Women who may want to become pregnant in the future should choose a different method.
- No protection against sexually transmitted diseases (STDs)

including HIV/AIDs.

44.Moreover, the Learned Government Pleader (Pondicherry) for the Appellants cites G.O.Ms.59, Health Department of Govoernment of Pondicherry, dated 26.11.1997 which speaks of the Central Government's liability for payment of exgratia in the event of death or incapacitation or for treatment of post operation complication arising out of any surgical or anaesthetic procedure attributable to the sterilization or IUD insertion and the same runs as follows:

a)Ex-gratia assistance per case in the event of death due to sterilization or IUD insertion Rs.50,000/-

b)Ex-gratia assistance per case for incapacitation depending on the level of incapacitation due to sterilization of IUD Rs.30,000/-

c)Ex-gratia assistance per case for serious post operation complications due to sterilization or IUD-the actual cost of treatment limited to Rs.20,000/-

45.The D.O. Letter No.23011/24/2008-Ply (Pt), New Delhi dated 04.07.2008 addressed to the Secretary,Health & FW Department, Government of Pondicherry, Chief Secretariat Building, Beach Road, Pondicherry refers to the family Planning Insurance Policy is now renewed with the ICICI Lombard General Insurance Company for a period of one year from 01st January, 2008 to 31st December 2008 with modified limits as under:

Section	Coverage	Limits
A.	Death due to sterilization in hospital or within 7 days from the date of discharge from the hospital	Rs.2 lakh
B.	Death due to sterilization within 8-30 days from the date of Death due to sterilization with discharge from the hospital	Rs.50,000/-
C.	Failure of sterilization leading/non-leading to child birth	Rs.30,000/-
D.	Cost of treatment upto 60 days arising out of complication from the date of discharge	Actual not exceeding Rs.25,000/-
E.	Indemnity Insurance per Doctor/facility but not more than 4 in a year	Upto Rs.2 lakh per claim

46.The Learned Government Pleader (Pondicherry) for the Appellants refers to the Tubectomy Statistics in respect of the Government Maternity Hospital, Puducherry in respect of the following years which runs as follows:

	2007	2008	2009
No. of Tubectomy Operation Performed	3944	3836	3764
No. of Failures in that year	4	5	2

47.The Maternity Admission Sheet in respect of the Respondent/Plaintiff of Maternity Hospital, Pondicherry at Karaikal, Department of Obstetrics and Gynecology shows that the patient's signature (Respondent/Plaintiff) has been obtained in Tamil and her husband has also been obtained in Tamil. In the Admission Sheet, the rest of the entries are made in English.

48.This Court quotes the decision CHATTERTON V. GERSONS AND ANOTHER (1981) Q.B. 432, at Page 433, wherein it is observed and laid down as follows:

> "The plaintiff suffered chronic intractable and unendurable pain in a post-operative scar in her right groin, and was sent for treatment to a pain clinic, where the defendant, a medical practitioner who specialised in the treatment of pain, operated, with her consent, to block the sensory nerve which transmitted the pain signals from the scar site to the brain. The defendant's regular practice was to explain to patients before the operation that it would result in numbness over an area larger than the pain source itself, and that it might involve temporary loss of muscle power. He did not later recall what he had said to the plaintiff, but her recollection was that he did not warn her that she would have numbness and perhaps muscle weakness. After the operation she experienced some numbness in her right leg, and the relief she experienced in the scar site was only temporary. The chronic pain returned and she underwent a repeat operation 10 months later, on which occasion the defendant did not think it necessary to give his usual explanation about the possible effects of the operation, being of the opinion that it involved no more risk than the first. The plaintiff lost the sensation in her right leg after the second operation and still experienced such acute agony in the scar area that she could not bear clothing in contact with it, and could only move about with a stick.
>
> On the plaintiff's claim, based on trespass and

negligence, against the doctor and the hospital that they had failed to obtain her consent to the operation:-

Giving judgment for the defendants, (1) that in order to establish trespass to the person a patient had to show that she did not consent to the operation; that, where a doctor failed to explain in broad terms and nature of the operation, the patient could not consent to it and, in such circumstances, any consent given would be unreal and an action would lie in trespass; but that the plaintiff, on her own evidence, understood the general nature of the operation and, accordingly, her consent was a real consent (post, pp.442B-C, H-443B).

(2)That the duty of a doctor was to explain to the patient what he intended to do and the implications of that action in a way that a careful and responsible doctor would do in similar circumstances; that where a patient had been given some explanation of the action proposed to be taken so that there was a real consent to the operation, an action would lie in negligence if there was a failure to inform the patient of the nature of the operation and its implications and the patient proved that, if a proper explanation had been given, she would not have consented to the operation; and that, sine the plaintiff had failed to prove that she had not been given details of the operation and its implications, her action both in trespass and negligence failed (post, pp..442h-443B, 445B).

Per curiam. (i)It would be very much against the interests of justice if actions based on a failure by the doctor to perform his duty adequately to inform were pleaded in trespass (post, p.443C).

(ii)The signing of a pro forma by a patient expressing consent to undergo an operation should be a valuable reminder to everyone of the need for explanation and consent. But it would be no defence to an action based on trespass to the person if no explanation had in fact been given (post, p.443D-E).

49.Also, this Court aptly points out the decision Administrator Natal v. Edourd (1990) 3 S.A. 581 (South African Case), wherein damages have been awarded for cost of maintaining a child.

50.In Thake v. Maurice (1982) 2 All E.R. 513; (1986) Q.B. 644, wherein damages for child's upkeep upto 17th Birth Day on account of negligence Vasectomy Operation performed on the husband have been awarded. But, the Court of Appeal in (1986) 1 All E.R. 497 held that 'the joy of having a child could be set off against the trouble and case in up-bringing the child and not against the prenatal pain and distress for which damages have been awarded'.

51.In Benarr v. Kettering Health Authority (1988) 138 NLJ 170

for the negligent performing of Vasectomy Operation the damages for future private education of child have been awarded.

52.There is no concept of team negligence whereby a team Standard of Care must be owed by every member. The duty of care of each member is that of a reasonable and careful Practitioner as per decision Wilsher v. Essex Area Health Authority (1987) Q.B.730, (1986) 3 All E.R. 801 (CA revised on different grounds (1988 A.C. 1074, 1988 1 All E.R. 871 H L.

53.A course of conduct must be judged in the light of material Knowledge existing at the time when it was adopted as per decision ROE v. Minister of Health (1954) 2 Q.B. 66.

54.The decision Rogers v. Whitaker (1993)109 ALR deals with the question of confirming to the Standard of Reasonable Care of a Doctor demanded by law.

55.In a case of Failed Sterilisation i.e., where the Defendants negligent performance of a Sterilisation Operation results in the birth of a healthy child a public policy does not prevent the parents from recovery damages for the unwanted birth, even though the child may in fact be wanted by the time of its birth. Also, damages are recoverable for personal injuries in regard to the period upto delivery of the child and in the Medical loss involved in the expense of losing paid occupation and the obligation of having to pay for the upkeep and care of an unwanted child as per decision Allen v. Bloomsbury Health Authority (1993) 1 All ER 651, (1992) PlQR Q 50.

56.Moreover, the damages may include the loss of earnings for the mother maintaining the child (taking into account of child benefit) (as to the child benefit See Social Security and Pensions Vol 44(2) (Reissue Para 237 et seq.) and pain and suffering to the mother as per decision Emeh v. Kensington & Chelsea and West Minister Area Health Authority (1985) Q.B. 1012, 1984 (3) All ER 1044 CA.

57.A Practitioner must bring to his task a reasonable degree of a skill and Knowledge and ought to exercise a reasonable decree of care failure to use due skill in diagnosis with the result that the wrong treatment is given is negligence as per decision Pudney v. Union Castle Mail SS CO Ltd (1953) 1 Lloyd's Rep 73; Newton v. Newton's Model Laundry (1959) Times 3 November (failure to diagnose broken patella after 12 foot fall).

58.Also, an inexperience is no defence and an inexperience team Member being able to seek an help from an experienced member. That apart, the liability of a practitioner for the negligence of other persons depends upon the relationship between him and them as per decision Hancke v. Hooper (1835) 7 C & P 81, wherein a Surgeon has been held liable for injury due to want of skill of his apprentice.

Hospital Authority is in principle liable for its failure to provide sufficient and properly qualified and competent medical staff for a Specialist unit in a Hospital as per decision Wilsher v. Essex Area Health Authority (1987) Q.B. 730, (1986) 3 All ER 801, CA revised on Appeal on different point (1988) AC 1074, (1988) 1 All ER 871, HL.

59.In this connection, this Court makes importantly refers to the decision of the Honourable Supreme Court Achutrao H. Khodwa v. State of Maharastra AIR 1996 SCC 2377, at Page 2383 wherein at Para 17 and 18, it is held thus:

> "16. In the present case the facts speak for themselves. Negligence is writ large. The facts as found by both the courts, in a nutshell, are that Chandrikabai was admitted to the government hospital where she delivered a child on 10-7-1963. She had a sterilisation operation on 13-7-1963. This operation is not known to be serious in nature and in fact was performed under local anaesthesia. Complications arose thereafter which resulted in a second operation being performed on her on 19-7-1963. She did not survive for long and died on 24-7-1963. Both Dr Divan and Dr Purandare have stated that the cause of death was peritonitis. In a case like this the doctrine of res ipsa loquitur clearly applies. Chandrikabai had had a minor operation on 13-7-1963 and due to the negligence of Respondent 2 a mop (towel) was left inside her peritoneal cavity. It is true that in a number of cases when foreign bodies are left inside the body of a human being either deliberately, as in the case of orthopaedic operations, or accidentally no harm may befall the patient, but it also happens that complications can arise when the doctor acts without due care and caution and leaves a foreign body inside the patient after performing an operation and it suppurates. The formation of pus leaves no doubt that the mop left in the abdomen caused it, and it was the pus formation that caused all the subsequent difficulties. There is no escape from the conclusion that the negligence in leaving the mop in Chandrikabai's abdomen during the first operation led, ultimately, to her death. But for the fact that a mop was left inside the body, the second operation on 19-7-1963 would not have taken place. It is the leaving of that mop inside the abdomen of Chandrikabai which led to the development of peritonitis leading to her death. She was admitted to the hospital on 10-7-1963 for a simple case of delivery followed by a sterilisation operation. But even after a normal delivery she did not come out of the hospital alive. Under these circumstances, and in the absence of any valid explanation by the respondents which would satisfy the Court that there was no negligence on their part, we have no hesitation in holding that Chandrikabai died due to negligence of Respondents 2 and 3.

17. Even if it be assumed that it is the second operation performed by Dr Divan which led to peritonitis, as has been deposed to by Dr Purandare, the fact still remains that but for the leaving of the mop inside the peritoneal cavity, it would not have been necessary to have the second operation. Assuming even that the second operation was done negligently or that there was lack of adequate care after the operation which led to peritonitis, the fact remains that Dr Divan was an employee of Respondent 1 and the State must be held to be vicariously liable for the negligent acts of its employees working in the said hospital. The claim of the appellants cannot be defeated merely because it may not have been conclusively proved as to which of the doctors employed by the State in the hospital or other staff acted negligently which caused the death of Chandrikabai. Once death by negligence in the hospital is established, as in the case here, the State would be liable to pay the damages. In our opinion, therefore, the High Court clearly fell in error in reversing the judgment of the trial court and in dismissing the appellants' suit.

60.In Maynard v. West Midlands Regional Health Authority (1985) 1 All ER 635, the test of medical negligence is approved.

61.In Whitehouse v. Jordon (1981) 1 All ER 257 (HL), the test of Medical negligence and error of Judgment are mentioned.

62.The Burden of proof is static at the commencement of trial by the State of pleadings and is one that never changes under any circumstances.

63.The term 'Burden of proof' in the meaning of burden of evidence is a burden which may shift continually throughout the trial according to the evidence on one scale or other preponderates as per decision in Pickup v. Thames Insurance Company (1873) 3 Q.B.D.594.

64.When an individual tenders such evidence as will support prima facie case the onus shifts on the Respondent to adduce rebutting evidence to meet the case made out by the petitioner. As the case continues to develop, the onus may shift back again to the petitioner.

65.On a careful consideration of respective contentions advanced on either side and in view of the qualitative and quantitative discussions mentioned supra and also on overall assessment of the conspectus of the evidence of PW1 and DW1 coupled with the documentary evidence on record, this Court, come to an inevitable conclusion that in the present case, the Tubectomy operation performed upon the Respondent/Plaintiff has resulted in failure which has given birth to a third child Moogambigai and this failure can

only be attributed to the principle of res ipsa loquitor and negligence in the absence of examination of a well trained Assistant, who performed the tubectomy operation under the supervision of the Third Appellant/Third Defendant (DW1) before the trial Court as a witness clearly goes to show unerringly that the tubectomy operation has not been conducted with a reason care and caution upon the Respondent/Plaintiff.

66.It cannot be forgotten that it is for the medical person to establish that the tubectomy operation has been done upon the Respondent/Plaintiff diligently with care and caution and that too without any act of omission or commission or negligence whatsoever, but the Third Appellant/Third Defendant or the Appellants 1 and 2/Defendants 1 and 2 have not established to the satisfaction of this Court that the tubectomy operation on 03.03.1998 upon the Respondent/Plaintiff has been properly performed exercising care and caution and after the birth of the child, the same cannot be avoided.

Therefore for the act of omission or commission or even negligence on the part of the Third Appellant/Third Defendant even in supervisory role/capacity or even in regard to the well trained Assistant's act of commission or omission or even the acts of negligence (in regard to the failure of tubectomy operation which has given birth to third child viz., Moogambigai to the Respondent/Plaintiff) the Appellants 1 and 2 are squarely vicariously liable to pay a compensation of Rs.1,50,000/- and therefore, the Award of compensation of Rs.1,50,000/- as determined by the trial Court cannot be found fault with and the point is answered accordingly.

67.Though DW1 (Third Appellant/Third Defendant) in her evidence has deposed that abnormality in the patient who has undergone tubectomy operation does include irregular menstrual cycle and that the tubectomy operation has been effected on Respondent/Plaintiff by the trained Assistant under her supervision as per modified Pomeroy's technique, which is recognized nationally and internationally as a safer technique and further that she has no direct participation in the tubectomy operation on the Respondent/Plaintiff but only a supervisory role, this Court opines that DW1 has not mentioned the name of the trained Assistant who conducted the tubectomy operation and also has not spoken in qualitative and quantitative terms as to the mode and manner in which the concerned trained Assistant conducted the operation in issue. In fact, DW1 has not come out of her Cocoon. Merely stating in evidence by DW1 (Third Appellant/Third Defendant) that the trained Assistant who conducted the tubectomy operation under her supervision will not suffice. Further, no convincing or satisfactory reasons have been adduced on the side of the Appellants/Defendants in regard to the non-examination of the trained Assistant who conducted the tubectomy operation upon the Plaintiff.

68.In the present case the fact which has been pre-eminently within the knowledge of the trained Assistant who performed the operation on the Plaintiff (under the supervision of the third Appellant/Third Respondent/DW1) has not been examined as a witness before the trial Court which is admittedly an unfavourable circumstance against the Appellants/Defendants and therefore the chance of pregnancy of 0.5% put forward on the side of the Appellants/Defendant is not accepted by this Court. Consequently, the Award of compensation for Rs1,50,000/- (Rupees one lakh fifty thousand only) as determined by the trial Court in Para 15 of its Judgment (Rs.25,000/- towards Pain and Sufferings, Rs.25,000/- towards mental agony and Rs.1,00,000/- towards up-bringing of the child and for marriage and maintenance expenses etc.) cannot be said to be an excessive, exorbitant or an arbitrary one. Per contra, the same is a Fair, Sensible, Equitable and Prudent one too. However, this Court exercising its discretion awards only interest @9% per annum for the said sum of Rs.1,50,000/- from the date of Plaint till date of realisation together with proportionate costs which sum is directed to be paid by the Appellants 1 and 2 on behalf of the Third Respondent of its vicarious liability for the wrong committed on the Respondent/Plaintiff. Resultantly, the Appeal succeeds in part.

69.In the result, the Appeal is allowed in part, leaving the parties to bear their own costs. The Judgment and Decree of the trial Court in O.S.No.61 of 2001 passed by the Learned Additional District Judge, Pondicherry at Karaikal stands modified. The Respondent/Plaintiff by means of an order dated 11.10.2004 in C.M.P.No.16277 of 2004 in A.S.No.907 of 2004 has been permitted to withdraw 50% of the amount deposited with accrued interest without furnishing security and the remaining amount has been directed to be deposited in any one of the Nationalised Bank for a period of three years. Hence, it is open to the Respondent/ Plaintiff to project necessary application for Payment Out as per Rule 166 of the Civil Rules of Practice before the trial Court in O.S.No.61 of 2001 on the file of the trial Court and the trial Court is directed to dispose of the said application within a period of two weeks from the date of receipt of a copy of the Judgment. Consequently, connected Civil Miscellaneous Petition is closed.

Sd/
Assistant Registrar

/True Copy/

Sub Assistant Registrar

mps

To

The Additional District Judge,
Pondicherry,Karaikal.

+1 CC to the Senior GP Cum Senior PP for Pondicherry (SR 85651)
+1 CC to Mr.T.Susindran, Advocate SR.85242

A.S.No.907 of 2004
and
C.M.P.No.13016 of 2004

NG(CO)
PKS