Shobha and Others Vs Govt. of Nct of Delhi and Another

Court: Delhi High Court

Date of Decision: April 25, 2003

Citation: (2006) 3 ACC 145

Hon'ble Judges: A.K. Sikri, J

Bench: Single Bench

Judgement

A.K. Sikri, J.
The opening remarks of the Supreme Court in the case of State of Haryana and Ors. v. Smt. Santra reported in 2000 (3)

Supreme 520 ably apply to the fact-situation prevailing in these two writ petitions. This is what the Supreme Court observed in the beginning of the

aforesaid judgment:

Medical negligence plays its game in strange ways. Sometimes it plays with life; sometimes it gifts an "Unwanted child" as in the instant case where

the respondent a poor labourer woman, who already had many children and had opted for sterilization, developed pregnancy and ultimately gave

birth to a female child in spite of sterilisation operation which, obviously, had failed.

Civil Writ Petition No. 7715 of 2001:

2. Civil Writ Petition No. 7715/2001 was heard and judgment reserved. Before this judgment could be pronounced Writ Petition No. 7515 of

2000 came up for hearing on 18th March, 2003. During the arguments it was noticed that the issue involved in this case was identical to the issue

involved in the earlier writ petition. In view of this position, both these writ petitions are disposed of by one common judgment. It would be noted

that both the cases are dealt with separately f however one common judgment is pronounced to avoid repetition regarding discussion on the legal

aspects.

3. Petitioner who was mother of four children gave birth to unwanted female child on 5th October, 2000. She attributes this to sheer negligence on

the part of the respondents as she had undergone tubectomy operation on 23rd February, 1999 and was assured that it was a successful operation

and she will not bear any more children. Petitioner alleges that she is a poor lady who belongs to a poor class of labourers and earn meagre

amount of Rs. 3,000/- per month by selling "jaljeera rehdi" (hawker). She, Therefore, claims damages from the respondents in this writ petition.

4. The case set up by the petitioner in the writ petition is that she had four children: three sons aged 18 years, 11 years and 9 years and a daughter

aged 3 years. Due to poverty the study of elder son had to be discontinued. In the year 1999 Government of NCT of Delhi launched family

planning programme of which the respondent-2, namely, Lal Bahadur Shastri Hospital was a participant. The petitioner, under the aforesaid

Scheme, approached and offered herself to the Chief a Medical Officer of the respondent No. 2 for complete sterilisation. The sterilisation

operation was performed on 23rd February, 1999 by a team of doctors under the supervision and guidance of Medical Officer/Superintendent,

Department of Gynaecology, Unit in charge, i.e. the respondent No. 3. After the operation was performed Certificate dated 23rd February, 1999

was issued to the petitioner. She was assured that full, complete and successful tubectomy operation had been performed upon her and she would

not conceive in future. But despite that the petitioner conceived in January, 2000 and when she contacted the Chief Medical Officer and other

doctors of Lal Bahadur Shastri Hospital, Khichripur, NCT of Delhi, she was informed that petitioner was not pregnant. Two months later when the

pregnancy became apparent she again approached those doctors who then told her that her tubectomy operation was not successful. When the

petitioner, requested for an abortion, petitioner was advised not to go for abortion, as the same would be dangerous to her life. Ultimately, the

petitioner gave birth to a female child on 5th October, 2000.

5. Petitioner states that she has already had four children and the birth of unwanted child has put on her unnecessary burden of rearing up the child

as also all the expenses involved in the maintenance of that unwanted child including the expenses towards her clothes, education and marriage.

That apart the petitioner has also suffered mental pain, agony and an extra burden of financial liability of this fifth new girl child born on 5th

October, 2000 to the petitioner on account of negligence of respondents. The sterilization (tubectomy) operation performed by the respondents

has failed on account of act of omission and negligence on the part of the respondents. Negligence is writ large in this case. In fact after the birth of

unwanted fifth child the petitioner again conceived and abortion was carried on 14th July, 2001 and thus it shows that the operation was not at all

successful.

6. Petitioner filed complaint in the Consumer Forum. However, it was -dismissed by District Forum in liming on 26th February, 2001 without

issuing notice to the respondents on the ground that such a complaint was not maintainable. Thereafter this writ was filed which contains the

following prayers-

(a) issue writ of mandamas, direction, order to the respondents directing them to pay Rs. 4,00,000/- to the petitioner for upbringing the fifth child,

who was born because of sheer negligence on the part of the respondents;

(b) direct the respondents to pay the petitioner further amount of Rs. 2,00,000/- and deposit in the name of Roopa, fifth child of petitioner in any

nationalized bank in Fixed Deposit for her marriage;

(c) take appropriate action against respondent No. 3 for being negligent and deficient in performing his duties;

(d) pass such other/further order(s) as this Hon''ble Court may deem fit and necessary on the facts and circumstances of the case.

7. In the counter affidavit filed on behalf of the respondents it is not denied that tubectomy operation was performed on 23rd February, 1999. It is

stated that rate of failure in such cases is 0.71 per cent as per the reference literature i.e., ""Integrated Obst. and Gynaecology for Post Graduates

written by Sir John Dew Hurst, 3rd Edition and 0.4 per cent as per reference literature ""Clinical Genealogic Endo Gynaecology and Infertility"", 5th

Edn. written by Leon Speroff, Robert H. Glass, Nat Ham G. Kase. The respondents have also admitted that the petitioner conceived after the

aforesaid operation and she approached the hospital authorities in January, 2000. However, she is blamed for not coming back to the hospital for

review checkups after two weeks from the date of stoppage of menstrual period and approaching the hospital after the lapse of two months when

she was probably in the late first trimester or second trimester of pregnancy wherein it was not safe to perform Medical Termination of Pregnancy

without undue risk to the petitioner and it shows gross negligence on her part. However, as she did not present herself immediately after the

stoppage of the menstrual period on due date for examination it appears that she was not serious about not having unwanted baby.

8. The aforesaid narration would show that there is hardly any controversy on factual aspects. It is not in dispute that petitioner had approached

the respondents for sterilization as obviously she did not want any further child. Operation was performed and she was issued necessary certificate.

It is also not in dispute that in spite of this operation the petitioner became pregnant and the conclusion which can be drawn there from is that this

operation was not successful. Interestingly, the respondents have themselves stated that rate of failure of sterilization operation is 0.71 per cent or

0.4 per cent as per different reference books. Thus as per the respondents themselves once the operation is performed, the chances of conceiving

thereafter are almost nil. In this factual background we have to ascertain as to whether the respondents were negligent in performing their job which

led to the birth of the unwanted child. The negligence will have to be considered at two levels, namely, (i) in the performance of the operation

which led to conception of the petitioner, and (ii) after it was known that the petitioner had conceived, the conduct of the parties which led to the

birth of the child. At this stage there could be negligence of the respondent and/or the petitioner and in case the petitioner is also negligent, it would

be a case of contributory negligence.

9. It may be stated at this stage that the defense which is put by the respondent is that the petitioner should have approached the respondents

immediately after the stoppage of her menstrual period and had it been done the pregnancy could be terminated immediately.

Medical Negligence:

10. In their book of ''On Negligence'' celebrated authors Charlesworth and Percy have defined ''negligence'' in the following manner (7th Edn., p.

15):

Negligence is a tort which involves a person''s breach of duty, that is imposed upon him, to take care, resulting in damage to the complainant"". The

essential components of the modern tort of negligence propounded by Percy and Charlesworth are as follows--

(a) the existence of a duty to take care, which is owed by the defendant to the complainant;

(b) the failure to attain that statement of care, prescribed by the law, thereby committing a breach of such duty; and

(c) damage which is both causally connected with such breach and recognised by the law, has been occasioned to the complainant.

11. The law imposes a duty on everyone to confirm to certain standards of conduct for protection of others. The need for existence of due care is

illustrated by Lord Wright in well known judgment Grant v. Australian Knitting Mills Ltd. reported in (1936) AC 85 in the following words:

All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care to

be deduced. It is, however, essential in English Law that the duty should be established, the mere fact that a man is injured by another''s act gives in

itself no cause of action, if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other

party is merely exercising a legal right; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be

careful exists.

12. The word "duty" connotes the relationship between one party and another, imposing on the one an obligation for the benefit of the other to

take reasonable care in the first instance. Viewed from this angle, when the petitioner approached the respondent No, 3 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. Such a duty of

medical practitioner has been elaborated by the Bombay High Court in the case of Philips India Ltd. Vs. Kunju Punnu and Another, holding that

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. We may also usefully quote the following observations of Shelat, J., while delivering the judgment of the Supreme

Court in the case of Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another,

A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for

the purpose. Such a person when consulted by a patient owes him certain duties, viz,, a duty of care in deciding whether to undertake the case, a

duty of care in deciding what treatment to give, or a duty of care in the administration of that treatment. A breach of any of those duties gives a

right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a

reasonable degree of care.

13. We may hasten to add that the professional has no duty to guard against the risk which is beyond the ambit of the professional"s contemplation

and as such duly enforceable. With the best will in the world things sometimes can amiss in surgical operations or medical treatment. A doctor is

not to be held negligent simply because something goes wrong. He is not liable for mischance. He is not liable for taking one choice out of two or

for favoring one school rather than another in choosing as to what treatment is to be given to a patient. He is only liable when he falls below the

standard of a reasonably competent practitioner in his field. The standard of reasonable care is a flexible criterion capable of setting the boundaries

of legal liability of the professionals depending on duties founded on tort or contract. The standard can be assessed in an objective manner

according to the nature of the task undertaken by the professional, irrespective 6f his qualifications or job title.

14. However, 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 it is clearly a 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.

15. 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 vasectomy operation and in spite operation being successful there could be a conception. The petitioner is blamed only to the

extent she did not approach the hospital immediately after the stoppage of her menstrual periods which aspect has already been dealt with. It may

be mentioned that the cause of failure of sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by x-ray

examination, or by pathological examination of the materials removed at a subsequent operation of re-sterilization. However, the respondents have

not come out with any such details. It appears that when the petitioner approached the respondents after her conception the doctor after examining

only opined that pregnancy could not be terminated at that stage. However, no attempt was made to see as to whether sterilization operation was

conducted properly and why she became pregnant. In fact this led to pregnancy of the petitioner once again and it was terminated. The

respondents are conspicuously silent as to what they did even when the petitioner approached on becoming pregnant second time after the

operation. This shows post-operation negligence on the part of the respondents as well.

Whether Contributory Negligence:

16. As pointed out above, the only defense put up by the respondent is that the petitioner should have approached, immediately after the stoppage

of her menstrual period and had it been done the pregnancy could have been terminated immediately. However, going by the background of the

petitioner, level of education it cannot be said that petitioner was negligent in not approaching the respondents immediately. It may be mentioned

that female child was born on 5th October, 2000. The petitioner had approached the hospital authorities in January, 2000 which fact is not

disputed. Thus it can be concluded that immediately after she conceived, the petitioner had approached immediately after her conception. It cannot

be expected that on stoppage of very first menstrual period she should have approached. It is again a matter of common knowledge that many

times menstrual period of women are delayed and it may not necessarily be a pregnancy. In the case of the petitioner, this is more so as she had

undergone tubectomy operation in February, 1999 and could not think only because of stoppage of menstrual period, that it would be pregnancy.

She must have felt assured that it could be only delay of her menstrual period because of some other reason. Moreover, as mentioned above,

being a poor and illiterate lady it could not be expected that merely because she did not have menstrual period on due date she would immediately

rush to doctors for examination. Therefore, it cannot be said that there was any negligence on the part of the petitioner as there was no undue delay

in approaching the hospital authorities.

17. There is force in the submission of the petitioner that the Medical Officer entrusted with the implementation of the family planning programme

cannot by their negligent acts in not performing the complete sterilization operation, sabotage a scheme of national importance. The people of the

country who cooperate by offering themselves voluntarily for sterilization reasonably expect that after undergoing the operation they would be able

to avoid further growth of family, Apart from the fact that such negligence affects the implementation of Family Planning Programme, this negligence

has caused personal loss to the petitioner. As pointed out above, the petitioner is a poor lady, which fact is not denied. Her husband is having a

meagre income of Rs. 3,000/- per month. Before the unwanted child was born they were having four children it is very difficult to maintain a family

of six with a meagre income of Rs. 3,000/-. Parents are not able to give proper education to the children. It is a matter of common knowledge that

the Family Planning Programme in this country has not been a success and has not been able to get proper fillip only because members belonging

to poor strata do not resort to family planning. If in these circumstances person like the petitioner, an illiterate woman, thought of planning her

family and did not want any more children, this move on their part deserves appreciation. However, due to negligence on the part of the

respondents, the petitioner has got fifth child, a girl child. It has imposed unnecessary financial and social burden on the petitioner. She has to

maintain this child also. The petitioner and her husband being poor and are not able to maintain so many children should not be a reason to deprive

the fifth child because of financial crunch of the petitioner and her husband. Proper upbringing of this child and giving her adequate education would

become the responsibility of the State in these circumstances as because of respondents negligence this child is born.

18. In Halsbury''s Laws of England, 4th Edition (Re issue), Vol. 12(1) while considering the question of ""failed sterilization"", it is stated in para 896

as under:

Failed sterilization--''Where the defendant''s negligent performance of a sterilization operation results in the birth of a healthy child, public policy

does not prevent the parents from recovering damages for the unwanted birth, even though the child may in fact be wanted by the time of its birth.

19. This has now become an established law by series of judgments of the Supreme Court as well as this Court that such compensation due to

negligence of State can be granted:

(i) Chairman, Railway Board and Ors. v. Chandrima Das (Mrs.) and Ors. reported in (2002) 2 SCC 465;

(ii) Tamil Nadu Electricity Board Vs. Sumathi and Others,

(iii) Hindustan Transmission Products Ltd. v. State of Kerala, (1997) 11 SCC 623

(iv D.K. Basu Vs. State of West Bengal,

(v) Nilabati Behera (Smt.) Alias Lalita v. State of Orissa and Ors. reported in 2 (1993) CCR 107 : (1999) 2 SCC 746.

20. The question that arises is as to what should be the quantum of compensation.

21. It may be mentioned at this stage that in England initially there were divergent opinions on the question as to whether doctors would be liable to

pay for all expenses which might reasonably be incurred in the education and up keep of the unplanned child born due to negligence of the doctor.

In Udale v. Bloomsbury Area Health Authority reported in (1983) 2 All. ER 522 , the plaintiff had undergone operation for laparoscopic

sterilization by the doctor of the defendant authority. Owing to negligence of the defendant-doctor the operation was not successful and the plaintiff

became pregnant. The plaintiff claimed damages for, (i) pain and suffering; (ii) loss of earnings; (iii) cost of enlarging family home; and (iv) cost of

bringing up the child up to the age of 16 years. However, the Court rejected the claim of damages under the last two heads, that is, for enlarging

the family house and for bringing up the child holding that it was contrary to public policy that damages should be recoverable arising from the

cause of coming into the world of a healthy normal child. View was that for claim for what has been called a ""Wrongful life"" discloses no cause of

action.

22. However, in Thake v. Maurice reported in (1984) 2 All. ER 513, the Court took contrary view. That was a case wherein the plaintiff who had

four children, had undergone an operation of vasectomy. Owing to negligence of the doctor the operation was unsuccessful and the wife of the

plaintiff became pregnant again. The Judge considered very carefully the matters referred to by Jupp, J., in ""Udale"" case and came to the

conclusion that he was not prepared to lay down any public policy objections to the claim which was being made in spite of the fact that the

parents were absolutely delighted and were very happy with the unwanted normal healthy child. The award of damages was not held to be against

public policy in spite of the fact that the parents were absolutely delighted and were happy c with the unwanted normal healthy child.

23. The aforesaid conflict of decision between Udale (supra) and Thake (supra) was noted by the Court of Appeal in England in Emeh v.

Kensington and Chelsea and Westminster Area Health Authority reported in (1984) 3 All. ER 1044 Court of Appeal preferred the approach of

Peter Pain, J., as more reasonable and awarded damage for pain, suffering and loss of amenity which would have to be given to the congenitally

abnormal child over the years. It was observed 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.

24. Thus the changed view of Court of Appeal in England is also that if as a result of a doctor''s negligence an unplanned child is born to parents

the doctor is liable to pay for all expenses which might reasonably be incurred in the education f and in the upkeep of the child having regard to the

child''s condition in life. It is not necessary to deal with this aspect of the matter any further as the justification of the view taken above can be found

in the judgment of the Supreme Court in the case of Smt. Santra (supra). That was also a case of failed sterilization because of which the

respondent had conceived and gave birth to a girl child. The respondent filed suit for damages which were awarded by the Trial Court after it was

found that the failure of sterilization was on account of negligence on the part of the doctor who performed the operation. The Supreme Court in

fact discussed the aspects of medical negligence elaborately noticing its earlier judgments as well as judgments of English Courts. Thereafter, the

Supreme Court dealt with the issue of grant of damages in such cases and scanned through the case law that has emerged in England, United

States of America, South Africa and New Zealand on this aspect. It also noted the judgment in the case of State of Madhya Pradesh and Others

Vs. Asharam, where the Court had allowed the damages on account of medical negligence in performing family planning operation in which a

daughter was born after fifteen months from the date of operation. It is not necessary to reproduce the same. Suffice is to say that the Supreme

Court put a stamp of approval on the principle that in such cases damages can be awarded by making following observations in the concluding

paras:

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 the family planning as an important programme performed implementation of which it had

created mass awakening for the use of various devices including sterilization operation, the doctor as also the State must he held responsible in

damages if the sterilization 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 sterilization.

The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilization operation cannot be accepted

in view of the law settled by this Court in N. Nagendra Rao and Co. v. State of A.P.; Common Cause, A Regd. Society v. Union of India and

Ors. and Achutrao Haribabu Khodwa and Ors. v. State of Maharashtra and Ors. The last case, which related to the fallout of a sterilization

operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a

Government hospital. The theory of sovereign immunity was rejected.

Smt. Santra, as already stated above, was a poor lady who already had seven children. She was already under considerable monetary burden.

The unwanted child (girl) born to her has created additional burden for her on account of the negligence of the doctor who performed sterilization

operation upon her and, Therefore, she is clearly entitled to claim full damages from the State Government to enable her to bring up the child at

least till she attains puberty.

25. There are other obvious reasons for taking the view that damages are payable. First of all, keeping in view the serious problem of population

explosion in this country, public policy warrants/demands adequate measures to be taken by the people, with the Government playing the major

role for checking the growth of this population. This justifies adoption and implementation of family planning scheme successfully,

26. Secondly under our Constitution, State is obligated to fulfill Directive Principles of State Policy enshrined in Chapter IV of the Constitution.

These Directive Principles embody the aims and objectives of the State under the Republican Constitution one of which is that it is a welfare State

and we have to achieve socio-economic justice as well. Article 38 enjoins the State to strive to promote the welfare of the people by securing and

protecting, as effectively as it a may, the social order in which justice--social, economic and political--shall inform all the institutions of national life,

striving to minimise inequalities in income and endeavor to eliminate inequalities in status, facilities, opportunities among individuals and groups of

people residing in different areas or engaged in different vocations. It reads as under:

Article 38. State to secure a social order for the promotion of welfare of the people.--(1) 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 justice, social, economic and political, shall inform all the

institutions of the national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and

opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

27. Further it will also be useful to note provisions of Clauses ''a'', ''e'' and ''f'' of Article 39 which are as under:

Article 39. Certain principles of policy to be followed by the State.--The State shall, in particular, direct its policy towards securing--

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;

XX XX XX

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by

economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and

youth are protected against exploitation and against moral and material abandonment.

28. In a case like this, Therefore, child has to be provided with proper opportunities and facilities to develop in a healthy manner. It is clear that the

9 petitioner did not want fifth child as she and her husband had no economic means to bring up another child. When this child is born because of

the negligence of the respondents, instrumentalities of the State, it becomes bounden duty of the State to meet the expenses for bringing up this

child. This family child has right to education (Article 41). Further, as per Article 45 the Government is to endeavor to provide free and

compulsory education for children, Art. 47 casts duty upon the State to raise the level of nutrition and the standard of living and to improve public

life. With these kinds of Directive Principles of State Policy, liability of maintenance and up-bringing of fifth child of the petitioner, for the birth of

which the State is responsible, cannot be shied away. Thirdly, grant of such compensation in writ proceedings as a public law remedy due to

negligence of the State has now come to be recognised by series of judgments of the Supreme Court as well as various High Courts. Without

elaborating the diet a laid down in these judgments, purpose would be served in enlisting the same:

(i) Chairman, Railway Board and Ors. v. Chandrima Das (Mrs.) and Ors. (supra).

(ii) Tamil Nadu Electricity Board v. Sumathi and Ors. (supra),

(iii) Thirath Ram Saini v. State of Punjab and Ors. (supra). (iv) Nilabati Behera (Smt.) @ Lalita v. State of Orissa and Ors. (supra).

29. 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. 3,25,000/- which is worked out on the following basis:

1. The child was born on 5th October, 2000. She is 2 1/2 years of age. The respondent shall pay a sum of Rs. 5,000/- per year for maintenance

of this child till she attains the age of five years. Liability is from the date of birth of the child and it would come to Rs. 25,000/- for five years.

2. On attaining the age of five years, the respondent shall admit her in a Government school. She would be provided free education, i.e., no fee

would be charged; all her expenses on books, stationary and other miscellaneous educational expenses, would be met by the respondent. She

would also be provided two sets each of summer and winter uniform every two years.

3. In addition the respondent shall pay Rs. 1.5 lakh to meet her needs for food and proper upbringing. Calculated @ Rs. 1,0007-per month,

amount under this head would be approximately Rs. 1.5 lakh.

4. In addition the respondent shall pay a sum of Rs. 1,50,000/-. This amount would be deposited in the bank in the name of the child Km. Roopa

with her father as guardian. This amount would be spent only for fulfillment of need of the child. Rs. 50,000/- out of this may be spent to meet

emergent and enforcing expenses of the child. No amount would be withdrawn from this account without the leave of the Court. Rs. 1 lakh would

be kept in fixed deposit to be spent for the purpose of higher education of the child and/or her marriage.

30. Writ petition is allowed in the aforesaid terms. Rule is made absolute. Petitioner shall also be entitled to cost quantified at Rs. 5,000/-.

Civil Writ Petition No. 7515 of 2000:

31. Petitioners are husband and wife. Two sons were born out of this wedlock. The petitioner No. 1 is working as "Safai Karamchari" with the

Border Security Force. Petitioner No. 2, wife of the petitioner No. 1, is also a Government servant working in MCD. After two children were

born, both the petitioners thought that their family was complete and they should not have any more children. With this intention, the petitioner No.

2 got Vasectomy ("nasbardi") done at Government Hospital, CGHS, Sector V, R.K. Puram, New Delhi and a certificate to this effect was issued

by the hospital authorities on 10th September, 1998. However, it is stated that in spite thereof petitioner No. 2 conceived. As she became

suspicious about her pregnancy on 25th April, 1999 she consulted doctor at CGHS dispensary, Pushp Vihar, New Delhi. The petitioners attribute

this to the negligence of the doctor who had performed the vasectomy operation and even before the birth of the child, legal notice dated 22nd

December, 1999 was served upon the respondent No. 1. A male child was born on 8th January, 2000 in Jeevan Nursing Home. Thereafter, on

8th July, 2000 the petitioners served another notice to the respondents calling upon the respondents to pay Rs. 10 lakh as damages on account of

negligent sterilisation operation. However, as no heed was paid by the respondents to this legal notice the present writ petition was filed.

32. In the writ petition it is stated that when the operation was conducted, the respondent No. 2/doctor told them that she was an experienced

doctor and had full knowledge of medical science and that she had taken full care while conducting the operation and that she would be fully

responsible in case child is born after this operation. It is stated that the petitioners are low paid employees working as ''safai karamcharis'' and

they cannot bear the burden of this unwanted child. Therefore, they are entitled to the compensation of Rs. 10 lakh.

33. In the counter affidavit filed on behalf of the respondents it is stated that the petitioners had been duly and properly counseled regarding the

procedure of operation and the risk of failure of sterilisation operation. Both the petitioners had signed ''informed consent'' stating the risk of failure

of MTP and sterilisation operation stating that they would not hold the hospital or the doctor performing the surgery responsible in case of failure of

operation. This ''consent form'' is annexed with the counter affidavit. It is also stated that the petitioners were informed verbally and in writing that in

case the petitioner No. 2 misses her menstrual cycle she had to report to the nearest hospital or dispensary. In the instant case, the petitioner No. 2

failed to take any such follow up step of consulting the hospital or the doctor and chose to proceed with the pregnancy on their free Will. In any

case, denying the responsibility of the respondent No. 2 it is stated that she was not involved at all in the entire process when the petitioner No. 2

was examined. For the purpose of surgery this examination was conducted by different doctors. On 11th September, 1998 MTP and

laparoscopic sterilisation operation was done by the respondent No. 2. That is the only time she came in contact with the respondent No. 2. Even

thereafter followup was done by other doctors and after operation also she was examined by other doctors. It is denied that there was any

negligence in performing the operation which was conducted by two seniormost doctors in the hospital. It is explained that in every case of

laparoscopic sterilisation there are two doctors performing the operation and in case of the petitioner No. 2, the respondent No. 2 was assisted by

Dr. Sulekha (Senior Consultant). After legation is done, i.e., both the Fallopian tubes are occluded with fellow springs than the second doctor

confirms that the tubes are occluded rightly. Therefore, there cannot be any question of negligence, the respondents have alleged. It is further stated

that according to the petitioner herself she came to know about her pregnancy on 24th May, 1999 but she visited the hospital on 23rd August,

1999 when she was at advanced stage of pregnancy (18-20 weeks) before that she never came for termination of pregnancy. Even according to

her own admission she realised that she was pregnant and pregnancy test showed positive on 24th May, 1999. Moreover, she was specifically

told at the time of laparoscopic sterilisation that she should report to the hospital authorities if she misses her cycle. Thus negligence is attributed on

the petitioners.

34. While dealing with Civil Writ Petition No. 7715/2001, law on this aspect has been discussed in detail above. The question which falls for

determination is as to whether there was any negligence on the part of the respondents and further whether there is any contributory negligence on

the part of the petitioners.

35. As already pointed out above in the counter affidavit filed on behalf of the respondents it is mentioned that petitioners had given ""consent form

stating the risk of failure of MTP and sterilization operation stating that they would not hold the hospital or the doctor performing the surgery

responsible in case of failure of operation. Even if it is presumed that there was some negligence on the part of the respondent in performing the

operation which led to the conception, it is clear that the birth of "unwanted" child could still be prevented had the petitioners been vigilant.

Negligence on the part of the petitioners after the conception, which led to the birth of the child, cannot be ruled out.

36. However, from the facts of this case, contributory negligence of the petitioners cannot be ruled out. In fact the events which have unfolded give

an impression that the third child born to the petitioners is not an unwanted child. No doubt the petitioners had approached the respondent-

authority for sterilization operation with intention not to have any more children and the operation was performed on 11th September, 1998.

According to the petitioner No. 2 herself, she became suspicious about her pregnancy and she consulted doctor at CGHS dispensary on 24th

May, 1999 when this pregnancy was confirmed. Since the child is born on 17th January, 2000, it can be safely inferred that the petitioner No. 2

must have got pregnant some time in April and as on 24th May, 1999 she would be 6-7 weeks pregnant. If she wanted she could have safely got

her pregnancy terminated at that time. She did not choose to do so even when all facilities for this purpose were available, as she and her husband

are Government employees. She visited the respondent No. 2 after this pregnancy for the first time on 23rd August, 1999 when pregnancy was at

advanced stage (18-20 weeks). This conduct of the petitioners shows : (i) either the petitioners were negligent, or (ii) even when the petitioners did

not initially want another child and the petitioner No. 2 had got herself operated on 11th September, 1998, but when she became pregnant in

April, 1999 the petitioners accepted this position and did not want the pregnancy to be terminated, As an afterthought legal notice was served on

22nd December, 1999 when the petitioner No. 2 was full term pregnant as the child was born on 8th January, 2000. The intention was Therefore

to get money for this third child. For drawing this inference one has also to take into account that before the birth of the third child the petitioners

had two male children.

37. Therefore even it is presumed that the respondents were negligent in performing tubectomy operation which resulted in the conception of

petitioner No. 2, it is clear that birth of the child has to be attributed to the conduct of the petitioners as even when there was full opportunity for

them to get the pregnancy terminated they failed to avail the same. The petitioners could have prevented the birth of the third child in spite of failure

of vasectomy operation. In these circumstances, in this case, 1 am of the opinion that only token damages should be awarded.

38. The ends of justice would be met by awarding damages of Rs, 10,000/-to the petitioners. This writ petition is thus disposed of with direction to

the respondents to pay a sum of Rs. 10,000/- to the petitioners.

39. No costs.