

GAHC010184202014



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/320/2014

BINOY DEKA
R/O VILL.- PATGIRI CHUBA, P.O.- DHEKIPARA, P.S.- SIPAJHAR, MOUZA-
LOKRAI, SIPAJHAR, DARRANG, ASSAM- 784145.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REP. BY THE COMMISSIONER and SECY. TO THE GOVT. OF ASSAM,
HEALTH and FAMILY WELFARE DEPTT., DISPUR, GHY- 6.

2:THE MISSION DIRECTOR
NATIONAL RURAL HEALTH MISSION
ASSAM
SAIKIA COMMERCIAL COMPLEX
CHRISTIAN BASTI
SREENAGAR ROAD
GHY- 5.

3:THE KASH SONAPUR SUB-DIVISIONAL HEALTH CENTRE
REP. BY THE CHIEF MEDICAL AND HEALTH OFFICER
SIPAJHAR
DARRANG.

4:THE DIRECTOR OF HEALTH SERVICES

DISPUR
GUWAHATI-6

5:COMMISSIONER AND SECRETARY
TO THE GOVERNMENT OF ASSAM
SOCIAL WELFARE DEPARTMENT
HAVING HIS OFFICE AT DISPUR

GUWAHATI- 781006

6:DIRECTOR
OF THE SOCIAL WELFARE DEPARTMENT
HAVING HIS OFFICE AT UZANBAZAR
GUWAHATI-781001

Advocate for the Petitioner : Mrs. R. S. Choudhury, Advocate

Advocates for the Respondents : Mr. B. Gogoi, Standing Counsel, Health and NHM
: Mr. P. Saikia, Standing Counsel, Social Welfare Department

Date of hearing : 26.09.2023

Date of Order : 22.12.2023

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER (CAV)

1. The pain and agony of the daughter of the Petitioner on account of a rare complication diagnosed as Acute Disseminated Encephalomyelitis (ADEM) and the incapacity of the Petitioner to cope up with the high cost of the treatment which in effect touches on the rights of the daughter to live a life with human dignity is the subject matter for consideration before this Court in the present proceedings.

2. The facts of the instant case as would reveal from a perusal of the writ petition are that a female child was born to the Petitioner at Sipajhar Public Health Centre on 28.11.2010. The child as per the Petitioner was fit and healthy and she was given all required vaccination at the time of her birth. On 14.11.2012, when the child was one and half year old, she was

administered vaccine namely DPT-Booster, Measles 2nd OPU-Booster, Vita A 2nd dose at Anganbadi Centre in village Patgiri Chuba under Khash Sonapur Sub-Divisional Health Centre. At the time of vaccination, the infant daughter of the Petitioner was normal and in good health. However, pursuant to the administration of the said vaccine, the health condition of the daughter of the Petitioner started to deteriorate and after a while she fainted and her legs buckled under her. Thereafter, she started suffering from high fever and was not able to stand on her legs. The Petitioner stated in his writ petition that the infant daughter of the Petitioner was immediately admitted to Sipajhar PHC and on the advice of the doctors on duty, she was shifted to Mangoldoi Civil Hospital.

3. The Authority of the Mangoldoi Civil Hospital considering the serious and critical condition of the daughter of the Petitioner referred her to the Guwahati Medical College and Hospital at Guwahati (for short "GMCH"). After reaching GMCH, the daughter of the Petitioner was immediately admitted at the ICU Pediatric Ward. The daughter of the Petitioner thereafter underwent treatment for almost three months in continuous stress and she was discharged from the GMCH on 05.01.2013. It was also mentioned in the writ petition that the daughter of the Petitioner though was discharged but till the date of filing of the writ petition in the year 2014, she was not able to walk and sit and she only lied on the bed. It was also mentioned that though, on the body of the discharge certificate of the daughter, the GMCH had recorded that her condition had improved but in reality, it was not so. It was also mentioned that during the course of the treatment, the Superintendent of the GMCH vide a communication dated 10.12.2012 issued

a reimbursement bill amounting to Rs.16,567/- in connection with the treatment of the daughter of the Petitioner for complications which arose due to wrong vaccination. It was averred in the writ petition that considering the degree of disability of the Petitioner's daughter, the reimbursement of the said medical expenses was not enough to meet the expenses of the best possible treatment. Under such circumstances, the Petitioner submitted a detailed representation on 04.03.2013 before the Mission Director, NRHM (now National Health Mission) by stating the entire facts which led to his daughter becoming permanently disabled pursuant to wrong vaccination in Government Civil Hospital. In the said representation, the Petitioner stated that due to his low income, it was impossible on his part to make arrangement for possible treatment for his daughter. It was also mentioned in the representation that the State Government had duly reimbursed the amount of Rs.16,567/- but that was not adequate enough for the purpose of treatment of his daughter. However, as nothing was done by the authorities concerned, the instant writ petition was filed seeking a direction upon the Respondent Authorities to pay adequate compensation to the infant daughter of the Petitioner by calculating the amount of compensation by an independent agency and/or for appropriate direction to the Respondents to forthwith consider the representation submitted by the Petitioner on 04.03.2013. At this stage, it is relevant to mention that the instant writ petition was filed on 22.01.2014, i.e. almost a decade back and at present, the daughter of the Petitioner is 13 years old.

4. This Court vide an order dated 24.01.2014 issued notice. On 11.04.2014, an affidavit-in-opposition was filed by the Respondent No.2 i.e. the Mission Director, National Rural Health Mission. In the said affidavit-in-

opposition, it was mentioned that as per the records available in the Office of the Sipajhar BPHC, the infant daughter was administered the vaccines namely DPT-Booster, Measles 2nd Booster and Vitamin-A and those vaccines were administered by trained and experienced ANM at Khas Sonapur SC. It was further mentioned that the daughter of the Petitioner was sent to GMCH and was admitted in the pediatric ward of GMCH on 16.11.2012. The daughter of the Petitioner was admitted with the complaint of having a high fever for two days and abnormal body movement. Further to that, it was mentioned that as per the finding of the GMCH, the patient was diagnosed to be suffering from viral encephalitis or AEFI (Advanced Effect Falling Immunization). Necessary treatment and medicines were accordingly administered to the child up to 28.12.2012. The MRI Report following the treatment by the GMCH showed signs of progress. In the discharge report dated 05.01.2013, it was mentioned that the daughter of the Petitioner was in stable condition, "took food orally, spasticity present over the right side then left and the patient was unable to walk". It was further mentioned that the administration of vaccines does not come under the purview of NRHM and the onus of responsibility of running the administration of vaccines lies with the Director of Health Service (FW), Assam. It was also stated that generally vaccines are administered to huge numbers of children everyday as a part of immunization programme and such cases of aberrations are mere exception than the rule. It was further mentioned that on the day of administration of vaccines to the daughter of the Petitioner, there were many other children who were administered the same vaccines and only one such case was reported where this unfortunate incident had taken place and therefore, it is difficult to establish that the

suffering of the child is due to wrong vaccine administered. To the said affidavit-in-opposition, there was an affidavit-in-reply was filed.

5. The record further reveals that the Deputy Secretary to the Government of Health and Family Welfare Department had filed an affidavit-in-opposition on 25.02.2016. To the said affidavit, the case summary was enclosed. It reveals from the case summary that the infant child was admitted to the pediatric ward GMCH on 16.11.2012 at around 7.40 PM under the observation of Professor and Head of the Department of Pediatrics, Dr. Abhinandan Das with a complaint of fever for 2 (two) days and abnormal body movement of 5 episodes on that day. As recorded in the case summary, the attendant of the infant child informed that the infant child had fever for 2 (two) days and abnormal body movement for 1 (one) day. There was 5 (five) episodes of abnormal body movement, each lasting for around one minute and also there was one episode of vomiting on that very day. It was also informed by the attendant that there was a past history of febrile convulsion 1 (one) year ago. Further, it was informed that they gave H/O DPT vaccination on 14.11.2012. At the time of admission of the infant child, she was provisionally diagnosed to be a case of Viral Encephalitis or AEFI (Adverse Event Following Immunization). The case summary further details out the various medications and the steps being taken to carry out the investigation and the treatment so given. It further reveals that on 05.01.2013, the infant child was discharged with the observations that the vitals were stable and the patient took food orally. It was also mentioned that spasticity was present more over the right side than left and the patient was unable to walk.

6. It is further relevant to take note of an affidavit filed by the Joint Director of Health Service, Dr. Binita Goswami on 07.11.2019. From the said affidavit, it transpires that on the basis of an order dated 01.03.2019 passed by this Court, a Medical Board was constituted of a Pediatric, Orthopaedic, Neurologist and Clinical Psychologist to give the right assessment of the health status of the child of the petitioner. The Medical Board was constituted with (i) Dr. Dulal Kalita, Associate Professor of Pediatrics as Chairman, (ii) Dr. Partha Sarathi Chakravorty, Associate Professor of Orthopaedic, Member, (iii) Dr. Mythili Hazarika, Associate Professor of Clinical Psychology as Member and (iv) Dr. Anirban Mahanta, Assistant Professor of Neurology as Member. The said Medical Board submitted a report on 09.04.2019. Taking into account the relevance, the findings of the said Medical Board examination report is extracted hereinbelow:

“On examination:

The child is awake, alert and cooperative, but does not follow commands for examination.

Psycho diagnostic Evaluation : The child Baby Patgiri was seen on 08.04.2019 in the Medical Board. She is 8 years 3 months old and not attending school independently since last 6/7 years. On clinical interview with the child, she could not respond to the verbal stimuli with verbal responses but with flickering of eye movement some questions were answered. A structured scale, Vineland Social Maturity Scale was administered and her social intelligence was found to be 0.9 - "Profound Mental Retardation". Her developmental milestones are below one year of age (8 months). Her social skills, self help skills, locomotion, communication and socialization are at the age of 8 months but her chronological age is 8 years 3 months (99 months). According to clinical findings and scale her condition is 100% disability as she would need constant

supervision, support and guidance in day to day living skills and to be independently functioning.

On examination of cranial nerves, her pupils are 3 mm & reacting to light bilaterally, she has convergent squint of left eye, and there is mild facial asymmetry. Other cranial nerve functions could not be examined adequately.

Her motor system examination showed wasting of thigh and leg muscles bilaterally (right more than left). Tone is increased on right side (spastic). Muscles strength could not be examined properly as the child is not following the command but grossly it is around 2/5 on right side and 3/5 on left side. Deep tendon reflexes are exaggerated bilaterally. Planter reflex is extensor on right side and indeterminate on left side.

On sensory system examination she responds to pain and deep pressure stimuli but other modalities of sensation could not be examined properly because the child was not following commands.

On loco motor system examination, her cranium and spine are intact. There are tendo achillis contracture both side and contracture of right knee joint. She can sit with crossed legs without support for around two minutes, but cannot stand and walk without support.

She has speech and language disability, intellectual disability and loco motor disability with respect to right upper and lower limbs.

Other systemic examination: -

Cardiovascular system : Found normal on examination. Pulse: 86/min, Blood pressure - 100/70 mm of Hg. 1st and 2nd heart sounds heard normally. No added sound (murmurs) heard clinically.

Respiratory system: Found normal on examination. Respiratory rate 20/min. Normal vesicular breath sounds heard bilaterally. No additional sound heard over

the chest.

Gastro-intestinal system : Found normal on examination. Liver and spleen are not palpable.

Clinical Impression: A case of right hemiparesis with profound Mental retardation due to "Acute disseminated encephalomyelitis (ADEM) with multiple disabilities.

Disabilities : 1) Profound mental retardation - 100%

2) Loco motor disabilities with respect to right upper limb and right lower limb-90%

N.B: The-disabilities must be reviewed by appropriate authority at the age of 10 years as per Govt. of India guidelines 2018."

7. It is also relevant to take note of that in the said affidavit so filed by Dr. Binita Goswami, Joint Director, it was mentioned that Adverse Event Following Immunization (AEFI) was not reported by the parents of the child at any health facility centre and therefore the matter was not within the purview of the Health Department as an Adverse Event Following Immunization (AEFI) case. It was further mentioned that the protocol of Adverse Event Following Immunization (AEFI) case, reporting is maintained ensuring Adverse Event Following Immunization (AEFI) within 48 hours and this protocol is followed strictly and in the case of the infant child of the petitioner, this was not reported as Adverse Event Following Immunization (AEFI) since the parents did not bring the child to any Government health facility Centre till 1.25 PM of 16.11.2012. In paragraph No.6 of the said affidavit, it was mentioned that as per the report of the Neurology Department of GMCH, it was provisionally diagnosed that the infant child of

the petitioner had Acute Disseminated Encephalomyelitis due to vaccination. However, it was mentioned in the said affidavit that the test which was conducted, was not conclusive inasmuch as only the Cerebrospinal Fluid Examination was done but the chemical examination was not conducted by the GMCH. It was also opined that the matter be referred to the National Adverse Event Following Immunization (AEFI) Secretariat, New Delhi which is the Expert Technical Body, Casualty assessment of vaccine related medical issues.

8. It is relevant to take note of that an affidavit-in-reply was filed by the petitioner on 29.03.2022 wherein it was mentioned that the petitioner had taken his infant daughter to the Government health facility on 16.11.2012 at about 1 PM which is well within 48 hours of the event having occurred and as such, it was the responsibility of the State authorities to have referred the matter as an Adverse Event Following Immunization (AEFI).

9. This Court further finds it relevant to take note of an additional affidavit filed by the Petitioner on 21.04.2022 pursuant to the order passed by this Court on 21.03.2022. In the said affidavit and more particularly at Annexure-A4, the details were given of the financial support that would be required to the child of the Petitioner. The said details included in broad headings of Assistive Device Support, Other Medical/Rehabilitation Expenses, Rehabilitation/Therapeutic Inputs, Conveyance Expenses and Other Expenses. It is relevant to mention that in the category of Other Expenses, various sub-heads were there which related to loss of future earnings due to permanent disability, full time care giver/Attendant allowance, loss of marriage prospects, pain sufferings and loss of amenities and Mis-recurring

expenses of toilet chair. The total amount so projected in the said Annexure-A4 was Rs.98,60,584/-.

10. Pursuant to the said additional affidavit so filed on 21.04.2022, this Court enquired with the learned counsel for the Petitioner as to on what basis, the said assessment was made and more particularly in respect to Other Expenses. The learned counsel for the Petitioner has drawn the attention of this Court to the judgment of the Supreme Court in the case of ***Master Ayush Vs. The Branch Manager, Reliance General Insurance Co. Ltd and Another reported in (2022) SCC Online SC 375***. This Court also finds it very pertinent to take note of Annexure-A5 of the said additional affidavit filed on 21.04.2022 which is the notification under Section 5 of the Minimum Wages Act, 1948 issued by the Government of Assam, Labour Welfare Department in respect to various categories of employees/workers. It is relevant to note that the Supreme Court had in the case of ***Master Ayush (supra)*** had taken into consideration the minimum wages notification in order to make the basis of granting the compensation.

11. The record reveals that an additional affidavit was filed by the Respondent No.1 on 26.04.2022 wherein a report submitted by a Committee constituted on 29.11.2019 by the Government was enclosed. In Clause B, C and D of the said report, the said Committee made observations as regards medical assistance to be provided to the child of the Petitioner, the compensation/financial support that can be provided to the child of the Petitioner under the Schemes of Health and Family Welfare Department/NHM as a special case as well as any form of rehabilitation support that can be provided from the Health and Family Welfare Department or any other

Department of the Government respectively. The said observations in the opinion of this Court have relevance for which the said Clauses B, C & D of the report are reproduced herein below:

“B. Whether any further medical assistance can be provided to the child:

Plan to provide financial assistance and medical therapy for the child:

1. *As the child has already developed severe form of disability and is totally dependent on others, she needs multi-disciplinary intervention in the form of physiotherapy, speech therapy and rehabilitation, in addition to nutritional support.*

2. *As Darrang Civil Hospital has District Early Intervention Center (DEIC), where both Physiotherapist and Speech therapist are available along with adequate equipment for rehabilitation, we may have a treatment plan with the help of CRC, GMCH.*

3. *A team may be constituted by the Principal, GMCH with faculties from CRC, Dept of Orthopedics, Pediatrics, ENT. As per the guidance of this team, a treatment plan will be formulated and as this treatment will be required for a long duration, the physiotherapist and speech therapist of DEIC, Darrang will accompany the parents to GMCH and they too will understand the treatment plan formulated by the expert team of GMCH and regular interventions will be carried in the DEIC, Darrang instead of coming to GMCH on daily basis. Every month the child will be reevaluated at GMCH by the expert team and the physiotherapist and speech therapist will change the treatment plan as per the changing status of the child. During this reevaluation the physiotherapist and speech therapist will accompany the child.*

4. *As the child is immobile, she needs mobility support in the form of*

wheelchair and walking aids.

5. *She may need surgical intervention/special shoes to help her walk. This may be decided after the evaluation of the child by the expert team constituted by the Principal GMCH.*

C. Whether any compensation/financial support can be provided to the children under any scheme of H&FW Dept/NHM as a special case, in view of desire expressed by the Hon'ble High Court:

Remarks:

1. *As the family had to carry the treatment of the child on own for a long period, the family is facing financial constrain. Considering this a special case we may provide financial support of Rs. 4 lakh from the program Snehasparsha and Assam Arogya Nidhi (2 lakh each from the two program) as a special case.*

2. *At the same time extra financial support may be provided for the continuation of her treatment in the form of physiotherapy and speech therapy as this require daily travel from her home to Darrang DEIC and also from Home to GMCH on monthly basis at least for a period of 2 years. For this the family may be provided with one time financial assistance of Rs. 2 lakh for this.*

3. *Budget breakup for this contingency cost for physiotherapy session at DEIC, Darrang : Travel cost from Lawjan (Residence of the child) to Darrang Civil Hospital via Sipajhar (Approximately 50 Km)*

1. *Vehicle hiring @ 1000/per trip (Two way).*

2. *2 days in a week: 8 days in a month.*

Total amount required : $1000 \times 8 \times 12 = 96,000/-$ for one year. For two years the contingency cost will be $Rs. 96,000 \times 2 = 1,92,000/-$.

D. Whether any form of rehabilitation support can be provided from

the H&FW Dept and or any other Dept of Government.

Remarks:

Interventions mentioned in the point number B and C will cover this part. The schemes which are available for differently able person from Social Welfare Dept, Govt. of Assam placed at Annexure 1."

12. To the additional affidavit so filed on 21.04.2022 by the Petitioner and more particularly the Annexure-A4, the Respondent No.2 i.e. the Mission Director, National Health Mission filed an additional affidavit on 25.05.2022. In the said additional affidavit, at Paragraph-4, it was stated that as regards customized wheelchair; dynamic ankle foot orthosis; knee gaiters to be used for therapy standing/long sitting; elbow gaiters on right side to keep elbows straight; hand splint for right side to reduce hand tightness; maintenance cost of assistive devices per annum, such support can be provided by the Social Welfare Department of the Government of Assam and for treatment part, support can be availed from the GMCH, Guwahati and expenses, if any would be borne by the Hospital Management Society, GMCH which will later be reimbursed to GMCH, Guwahati under the available schemes of Government of Assam implemented by the NHM Assam. In respect to special education for early educational inputs; teaching, learning materials; loss of future earnings due to disability; full time care giver/attendant allowance for care of child with high support needs; loss of marriage prospects; pain sufferings and loss of amenities and recurring expense of toilet chair, it was remarked that the said type of support may be provided by the Social Welfare Department of the Government of Assam. In respect to the medical : yearly check up, it was mentioned that the child of the Petitioner is already availing rehabilitation at the District Early Intervention Centre

(DEIC), Darrang free of cost including free transportation. Further to that, when the child of the Petitioner attains the age of 18, she can avail free treatment under the Rashtriya Bal Swasthya Karyakram (RBSK) which can be utilized for current health condition and any condition that may arise later on which are covered by the programme. Apart from that, the child of the Petitioner can avail benefit under the Atal Amrit Abhiyan (AAA)/PMJAY considering the eligibility and cases/procedures covered under them. The AAA Scheme would provide cashless inpatient treatment facility at empanelled hospitals (public and private) upto Rs.2,00,000/- per individual per year and PMJAY Scheme would provide secondary and tertiary healthcare completely cashless upto Rs.5,00,000/- per family per year. As regards other illness requiring check up, different levels of health system present can be used starting from Primary Level, Secondary Level to Tertiary Level for various disease conditions. It was also mentioned that free referral transport present under the health system can be utilized for transportation of the patient as and when required free of cost. On the aspect of occupational therapy for activities of daily living, it was mentioned that the Darrang Civil Hospital/District Early Intervention Centre (DEIC) was already providing physiotherapy and speech therapy free of cost on regular basis as per norms. The domain of occupational therapy though not covered by the Department of Health and Family Welfare but support from other Departments can be taken into consideration. In respect to the vehicle hire charge for travel to Darrang Civil Hospital, it was mentioned that the free referral transport present under the health system can be utilized for transportation of the patient to and from the hospital and referral to higher centres if required can also be considered under the RBSK Programme.

Further to that, it is also mentioned that in addition to the above, the child of the Petitioner can claim financial assistance under Snehasparsha Plus (One time financial assistance of Rs.50,000/- followed by Rs.2,500/- per month for 3 years) as applicable.

13. Taking into account the specific stand taken in the additional affidavit filed by the Mission Director, National Health Mission on 25.05.2022, this Court impleaded the Commissioner and Secretary to the Government of Assam, Social Welfare Department as well as the Director of Social Welfare Department vide an order dated 28.04.2022 as Respondent Nos. 5 and 6 to the writ petition.

14. The record further reveals that the Respondent No.6 thereupon had filed an affidavit-in-opposition on 13.06.2022 through the Director of Social Welfare Department. In the said affidavit-in-opposition, it was mentioned that after going through the support sought for in Annexure-A4 to the Additional Affidavit dated 21.04.2023, the Social Welfare Department can provide an assistive support device (wheel chair) to the Petitioner's daughter free of cost. It was also mentioned that in pursuance to the provisions of the Persons with Disability Act, 1995 and Rights of Persons with Disabilities Act, 2016, the Government of Assam, Social Welfare Department had introduced various welfare schemes for the Persons with Disabilities (PWD) with a view to empower them in various field with unique abilities. The details of the schemes were pertaining to Deen Dayal Divyangjan Pension which provides pension of Rs.1000/- per month and Deen Dayal Divyangjan Punorsansthapon Achoni, which is applicable to the age group from 18 to 50 years of an one time grant of Rs.20,000/-. At this stage, it is pertinent to

observe that the Scheme Deen Dayal Divyangjan Punorsansthanpon Achoni may not apply to the daughter of the Petitioner as the minimum qualification is Class – X.

15. The record further reveals that the Respondent No.2 filed another additional affidavit on 02.08.2022 wherein it was mentioned that from April, 2020 onwards, the rehabilitation of the daughter of the Petitioner is going on at the District Early Intervention Centre (DEIC), Darrang free of cost including free transportation. Further to that, it was mentioned that the child of the Petitioner was undergoing rehabilitation in the Department of Speech Therapy, Physiotherapy, Psychology and by a Pediatrician/Medical Officer. It was also mentioned that the child of the Petitioner is receiving rehabilitative therapy free of cost and if the child requires any other treatment, then upon referral by the Tertiary Care Hospital under the Government of Assam, the same would be taken care of. It was also mentioned that if any referral is advised (within the State or outside) services/reimbursement can be availed considering the eligibility criteria as mentioned under the Schemes after submission of the relevant documents including voucher, original bills etc subject to the conditions as laid down in the scheme.

16. This Court finds it relevant to take note of another additional affidavit filed by the Respondent No.6 on 02.08.2022. In the said additional affidavit, it was mentioned that the Women and Child Development Department which was formerly known as Social Welfare Department, can provide a manual Wheel Chair to the daughter of the Petitioner free of cost as per the requirement. Further to that, the Director of Social Welfare Department had made a request to an organization in the name and style of 'Shree Bhagwan

Mahaveer Viklang Sahayata Samiti' to provide an assistive support device to the Petitioner's infant daughter and the said association had duly responded by making enquiry as to what kind of walking device would be convenient to the Petitioner's daughter so that the same could be arranged accordingly. Further to that, the Petitioner was also requested by the Chief Executive Officer of the said organization to visit the Office for placing the requirement.

17. In the backdrop of the above pleadings as well as various reports, it is relevant to take note of that the Petitioner herein had sought for adequate compensation from the respondent authorities as it is the case of the petitioner that it was on account of the negligence on the part of the respondent authorities which have resulted in the sufferings that the child of the petitioner has been endured into. On the other hand, the respondent Health Department had specifically denied any negligence on their part by stating inter alia that when the incident was reported, the best available treatment was given to the child of the petitioner and as such it cannot be a case of negligence.

18. This Court finds it pertinent to mention that in view of the respective stands taken by the parties, it was the opinion of this Court that the relief(s) to be granted in the writ petition would differ based on the question of negligence inasmuch as the judgments relied upon by the counsels for the respective parties shows that compensation have awarded on the basis of negligence. Another very significant aspect also arose before this Court as to whether the question of negligence could be decided in a proceedings under Article 226 of the Constitution. This aspect was duly heard. Upon hearing, this Court was of the opinion that taking into account that the writ petition

was pending for almost a decade, it would not be in the interest of justice to relegate the Petitioner to the Civil Courts for an adjudication on the question of negligence. Further to that, it was also the opinion of this Court that relegating the Petitioner to the Civil Courts at this stage would cause insurmountable agony to the Petitioner who not only did not have the capacity to undergo the long ordeal of a civil proceedings but also would effect the cause of the pain and agony of the daughter who required assistance to live a life with human dignity – a facet of Article 21 of the Constitution.

19. Under such circumstances, this Court vide an order dated 11.04.2023 had appointed a commission to look into the aspect of the medical negligence. In the said order dated 11.04.2023, this Court framed the terms of reference for the Commission as under:

(A) Whether on the facts of the present case, the permanent disability of the child of the petitioner could have been prevented by the Respondent Health Department?

(B) Whether there was medical negligence on the part of the Respondent Health Department which led to the permanent disability of the child of the petitioner?

(C) What medical remedial steps are required to be taken for the child of the petitioner to live a life with dignity?

20. This Court further vide the said order also requested the Commission to submit the report within a period of two months from the date the order was served upon the members of the Commission. Be that as it may, on

account of the ailment of one of the Commission members, this Court vide an order dated 29.05.2023 reconstituted the Commission by appointing Dr. Nabajyoti Barkataky, a well renowned Neurologist engaged in ARK's Neurocare Centre and Dr. Rashna Das Hazarika who was also a renowned Pediatrician and is a Senior Pediatric Consultant at Guwahati.

21. The Commission Members submitted a report on 05.09.2023. The said report is reproduced hereinunder:

“Sir,

The Commission comprising of Dr. Nabajyoti Barkataky (Neurologist) and Dr. Rashna Dass Hazarika (Pediatrician), and appointed by the Honourable Guwahati High Court, sat twice on 10th August 2023 and 29th August 2023 at the Office of the Director, Medical Education (Govt. of Assam), Six Mile, Khanapara. We have evaluated the relevant medical and legal documents of the patient, and also made a virtual assessment of the child's health condition (via video calling). The following are the comments of the Commission members:

- 1. The child was given an appropriate vaccine for age at a proper physical state and proper dose.*
- 2. The immediate post-vaccination symptoms was properly treated by the local physician to the best of his/her capacity.*
- 3. When the child symptoms increased, she was rightly referred for specialist opinion first to the Mangaldoi Civil hospital and then further to the Department of Pediatrics, Guwahati Medical College and Hospital, Guwahati.*
- 4. The physical examination and investigations done at the Guwahati Medical College and Hospital was done as per hospital protocol.*

5. *The diagnosis of Acute Disseminated Encephalomyelitis (ADEM) and its subsequent treatment at GMCH was as per current guidelines.*

6. *Unfortunately ADEM is a rare complication following any VACCINATION (with an incidence of 0.8 per lakh population of vaccinated children), and it cannot be predicted or prevented in spite of the best medical facilities.*

7. *It appears that the treating team did try their best to minimize the damage caused by ADEM.*

8. *On assessment of her current disabilities, the Commission noted that the child has the following problems:*

a. *Her vision is severely compromised.*

b. *Severe imbalance hampering her ability to sit, stand or walk without support.*

c. *Bilateral foot drop and right wrist drop.*

d. *Difficulty in communication due to unclear speech.*

e. *She is not able to perform basic daily tasks like toilet needs without help.*

9. *It is therefore the opinion of the Commission members that:*

a. *The child can never lead an independent life in the future consequent to the multiple severe disabilities. She needs the constant help of a caretaker.*

b. *The child will need continued evaluation and treatment/rehabilitation training (physiotherapy, occupational therapy and speech therapy) to lead a reasonably dignified life. She will also need ORTHOTIC device support to help her to achieve*

some degree of independent walking abilities.

c. She will also need time to time evaluation (at least twice a year) by a Pediatrician (till 18 years of age) and by a Physician (after 18 years of age), and a Neurologist for adjustments of medications and therapy. Both the members of the Commission are keen to help the child as and when required in the future and free of any cost to the patient.

10. It is for the Honourable High Court to decide on the appropriate medical, social and financial compensation (as per existing Government norms for persons with 100% disability) in an attempt to provide the life-long support needed for the child as outlined above, and to allow her to lead a life with reasonable dignity. The usual life span of a person with severe disabilities as per a Korean study is approximately 50 years (Copy of the study attached for reference).

We sincerely thank the Honourable High Court, Guwahati for giving us the opportunity to study the case and give our opinion."

22. From a perusal of the above report, it would reveal that the Commission members opined that the Petitioner's daughter was given an appropriate vaccine for age at a proper physical state and proper dose. It was opined that the immediate post-vaccination symptoms was properly treated by the local physician to the best of his/her capacity and when the child's symptoms increased, she was rightly referred for specialist opinion first to the Mangaldoi Civil Hospital and then further to the Department of Pediatrics, GMCH, Guwahati. It was further opined that the physical examination and investigations done at the GMCH was done as per hospital protocol and the diagnosis of Acute Disseminated Encephalomyelitis (ADEM) and its subsequent treatment at GMCH was as per current guidelines. It was

further mentioned that the said ADEM is a rare complication following any vaccination and it cannot be predicted or prevented in spite of the best medical facilities. The ratio mentioned is 0.8 per lakh of vaccinated children. It was therefore opined that the treating team did their best to minimize the damage caused by ADEM. Therefore, from the said report, it is apparent that there was no negligence on the part of the Respondent Health Department which led to the permanent disability of the child of the Petitioner.

23. As regards the current disabilities of the child of the Petitioner, the Commission members also opined that the child of the petitioner suffers from severely compromised vision; severe imbalance hampering her ability to sit, stand or walk without support; bilateral foot drop and right wrist drop; difficulty in communications due to unclear speech and that the child of the Petitioner would not be able to perform basic daily tasks like toilet needs without help.

24. On the remedial measures, the Commission members opined that the child can never lead an independent life in future consequent to the multiple severe disabilities and then the child of the Petitioner would require constant help of a caretaker. It was also opined that the child would need continued evaluation and treatment/rehabilitation training (physiotherapy, occupational therapy and speech therapy) to lead a reasonably dignified life. Further, the child will also need ORTHOTIC device support to help her to achieve some degree of independent walking abilities. It was also opined that the child would need time to time evaluation (at least twice a year) by a Pediatrician (till 18 years of age) and by a physician (after 18 years of age) and a neurologist for adjustments of medications and therapy. It was also

mentioned that the usual life span of a person with severe disabilities as per a Korean study is approximately 50 years.

25. Before moving forward, this Court however finds it pertinent to express the deep gratitude of this Court to the Members of the Commission for rendering their opinion by taking time out from their busy schedule.

26. From the above therefore, it would be seen that the disease with which the Petitioner's daughter was inflicted upon is a very rare complication which happens on account of vaccination and the ratio being 0.8 per Lakh. The opinion reveals that the Respondent Health Department did their best with the abilities available so that the Petitioner's daughter was provided the required treatment. It is also seen from the report that such rare complications following any vaccination cannot be predicted or prevented in spite of the best medical facilities. Therefore, under such circumstances, this Court on the basis of the said report has to reach only one conclusion that there was no negligence on the part of the Respondent Health Department in administering the vaccine as well as in providing the treatment.

27. In view of the above findings, a bigger question arises as to whether this Court can grant any relief to the Petitioner in the present facts that too when the Petitioner's daughter admittedly would require support to live a life with dignity. The report so submitted categorically mentions that the disability of the Petitioner's daughter is 100% and she would require medical assistance in the form of regular medical check-ups, rehabilitation programs and orthotic device supports. It is also seen from the report that the Petitioner's daughter cannot lead an independent life in future and would require a constant help of a caretaker.

28. It is well established that right to life also includes a right to live with human dignity. This Court also takes note of that the Petitioner is a vegetable vendor and earns a meager income and taking into account the requirements as per the report for the child of the Petitioner to live a life with dignity, it would not be possible to do so without the aid of the State Government.

29. This Court also finds it very apt to note that the Respondent State Authorities during the pendency of the instant proceedings have not taken the present litigation in an adversarial manner. Rather the Respondents have provided all the necessary facilities to the Petitioner's daughter so that she is in a position to get medical assistance. The affidavits filed and more particularly in the later stages of the instant proceedings would also show that the Health Department of the Government of Assam as well as the National Health Mission have shown their eagerness to provide their support for the well being of the child of the Petitioner. Reference can be made to the affidavits filed by the Respondent No.2 on 25.05.2022 and 02.08.2022. The Respondent in the Social Welfare Department have also stated in their affidavits as to what possible help they can render so that the child of the Petitioner can live a life with human dignity. It is also very pertinent to mention that this Court does not have expertise to know the medical needs and intricate welfare needs of the child of the Petitioner. It is the opinion of this Court that the experts in medical fields and humanities would be in the best position to know the actual time to time needs of the Petitioner's child and this Court duly expects that the Respondent Authorities would do the needful in that regard.

30. In view of the above, this Court therefore disposes of the instant writ

petition with the following observations and directions:

(i) The daughter of the Petitioner as per the opinion rendered in the report dated 05.09.2023 cannot lead a life independently and would require a constant help of a caretaker. As of now, the daughter of the Petitioner has her mother and father to look after her but for taking care of the Petitioner's daughter daily needs which would escalate from time to time on account of the increase in the needs and the inflation, this Court is of the opinion that a reasonable amount is required to be paid to the father of the Petitioner monthly till the daughter of the Petitioner attains the age of 18 years and thereafter to the Bank Account of the Petitioner's daughter or the Bank Account of the guardian duly appointed as per law. This Court is of the opinion that a monthly stipend would be just for that purpose, which is required to be paid in terms with the prevalent notification under the Minimum Wages Act, 1948 issued by the Labour Welfare Department of the Government of Assam in respect to unskilled workers and the said monthly stipend should be increased from time to time on the basis of subsequent notifications issued by the Government of Assam in the Labour Welfare Department. Accordingly, this Court therefore directs the Respondent Authorities and more particularly the Commissioner and Secretary to the Government of Assam, Health and Family Welfare Department to take appropriate steps for payment of the monthly stipend at the rate as applicable to unskilled workers to the Petitioner's Bank Account monthly till the Petitioner's daughter attains the age of 18 years and thereupon to the Bank Account of the Petitioner's daughter or her guardian duly appointed under the provisions of law till she survives. This Court further directs the said Authorities that the said monthly stipend so directed to be paid shall

periodically be increased on the basis of subsequent notifications issued enhancing the minimum wages per month of the unskilled workers. In addition to that, this Court further directs that an amount of Rs.3,700/- per month be paid to the Petitioner in his Bank Account for the purpose of engaging a caretaker. This amount would be paid to the Petitioner till the daughter of the Petitioner attains the age of 18 years. Thereupon, the said amount be paid to the Bank Account of the Petitioner's daughter or her guardian duly appointed as per the provisions of law. This Court further directs that the Life Certificate of the Petitioner's daughter be submitted annually in the month of November as is done in the case of pensioners.

(ii) This Court also understands that this process would take some time for due compliance as there would be the requirement of various formalities/concurrences from various Departments which this Court estimates to take around 6 (six) months. Under such circumstances, this Court directs the Commissioner and Secretary to the Government of Assam, Health and Family Welfare Department to disburse an amount of Rs.1,00,000/- to the Bank Account of the Petitioner within a period of 30 days from the date of this judgment and thereupon ensure that within a period of 6 (six) months, the monthly stipend along with the cost of the caretaker is paid as directed hereinabove.

(iii) This Court further directs the Commissioner and Secretary to the Government of Assam, Health and Family Welfare Department as well as the Mission Director, National Health Mission to take effective steps so that the child of the Petitioner is evaluated at least twice a year by a pediatrician till she attains the age of 18 and by a physician after she attains the age of 18. Further to that, the said authority shall also ensure that a neurologist of the

GMCH provide the necessary consultations from time to time as per the need of the child of the Petitioner. The said authorities shall also ensure that medical treatment as well as the rehabilitation training which is presently being offered to the petitioner's daughter is continued so that the Petitioner's daughter is in a position to live a reasonably dignified life.

(iv) The Respondent Nos. 1 and 2 shall also in consultation with the Social Welfare Department provide the orthotic device supports as are required so that the Petitioner's daughter could achieve some degree of independent walking abilities.

(v) Further to the above, this Court also directs the Respondent Authorities in the Health Department to ensure that the daughter of the Petitioner is provided the support at the District Early Intervention Centre (DEIC) where physiotherapist and speech therapist are provided free of cost.

(vi) This Court further directs the Social Welfare Department to provide the necessary assistance in respect to the medical devices which would be required so that the Petitioner's daughter is in a position to continue with the dignified life.

(vii) In addition to the above, the Respondent Authorities shall also provide the other assistance which are required as stated in the report enclosed to the additional affidavit filed by the Respondent No.1 on 26.04.2022 more particularly at Clause B, C and D as already quoted hereinabove.

(viii) This Court further directs that the Respondent Authorities shall periodically evaluate the health conditions of the Petitioner's daughter and her welfare needs and take appropriate steps accordingly.

(ix) This Court further finds it relevant to observe that as this Court is disposing of the instant writ petition, liberty is given to the Petitioner to approach the Secretary, District Legal Services Authority, Darrang, if the directions herein are not complied with. The District Legal Services Authority, Darrang shall thereupon intimate the said aspect of the matter to the Secretary, State Legal Services Authority who in turn shall inform the Registrar (Judicial) of this Court so that the matter can be thereupon placed before this Court for passing appropriate directions.

(x) The above directions are passed taking into account the exceptional facts of case and more particularly when the rare complications of ADEM occur at 0.8 per lakh of vaccinated children.

31. Before parting, this Court finds it very relevant to note that keeping the writ petition pending for all these years have yielded results inasmuch as this Court could monitor the progress of the treatment of the daughter of the Petitioner and pass appropriate directions. During the passage of time on account of the commendable assistance of Mrs. R. S. Choudhury, Mr. Budhadip Gogoi, Advocates as well as the assistance provided by the Respondents in the Health Department, National Health Mission as well as the Social Welfare Departments, it is seen that this Court no longer is required to keep the instant writ petition pending, for which this Court have disposed of the same in terms with observations and directions given hereinabove.

JUDGE

Comparing Assistant