
Before M.M. Kumar, J

FULLA DEVI @ FULLO DEVI,—Appellant/Plaintiff

versus

STATE OF HARYANA & OTHERS,—Respondents/Defendants

R.S.A. No. 368 OF 2002

18th August, 2003

Code of Civil Procedure, 1908—Failure of a tubectomy operation—Birth of an unwanted female child after two years of operation—Doctor failing to establish that he performed his duty with reasonable degree of care & skill—Negligence on the part of doctor—Appellant held entitled to compensation—Trial Court order awarding compensation to the appellant upheld.

Held, that the reason given by the learned District Judge is that there was an unwanted pregnancy. The family could have gone for pre-mature termination of such a pregnancy. The learned District Judge ignored the statement made by the appellant that she approached the Civil Hospital who advised her not to go for the operation because it was dangerous to her life. The view taken by the learned District Judge does not deserve to be accepted. It has been found as a fact that the plaintiff/appellant underwent a tubectomy operation on 19th December, 1995 and the operation was conducted by one Dr. Kulbhushan Jain, Medical Officer, Pehowa who was posted at Community Health Centre, Pehowa. He also issued a certificate to that effect. It has also been found to be a fact that the plaintiff-appellant gave birth to a female child on 20th November, 1997, within two years of the operation which was apparently due to failure of the tubectomy operation. Once there is a failure in performing the tubectomy operation, an unwanted female child has born. It has to be assumed that there was a negligence and the doctor has failed to act with reasonable degree of care and skill.

(Paras 3 & 6)

Pritam Saini, Advocate, *for the appellant.*

N. K. Joshi, AAG, Haryana, *for the respondents.*

JUDGMENT

M.M. KUMAR, J.

(1) This is plaintiff's appeal filed under Section 100 of the Code of Civil Procedure, 1908 (for brevity, the 'Code') which is directed against the judgment and decree dated 9th November, 2001 passed by the District Judge, Kurukshetra, reversing the judgment and decree dated 14th May, 2001 passed by the Additional Civil Judge (Senior Division), Kurukshetra. The Civil Judge has decreed the suit filed by the plaintiff-appellant holding that the tubectomy operation had failed because of the negligence on the part of the defendant-respondents. The negligence on the part of the defendant-respondents. resulted into birth of a third unwanted female child to the plaintiff-appellant which has apparently burdened the plaintiff-appellant financially. The plaintiff-appellant is proved to be a poor lady who had already four children and has also been under considerable financial burden. The trial Court assessed the expenses for bearing of the child to Rupees 4,000 per year and applied the multiplier of 18 years. Accordingly, she was given Rs. 72,000 as compensation for up bringing of the unwanted child and Rupees 18,000 on account of expenses incurred by her on her treatment, damages and pain including litigation expenses. The trial Court had also awarded interest at the rate of 12 per cent per annum. However, the learned District Judge has dismissed the suit by holding that in such like sterilisation operations there is always a chance of failure which was explained to the plaintiff-appellant. According to the learned District Judge, the doctor of the Government cannot be held responsible for such failure. The observations of the learned District Judge read as under :—

“8. Thus the only controversy to be resolved in this case is whether the said sterilisation operation failed in routine per chance, or because of the negligence on the part of the operating surgeon. However, about this it would be noted that when examined as DW-1 Dr. S.S. Saini, the concerned medical officer of Lok Nayak Jai Parkash Hospital, Kurukshetra has stated categorically that on 19th December, 1995 he had performed the impugned sterilisation operation upon the plaintiff and at that time had told her categorically that despite of such sterilisation operation, still there was risk of failure and she had thumb-marked the application/consent letter, Ex. D-1, in this regard and a close scrutiny of the same also shows

that therein too it is mentioned specifically that such operation may fail and for that neither the doctor nor the Government Hospital shall be responsible for such failure. Moreover, it is well settled that there is some chance of failure in operation for such sterilisation and in the Text Book of Gynaecology, including contraception, third Edition, by D.C. Datta, M.B.B.S., D.G.O., M.O. (Calcutta) Professor and Head, Department of Obstetrics and Gynaecology Nilratan Sircar Medical College and Hospital, Calcutta 3rd Edition, it is mentioned at page 459 that failure rate of mini lap sterilisation is 0.1-0.2-0.6%. Likewise in Te Linde's Operative Gynaecology, Sixth Edition, by Richard F. Mattingly, M.D. Professor and Chairman, Department of Gynaecology and Obstetrics the Medical College of Wisconsin, Milwaukee, Wisconsin, and John D. Thompson, M.D. Professor and Chairman, Department of Gynaecology and Obstetrics, Emory University, School of Medicines, Atlanta, Georgia, U.S.A., it is mentioned that in case of tubal sterilisation, even if both tubes are properly ligated, still 1 to 20 per 1000 women may conceive in the future. Thus for the simple reason that the plaintiff-respondent conceived despite of such sterilisation, it cannot be claimed that the same itself shows that the operating surgeon, namely Dr. S.S. Saini, holding post-graduate degree in surgery, was negligent in performing such sterilisation operation."

(2) The judgment in the case of **State of Haryana versus Smt. Santra**, (1) has been distinguished on the ground that in **Smt. Santra's case** (supra), the doctor had admitted negligence on his part by stating that both of the fallopian tubes should have been operated upon whereas the operation was conducted only on the right Fallopian Tube. According to the learned District Judge, this fact impelled the Supreme Court to award compensation to Smt. Santra. The observations of the learned District Judge in this regard read as under :—

"9.....However, a close scrutiny of the same shows that therein Smt. Santra had offered herself for complete sterilisation/operation and for the same it was observed

that both of her fallopian tubes should have been operated upon, whereas the operation surgeon had himself admitted that sterilisation operation upon the lady was not complete, as in that operation only right fallopian tube was operated upon, while the left of such tube was left untouched, and for the same the Court held that this very fact exhibited negligence on the part of the operating surgeon, who had performed the operation. Moreover, therein in spite of such incomplete operation the lady was told that such sterilisation operation was successful and she would not conceive any child in future, whereas in fact she conceived and delivered unwanted female child and only in such circumstances the operating surgeon was held liable to pay compensation to her. Further-more, even the State was held liable vicariously to pay the said amount of compensation to the lady, who had undergone such sterilisation, but in the case in hand it is not so, as herein it is not shown that the operating surgeon, namely Dr. S.S. Saini, DW-1, was negligent in any manner while performing the impugned sterilisation operation upon the plaintiff-respondent Smt. Phulla Devi. Rather when examined in the court as DW-1, he has stated categorically that he has taken due care and caution at the time of performing such operation and the same was successful. Thus this authority cited by the learned counsel for the plaintiff-respondent and even relied upon by the learned trial court does not help the plaintiff-respondent in proving her case of negligence on the part of the operating surgeon and simply on the basis of the same she is not entitled to claim compensation.

10. Further, a close scrutiny of the said authority relied upon by the learned counsel for the plaintiff-respondent, as well as the trial court shows that therein it was also held that when a person is guilty of negligence *per se*, no further proof is needed and as discussed to above therein the operating surgeon had himself admitted that he had sterilised only one of the fallopian tube and did not touch the other, but in the case in hand, it is not so."

(3) Another reason given by the learned District Judge is that there was an unwanted pregnancy. The family could have gone for pre-mature termination of such a pregnancy. The learned District Judge ignored and the statement made by the plaintiff-appellant that she approached the Civil Hospital who advised her not to go for the operation because it was dangerous to her life.

(4) Mr. Pritam Saini, learned counsel for the plaintiff-appellant has argued that the District Judge has made an unwarranted distinction between the facts of the instant case and the judgment of the Supreme Court in *Smt. Santra's case (supra)*. According to the learned counsel, all the distinctions pointed out by the District Judge have already been taken into consideration by the Supreme Court in *Smt. Santra's case (supra)* and the same stand rejected.

(5) Mr. N.K. Joshi, the learned State Counsel made an attempt to support the judgment of the District Judge by maintaining the distinction as pointed out in the impugned judgment by arguing that in the instant case, all care has been taken with regard to tubectomy operation performed on the plaintiff-appellant.

(6) After hearing the learned counsel for the parties and perusing the judgments of both the Courts below, I am of the considered opinion that the view taken by the learned District Judge does not deserve to be accepted. It has been found as a fact that the plaintiff-appellant underwent a tubectomy operation on 19th December, 1995 and the operation was conducted by one Dr. Kulbhushan Jain, Medical Officer, Pehowa who was posted at Community Health Centre, Pehowa. He also issued a certificate to that effect Ex. P.1. It has also been found to be a fact that the plaintiff-appellant gave birth to a female child on 20th November, 1997, within two years of the operation which was apparently due to failure of the tubectomy operation. On the basis of the aforementioned facts, the question which required to be determined is whether negligence on the part of the doctor is inferable or it has to be ignored, as opined by the District Judge in his judgment. Once there is a failure in performing the tubectomy operation, an unwanted female child has born. It has to be assumed that there was a

negligence and the doctor has failed to act with reasonable degree of care and skill. In the case of **Poonam Verma versus Ashwin Patel and others (2)**, the question of medical negligence was considered in the context of treatment given by Doctor. Various manifestations of negligence were considered by the Supreme Court in para 40 of the judgment which read as under :—

“Negligence has many manifestation-it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, wilful or reckless negligence or Negligence per se, which is defined in Black’s Law Dictionary as under :—

Negligence *per se*: Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.”

(7) Similar observations have been made in the case of **M/s Spring Meadows Hospital and anr. versus Harijol Ahluwalia, (3)**. The Supreme Court in **Smt. Santra’s case (supra)** has pointed out that negligence is a ‘tort’ and there is a duty imposed on every doctor to act with reasonable degree of care and skill. The observations of Their Lordships in **Smt Santra’s case (supra)** read as under :—

“Negligence is ‘tort’. Every Doctor who enters into the medical profession has duty to act with a reasonable degree of care and skill. This is what is known as ‘implied undertaking’

(2) 1996 (4) S.C.C. 332

(3) JT 1998 (2) S.C. 620

by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. In *Bolam v. Frient Hospital Management Committee* (1957) 2 AIR 18, McNair, J. summed up the law as under :

“The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well establishment law that it is sufficient if he exercise the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent.”

(8) The aforementioned principles make it evident that proof of actual negligence in such like relatively simple surgeries is not required. The application of *Smt. Santra's* case to the facts of the present case cannot be refused merely on the ground that in *Smt. Santra's* case the doctor appearing as a witness had admitted the negligence in performing surgery and therefore, it must be assumed that in the present case reasonable degree of care and skill has been exercised. It appears that by citing the observations of the Supreme Court from the judgment in *Poonam Verma case (supra)*, the principle of negligence *per se* would be attracted and it has to be concluded that the arrival of a femal child despite sterilisation operation is a *per se* proof of negligence unless the contrary was proved that the doctor has performed his duty with reasonable degree of care and skill. Therefore, the principles in *Smt Santra's* case are fully applicable to the facts of the present case.

(9) The appeal is allowed. The suit of the plaintiff-appellant is decreed and she is held entitled to compensation of Rupees 90,000 with interest at the rate of 9 per cent per annum.

R.N.R.