(2003) 07 GAU CK 0041

In the Gauhati High Court

Case No : WP (C) No''s. 41, 129, 139, 176, 194, 282, 484, 566, 567 and 616 of 2001 and 53, 55, 56, 61, 62 and 65 of 2002

Archana Paul — APPELLANT

Vs

State of Tripura and Others — RESPONDENT

Date of Decision : 10-07-2003

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2005) ACJ 158 : AIR 2004 Guw 7 : (2003) 3 GLR 675

Hon'ble Judges : P.K. Sarkar, J

Bench : Single Bench

Advocate : S. Deb Sr, S. Deb Jr, B. Das, S. Das, S. Datta, S. Roy, P.K. Biswas, H.K. Bhowmik, S. Bhattacharjee, P. Majumder, B. Ghosh, S. Debnath, A.L. Saha, J. Paul, S. Majumder, M. Bhattacharjee, P. Roy, B.N. Majumder, D.C. Deb, M.K. Bhowmik, R.R. Dutta and K.C. Pal, for the Appellant; U.B. Saha, A. Ghosh, T.D. Majumder, S. Chakraborty, R. Chakraborty, S. Talapatra, H.K. Bhattacharjee, B. Choudhury, B. Das, J. Majumder, A.M. Lodh, M. Dutta, P.S. Roy, A. De, P. Roy Barman, R. Debnath, P.R. Barman, B. Saha and M. Debroy, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Sarkar, J.—These group of cases involved the same questions of facts and law and, therefore, I decide by this common judgment.

2. In all these cases, the petitioners are poor women who had two/three children and had opted for sterilisation in different Health Camps in Tripura and in Govt. Hospital, but subsequently had to bear pregnancy and ultimately some of them gave birth to a female child and some gave birth to a male child inspite of sterilisation operation by Govt. Doctors. It is, therefore, contended by the petitioners that the doctors who conducted the sterilisation operation were negligent and the operation failed for which they became pregnant inspite of sterilisation operation. All these petitioners therefore filed these writ petitions claiming compensation as damages and for maintaining the unwanted child for medical negligence.

3. The Govt. and the doctors who were made parties in some of the writ petitions filed counter-affidavit stating that the sterilisation scheme as framed by the Central Govt. was undertaken by the Tripura Govt. and taking the advantages of the scheme, these petitioners got sterilisation mostly in ninety''s and some of them in the year 2000, After sterilisation operation was performed in the petitioners, they were issued certificates to that effect. It was contended that there was no negligence on the part of the Medical Officer while performing sterilisation operation and it was clear to the petitioners that this operation is likely to succeed, but there was no guarantee that the operation is 100 percent proved against the sterilisation. The petitioners also contended that when they felt that they had become pregnant, they approached the Govt. doctors who told them that after sterilisation operation they cannot have pregnancy. But when pregnancy became apparent, the doctors advised not to go for abortion as the same would be dangerous to life.

4. In W.P.(C) 484/01, the petitioner went for termination of pregnancy and pregnancy was terminated but the petitioner claimed for compensation due to pain and agony of the pregnancy. All the petitioners had two/three children and in fact, after sterilisation operation put them to unnecessary burden of bearing up a child, as also of the expenses involved in the maintenance of the child including expenses towards their clothing and education. It was in these circumstances that these writ petitions were filed by the petitioners.

5. The respondent Govt. in addition had taken the plea that the writ petitions are not maintainable on the ground that no allegation has been made against the Medical Officer who has conducted the sterilisation operation - the manner in which the negligent committed or even the petitioners were silent in which way the operation was unsuccessful. It was further contended that whether the negligence was committed by the Govt. doctors is purely a question of fact which cannot be decided by this Court under writ jurisdiction. It is also contended by the Respondent-Medical Officer as well as by the Govt. that in all these group of writ petition, the petitioners had undergone sterilisation by Leperoscopic Ligation Operation. In the Leperoscopic sterilisation the tubes are not disconnected by cutting a portion of fallopian tube. The tubes are tied by wearing scientific rings.

6. After sterilisation operation written instructions are given to the petitioners to visit the hospital or primary health centre at regular intervals and in case of any complication, to contact the Medical Officer immediately for check up by the doctors. It is contended that after the operation none of the petitioners contacted the Medical Officer either in Govt. hospital or primary health hospital and they have allowed the pregnancy to become matured and ultimately they gave birth to a male or female child. It is further contended that no assurance was given to the petitioners that they would not have any conception in future, on the contrary it was informed to the petitioners about the success, failure and risk of the operation and also about the pre-caution to be taken after operation and to contact the Medical Officer of the nearest hospital immediately if there is any

stoppage of monthly period or any other gynaecological problem. It was further contended by the Medical Officer and the Govt. in the counter-affidavit that in the leparscopic sterilisation there are chances of failure and failure is due to spontaneous recanalisation of human organs which is supremacy of the nature on human being. There is established failure rate of sterilisation in case of laperoscopic operation which varies from 0.2% to 2.63% and this failure has been universally accepted. The Internationally Study Group reported the failure rates between the 0.2% to 2.63% following laperoscopic sterilisation. The Text book - Manual of Clinical problems in obstetrics and Gynaecology (4th Edition) by Michel E. Riviln, Rick W, Martin at page 330 on the topic of Female Sterilisation reported that failure of female sterilisation varies from 0.9 to 6.0 percent per thousand and 99% of the failure cases is due to spontaneous recanalisation.

7. It is further stated in the counter-affidavit of the Govt. that at the time of laperoscopic ligation operation, all petitioners submitted applications for sterilisation operation. The extract of the application is as follows :

"I have consulted my wife/husband regarding my decision to undergo sterilisation operation, which has been taken independently by me and my wife/ husband without any outside pressure, inducement or coercion. I know that for all practical purpose this operation is irreversible. I know that there are some chances of failure of the operation for which Government/Hospital/Operating surgeon cannot be held responsible. My spouse is not sterilised earlier."

8. It is further contended that after giving the aforesaid declaration, the doctors conducted the sterilisation operation on the petitioners after explaining them the method of operation. The petitioners have deliberately suppressed all these medical facts. Although laperoscopic sterilisation by fallopian ring failed in the case of the petitioners, the doctors and Govt. cannot be held responsible as they fall within the category of failed sterilisation due to recanalisation or supremacy of human body played a major part in their case. It is also stated that for failure rate of sterilisation which is beyond the control of human being, the respondents cannot be held liable for unwanted child of the petitioners. It is further stated that if the petitioners could have reported the Hospital authority as advised by the Medical Officer, the pregnancy could have been terminated and re-sterilisation could have been done. But due to negligence of the petitioners, they allowed the pregnancy to be matured and ultimately gave birth child. It is further stated that family sterilisation programme by way of laperoscopic ligation has been done in different hospital, primary Health Centre, Sub Centres and Camps by competent medical officers of Gynaecology. The Medical Officer who have done operation with utmost earnest and care and dedication cannot be blamed for the failure as in the case of laperoscopic sterilisation certain percentage of failure is bound to happen because of recanalisation. The Medical Officer also contended that they have done the operation with utmost care and diligence and there was no negligence on their part and therefore, they cannot be held responsible for subsequent pregnancy of the petitioners.

9. I have gone through many medical journals and text book on sterilisation. According to the Medical Expert, Leperoscopic is the commonly employed method of endoscopic sterilisation. It is gradually becoming more popular specially, in health camps. Procedure is mostly done under local anaesthesia. The operation is done in the interval period when women is not pregnant, concurrent with vaginal termination of pregnancy or six weeks following delivery. The procedure can be done either with single puncture or double puncture technique. The fallopian tubes are occluded either by a silastic ring (silicon rubber with 5% barrium sulphate) devised by falope or by Filshie clip made of titanium lined by with silicone rubber. In Tripura, in case of all the petitioners, leperscopic ligation sterilisation has been done with using fallopian rings. Before operation is conducted, the patients are given anaesthesia either by pethidine or Phenergan or Atropine taking usual aseptic precautions about 10 ml of 1% xylocaine hydrochloride is to be infiltrated at the puncture site (just below the umbilicus) down up to peritoneum. A small incision (1.25 cm) is made just below the umbilicus (naval region). The verres needle is introduced through the incision in 45 degree angulation into the Peritoneal cavity. The abdomen is inflated with about 2 litres of gas (carbondioxide or nitrous oxide or room air or oxygen). Thereafter, introduction of trocar and laparoscope with ring loaded applicator - Two silastic rings are loaded one after the other. On the applicator with the help of the loader and pusher, the trocar and the canula is introduced through the incision previously made with a twirling movement. The trocar is removed and the leperscope together with the ring applicator is inserted through the canula. The ring loaded applicator approaches one side of the tube and grasps at about 2-3 cm from the utero-tubal junction. A loop of the tube (2.5 cm) is lifted up, drawn into the cylinder of the applicator and the ring is slipped into the base of the loop under the direct vision. The procedure is repeated on the other side. After viewing that the rings are properly placed in position the tubal loops looking white and there is no intraperitoneal bleeding, the leperoscope is removed. The gas or air is deflated from the abdominal cavity. The abdominal wound is satured by a single chromic catgut sature. The over all failure rate in tubal sterilisation is about 7%. The pomeroy technique (tubectomy) being the lowest. 1-3 percent in contrast to madleners being 1.5% to 3%. The failure rate is increased when it is done during hysterotomy or during caesarian operation. The rate of failure in laperoscopic procedure is 1 to 10 in thousand sterilisation. However, according to some expert, failure rate may rise to 2 to 6% per thousand and according to some other experts, the failure rate may be 3 to 6% per thousand. International Studies reported failure rates between 2% to 2.63% following laperoscopic operation. According to the Medical Experts, the causes of failure in laperoscopic sterilisation is due to:

(a) Re-canalisation of the cut ends of the fallopian tubes by the natural process of union.

(b) Tubo-peritoneal fistula formation.

(c) In appropriate application of the ring due to deep adhesion among the nearby structures, when identification of the tube become difficult.

(d) Disease condition of the lower abdomen such as PID Endometriosis and other disease condition.

(e) Slipping or tearing of the ring.

There may be other cause which are not yet known to the medical faculty. In a word it can be said that the failure of sterilisation is the nature''s over power on human effort to maintain the nature rule of pregnancy. In the instant case, there is no allegation against any Medical Officer who has conducted the sterilisation operation that he has not taken due care and diligence when conducting the operation. Further there is no statement when the operation failed; whether it is because of the negligence of the operating doctor or because of natural failure for any of the reasons indicated above.

10. Mr. S. Deb, learned senior counsel appearing on behalf of some of the petitioners argued that the petitioners had undergone sterilisation operation but subsequently developed pregnancy and ultimately gave birth of a male or female child in spite of sterilisation operation which obviously had failed. Mr. Deb accordingly submits that there was complete negligency on the part of the Medical Officer who had conducted the sterilisation operation otherwise petitioners can not become pregnant after sterilisation. It is also submitted by Mr. Deb that since the Medical Officer was negligent in conducting the sterilisation operation, the State should compensate the petitioners for unwanted child and also for rearing them up and the State should also bear all the expenses involved in the maintenance of the child including the expenses towards cloths and education. Mr. Deb relied on a decision of the Apex Court reported in AIR 2000 SC 1888 (State of Haryana and Ors. v. Santra). Mr. Deb relying on the aforesaid decision of the Apex Court submits that the Trial court as also lower appellate Court recorded concurrent findings that the sterilisation operation performed upon Smt. Santra was not complete as in that operation only right fallopian tube was operated while the left fallopian tube was left untouched. The High Court also dismissed the appeal filed by the State of Haryana and lastly the Apex Court has also dismissed the appeal filed by the State of Haryana and awarded compensation to Smt. Santra by way of damages and the Apex Court directed the State Govt. to compensate the petitioner Smt. Santra.

11. Relying on the aforesaid decision, Mr. Deb submits that in all the present cases, the petitioners had undergone sterilisation operation, but in spite of sterilisation operation, they gave birth male or female child and therefore, the State should compensate them adequately. I do not agree with the submission of Mr. Deb. On plain reading of the aforesaid judgment it is clear that Dr. Sushil Kumar Goyal who was examined as DW 2 stated in his evidence that Smt. Santra''s sterilisation operation was not successful. Dr. Goyal further stated that

the operation related only to the right Fallopian Tube and the left Fallopian Tube was not touched which indicated that complete sterilisation operation was not done. In the present cases, none of the petitioner alleges that Fallopian Tube on both sides were not put in right position. In Santra''s case, it was therefore held that since the left Fallopian Tube was not put in right place, it was not a complete sterilisation. In the instant case, there is no whisper even by the petitioners that incomplete operation was done on any of the petitioners by the Medical Officer or the doctors were negligent in conducting the sterilisation operations.

12. Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive 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."

13. In the instant case there is no averment in the petition how the doctors conducted the sterilisation operation was negligent. Further, if negligent is alleged, then the specific case is to be made out that in what manner the doctor was negligent in conducting the operation. In this regard, I am in complete agreement with the learned Govt. Advocate that negligence when alleged against any person it is a question of fact which can be decided by oral and documentary evidence. This Court under writ jurisdiction cannot decide such question of facts. There is no allegation in the instant petitions against the Medical officers that they did not take reasonable and competent degree of skill while performing the operation.

14. The law requires a fair and reasonable standard care and competence by the Medical Officer towards his1 profession. If the sterilisation operation failed due to the carelessness of the doctor or the doctor was not using due care and caution at the time of operation, the medical officer can be held responsible for the failed sterilisation, but in the instant case there is no such allegation against the medical officers. Lord Denning M.R. rightly pointed out in Hucks v. Cole (1968) 118 NLJ 469 as follows :

"A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was

so grave, so should the proof be clear. With the best skill in the world, things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong. He was not liable for mischance or misadventure; or for an error of judgment. He was not liable for mischance or misadventure or for an error of judgment. He was not liable for taking one choice out of two or for favouring one school rather than another. He was only liable when he fell below the standard of a reasonably competent practitioner in his field so much so that his conduct might be deserving of censure or inexcusable."

15. Having regard to the aforesaid observation, I am clearly of the opinion that in the instant case all the medical officers who are competent surgeon in gynaecology has taken due care and skill while conducted the operation. But in case of petitioners, the operation failed because of recanalisation or for tubo-peritoneal fistula formation or may be for any other reasons which has neither been stated by the petitioner nor disclosed at the time of argument. From the report of the various medical experts, it is evident that in leperscopic sterilisation, failure rate is between 2% to 2.63% and this has been clearly stated to all the petitioners before sterilisation operation was conducted, and all the petitioners had given their undertaking in case of failure of sterilisation operation, they will not be held responsible the Medical Officer or Govt. in any manner as there are chances of failure in leperscopic sterilisation. It cannot be that Medical Officer who has undertaken sterilisation operation has given any assurance to any of the petitioners that after the operation there is no chance of pregnancy. The object of taking undertaking only indicates that there are chances of failure in sterilisation operation and therefore, undertakings were taken from the petitioners before sterilisation operations. Consequently, I am of the view that the petitioners were aware that there were chances of failure in the sterilisation operation and therefore, they were advised for check up by the medical officer in regular intervals, but none of the petitioners have followed the instructions of the Medical Officers.

16. In Writ petition 53/02 and Writ petition 139/02 it appears that the petitioners were pregnant when sterilisation operation was done and they have concealed this fact to the Medical Officer. In W.P.(C) 53/02, the petitioner gave birth to a child within 8 months of sterilisation operation and the petitioner of WP(C) 139/02, gave birth to a child within seven months from the date of sterilisation. In both the cases, the petitioner intentionally suppressed the fact of their pregnancy otherwise they cannot deliver the child within seven and eight months from the date of sterilisation operation. The minimum period for giving birth of a child is 280 days which means 9 months 10 days. These two petitioners gave birth to a full grown child within seven and eight months respectively from the date of sterilisation operation and, therefore, these two petitions are liable to be summarily dismissed.

17. The skill of Medical Officers differ from doctor to doctor. The very nature of

the profession is such that there may be more than one course of treatment which may be advisory for treating a patient. Court would indeed be slow in attributing negligent on the part of the doctor if he has performed his duties to the best of his ability with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient. But as long as a doctor acts in a manner which is acceptable to the medical profession and Court finds that he attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold that the doctor to be guilty of negligence. In the instant cases, there is nothing to show that the Govt. doctors did not take due care, skill and diligence while performing the sterilisation operation. On the contrary, the Medical Officers in their counter-affidavit has clearly stated that they have taken due care, skill and diligence while undertaking the sterilisation operation.

18. From the above facts it is clear that the Medical Officers while undertaking laperoscopic sterilisation operation did not act negligently and had acted in accordance with the standard practice. There is nothing on records to indicate that in the Hospital or Primary Health Centre or Health camps, the petitioners were not attended with due care and the Medical Officers while undertaking operation did not act with reasonable care or had acted in such a manner which had fallen short of standard of reasonable medical care.

19. On the basis of the above facts and settled legal position, it can not be said that there was any negligence on the part of the Medical Officers so as to saddle any of them with any liability in the instance cases. Though I have sympathy for the petitioners yet I have my own limitation in view of the legal position explained and reasons already stated. The petitioners in these group of cases are not entitled to any relief. Accordingly all these petitions filed by the petitioners are dismissed. In the facts and circumstances of the case, parties are left to bear their own costs.

20. Interim order passed in different petitions stands vacated. However, if in pursuance of any interim order any payment has been made by the Govt. to the petitioner, in that event, the money would not be realised from the petitioner.

