
(2011) 05 SHI CK 0009

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 471 of 2001

Pushpa Devi (Smt.)

APPELLANT

Vs

Government of Himachal Pradesh and others

RESPONDENT

Date of Decision : 25-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2011) 2 ShimLC 454

Hon'ble Judges : Surinder Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Surinder Singh, J.—The present regular second appeal u/s 100 of the CPC filed against the concurrent findings of the Courts below returned against the plaintiff, which was admitted on the following substantial questions of law:-

1. Whether the Courts below failed to appreciate the evidence on record?
2. Whether the principle of res-ipsa loquitur are applicable to the facts and circumstances of the present case?

2. The brief facts giving rise to the present appeal are that on 2.4.1991, the appellant herein underwent the sterilization operation, but despite that she became pregnant and delivered a female child. It is alleged that defendant No. 4 Dr. Radha Chopra was negligent in performing the aforesaid operation, thus, she claimed Rs. 1,05,000/- as damages/compensation as follows:-

Sl. No.

Nature of claim

Amount

1.

Expenses incurred during pregnancy.

Rs. 2,000,00

2.

Expenses for delivering the female child.

Rs. 5,000.00

3.

Invalidity of the Green Card.

Rs. 10,000.00

4.

For bringing up and marriage of female child.

Rs. 80,000.00

5.

Damages for mental tension

Rs. 8,000.00

Total claim:

Rs. 1,05,000.00

3. The suit of the plaintiff was resisted and contested by the defendants. They raised the preliminary objections viz. locus-standi of the plaintiff to file the suit, valuation and jurisdiction. On merits, they denied any negligence on their part and particularly on the part of defendant No. 4, who performed the sterilization operation after following the requisite procedure. It is specifically averred that there are chances of failure of such operation despite taking all the precautions by the doctors as well as by the person, who is to be operated upon. If the lady is already pregnant on the day of the operation, she could abort within three months, but it was a case of concealed pregnancy at the time of operation. She was advised to undergo abortion, but she failed to act as per medical advice, thus, there is no question of paying any damages to her because she had chosen to deliver her child knowing fully the consequences, if any.

4. On the pleadings of the parties, the learned trial Court framed following issues:-

1. Whether the defendants were negligent in performing operation of the plaintiff as alleged?..OPP.

2. If issue No. 1 is proved in affirmative, whether the plaintiff is entitled to chum damages, if so, to what extent?..OPP.

3. Whether the suit is bad for want of legal and valid notice?..OPD.

4. Whether the plaintiff has no cause of action?..OPD.

5. Whether the suit is not maintainable?...OPD.

6. Whether the plaintiff has no locus-standi to file the suit?..OPD.

7. Relief.

5. Since the learned trial Court held that there was no negligence on the part of the doctor in performing the sterilization operation, the suit of the plaintiff was dismissed. Feeling dissatisfied by the impugned judgment and decree, plaintiff filed the appeal before the learned District Judge, which was also dismissed, hence the present second appeal.

6. Shri Neel Kamal Sood, learned Counsel for the appellant vehemently argued that the doctor did not take appropriate tests and precautions while performing the operation and the plaintiff was not informed of follow-up treatment/ action, if any. Since it is admitted by the defendants that the plaintiff had undergone the sterilization operation, the very fact of delivering the female child proves negligence on the part of the defendants, as such, the plaintiff was entitled for the damages claimed on the basis of doctrine of res-ipsa loquitur.

7. Contra, Shri A.K. Bansal, learned Additional Advocate General dislodged the above arguments, submitting that all the necessary tests and precautions were performed by the doctor and the evidence on record proves that the doctor had taken due care and caution while performing the sterilization operation, but despite that the plaintiff delivered a female child which could be due to the fact that 2-3 days prior to the said operation admittedly plaintiff had sex with her husband and she concealed this fact. Further, if the child was unwanted, the plaintiff could have undergone the abortion under the medical advice. The learned Additional Advocate General led me through the authoritative books, the extract of which are Ex.DW3/B on "Principles of Gynaecology". Ex.DW3/C of William Obstetrics, also the relevant extract from Ex.DW3/D of Te Linde's "Operative Gynaecology" and the extract from the Book of "Preventive and Social Medicine" Ex.DW3/E to show that there remains the chances of failure of sterilization operation notwithstanding due care and caution of performing the said operation. Thus, supporting the issue-wise concurrent findings arrived at by the Courts below, the submission is made to dismiss the appeal.

8. I have given my thoughtful consideration to the respective contentions of the parties and have carefully gone through the law and the facts in the instant case closely and minutely.

9. "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.

10. The essential components of the modern tort of "negligence" propounded by the celebrated authors "on negligence" Charlesworth and Percy are as follows:-

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

(b) the failure to attain that standard 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 conform 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.* (1936) AC 85 (103) 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 plaintiff approached defendant No. 4 for sterilization, with a clear object not to bear any more children, it was therefore the duty of the defendants to ensure that operation is successful. A breach of any of those duties gives a right of action for negligence to the patient. The doctor must bring to his task a reasonable degree of skill, knowledge and care.

13. I hasten to add that the professional has no duty to guard against the risk which is beyond the ambit of the contemplation of the doctor and as such duty enforceable. With the best will in the world things sometimes can amiss in surgical operation or medical treatment. A doctor is not to be held negligent simply because something goes wrong. He is not liable for mischance, but he becomes only liable when he falls below the standard of a reasonable 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 of his qualifications or job title.

14. Supreme Court in a recent judgment *Kusum Sharma and Others Vs. Batra Hospital and Medical Research Centre and Others*, while dealing with the cases of negligence, examined various pronouncements and while deciding whether the medical profession is guilty of medical negligence held that following well known

principles must be kept in view:-

I. Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XL The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

95. In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence. We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duties with free mind.

15. In *Jacob Mathew Vs. State of Punjab and Another*, conclusions summed up by the Court were very apt and some portions of which are reproduced hereunder:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage".

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

(3) The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

16. It is well established that the negligence in the context of the medical profession necessarily calls for a treatment with a difference. Any task which is

required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A physician would not assure the patient of full recovery of every case. Similarly, a surgeon cannot or and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100%, for the person operated upon. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. (Also see Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Others,

17. Thus, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. As already stated above, the standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. A case of occupational negligence of the medical doctor, is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment would also be available or simple case a more skilled doctor would not have chosen to follow or resort to that practice or procedure, which the accused followed.

18. Judged by the above standards, the plaintiff in the instant case failed to prove the negligence of Doctor. As PW-1 plaintiff clearly stated that on 2.4.1991, she was medically checked up by defendant Dr. Radha Chopra before sterilization operation and further stated that when she approached her for the sterilization operation, she was made to understand all the pros and cons of such operation. She was asked about the menstruation, which took place on 2.3.1991. She further stated that 2-3 days prior to the said operation, she had a sexual intercourse with her husband. She was got thoroughly medically checked-up. She also admitted having executed consent form Ex.D1. She is under-matric and admitted that the doctor had informed to her if she was pregnant no sterilization

operation would be performed. He further stated that after about two months, she sustained pain in her stomach and got her medically checked-up and only then she came to know that she was carrying the pregnancy.

19. DW-2 Dr. M.R. Lamba testified that the plaintiff was subjected to the pregnancy colour test, available with them, which was negative. He proved OPD slip Ex.DW2/A. Defendant Dr. Radha Chopra (DW-3) also testified this fact. There is absolutely no specific denial to this effect.

20. DW-4 Dr. Renu Milan, a Specialist and Expert Gynaecologist stated that there is only test for pregnancy which was available, was the "pregnancy-colour test". Thus, the operation of the plaintiff was performed after clinical examination of the plaintiff for determination of the pregnancy. The Medical Journals referred to above clearly states that none of the chemical tests for pregnancy is sufficiently accurate to provide positive proof of pregnancy. Further Te Linde's Operative Gynaecology Fifth Edition makes the mention that all methods of tubal sterilization suggest that an acceptable failure rate is about 1 to 5 per thousand. The failures of tubal sterilization occur in two ways: resumption of ovum and sperm migration may be made possible by-

(i) recanalization of the tube, or

(ii) formation of a tubo-peritoneal fistula or an endometrial-peritoneal fistula at the uterine cornu.

Even the laparoscopic sterilization with the silastic band and Hulka clip technique to date has the failure of operation @ of 2 to 6 per thousand.

21. Thus, from the above, it is apparent that it is difficult to accurately detect the pregnancy in a short span of a week from the coitus and further there are acceptable failure rates of the sterilization operation. The very short duration of pregnancy on the date of operation cannot be detected despite due care and caution adopted by the doctors, in view of clear cut admission by the plaintiff that she had a coitus with her husband 2-3 days prior to the sterilization operation. Medical Expert has been examined by the plaintiff to prove that there are ways and means or any authenticated technique available to detect the pregnancy within such a short span. Further the plaintiff did not seek the opinion of the Medical Board to establish that she had conceived because of the negligence of the doctor(s). The plaintiff is under-matric. She executed the consent form Ex.D1. She was aware of the other methods of contraception. She was also made aware that there are some chances of failure of operation for which the defendants could not be held responsible. She underwent the operation, which carried the element of risk. She was also informed about the eligibility criteria of the operation to which she affirmed despite that she was ready and willing to undergo the sterilization operation. She also did not go for abortion despite medical advise rather prepared to deliver a child, which cannot be said to be an unwanted one.

22. Therefore, the learned trial Court in my considered opinion has rightly declined the relief sought for by dismissing her suit and also the appeal by the First Appellate Court. Further in the aforesaid set of the circumstances, the doctrine of res-ipsa-loquitur has no application at all. Thus, the above substantial questions of law are accordingly answered. The appeal sans merit and is accordingly dismissed.

23. Parties are left to bear their own costs.

24. Send down the records.