
(2014) 10 OHC CK 0025
In the Orissa High Court
Case No : RVWPET No. 16 of 2014

Rukmuni Das

APPELLANT

Vs

State of Odisha and Others

RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:

Constitution of India, 1950 — Article 21

Citation : (2015) 120 CLT 387 : (2015) 1 ILR 225

Hon'ble Judges : Amitava Roy, C.J.; Akshaya Kumar Rath, J.

Bench : Division Bench

Advocate : Dhaneswar Mohanty, for the Appellant

Final Decision : Dismissed

Judgement

Amitava Roy, C.J.? Heard Mr. D. Mohanty, learned counsel for the review applicant. By the instant application, a review of the judgment and order dated 18.12.2013 rendered in W.P.(C) No. 3156 of 1997 has been sought for.

2. The review applicant had instituted the aforementioned writ proceeding attributing medical negligence in conducting tubectomy operation on her for the failure whereof she had conceived for the third time and had eventually given birth to a female child on 3.4.1996. She had pleaded that she had undergone the tubectomy surgery on 17.4.1993, whereafter she had duly been issued one Green Card entitling her to the benefits enumerated in the relevant regulations of the Health and Family Welfare Department of the State of Orissa. Alleging that due to deficiency in the surgical procedure involved, she did sustain financial loss and also suffered from mental agony she sought the intervention of this Court by filing the writ petition for an appropriate writ directing the opposite party to pay adequate compensation and for releasing all benefits as contemplated for a Green Card Holder. A direction to take steps for rectification of the operational errors free of costs was also prayed for.

3. This Court by order dated 18.12.2013 dismissed the writ petition in the

following terms:

"This petition seeks direction to award compensation to the petitioner for medical negligence.

The case of the petitioner is that after giving birth to two male children, the petitioner underwent Tubectomy operation on 17.04.1993. Still, petitioner conceived the third child. Accordingly, the petitioner is entitled to compensation to meet the cost of the third child and to compensate for the mental agony on account of the birth of the third child.

We have heard learned counsel for the petitioner.

It is well settled that mere failure of the Tubectomy operation could not be held to be medical negligence entitling the person undergoing such operation to compensation.

Reference is made to the decision of the Supreme Court in the case of State of Punjab Vs. Shiv Ram and Others, and Martin F. D'Souza Vs. Mohd. Ishfaq, .

Accordingly, this petition is dismissed."

4. According to the review applicant, this adjudication suffers from errors apparent on the face of the records, inasmuch as, this Court had left out of consideration the fact that failure of the tubectomy operation did per se demonstrate medical negligence of the performing surgeon for which the State was vicariously liable to pay compensation. This is more so, as in spite of the notice no counter had been filed by the opposite party. That the medical negligence involved had resulted in infringement of the review applicant's right to life as enshrined under Article 21 of the Constitution of India has also been emphasized.

5. Learned counsel for the petitioner while emphatically reiterating the above has placed reliance on the decisions of the Apex Court in State of Haryana and Others Vs. Smt. Santra, and that of the Allahabad High Court in Smt. Shakuntala Sharma and another Vs. State of U. P. and others, .

6. We have carefully analysed the pleaded facts, the documents on records and the arguments advanced.

7. The instant application being one for review, the scope of scrutiny essentially is constricted and limited by the parameters recognized in law. As would be evident from the judgment and order dated 18.12.2013, a coordinate Bench of this Court did hold that mere failure of the tubectomy operation could not per se be demonstrative of medical negligence entitling the person undergoing the same to compensation. This view was sought to be sustained by referring to the decisions of the Hon"ble apex Court in State of Punjab Vs. Shiv Ram and Others, ; and Martin F. D'Souza Vs. Mohd. Ishfaq, .

8. Evidently in the facts pleaded in the writ petition and also in the review

application, except stating that the review applicant/writ petitioner had undergone tubectomy operation on 17.04.1993 and in spite thereof, she had conceived thereafter, there is no material to establish the medical negligence on the part of the doctor performing the related surgery.

9. The Hon''ble apex Court, dealing with the aspect of medical negligence in *Jacob Mathew Vs. State of Punjab and Another*, , had while laying down the guidelines to construe negligence in the context of medical profession had propounded that simply because a patient has not responded favourably to a treatment given by the physician or because a surgery had failed, the doctor cannot be held liable per se by applying the doctrine of *res ipsa loquitur*.

10. In *State of Punjab Vs. Shiv Ram (supra)*, the Hon''ble apex Court, after a dialectical analysis of the facts in the case of *State of Haryana Vs. Santra (supra)*, as relied upon on behalf of the review applicant, held that the cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of childbirth. It was held, in the contextual facts, in *State of Haryana Vs. Santra (supra)* that the lady involved had offered herself for complete sterilization and not for partial operation and, therefore, both her fallopian tubes should have been operated upon, but it was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched and she was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in those facts and circumstances, that the case of medical negligence was held to be proved for which the compensation in tort was adjudged to be justified.

11. In *Martin F. D'Souza (supra)*, the Hon''ble apex Court, amongst others, referring to *Jacob Mathew (supra)* held that a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another, and he could be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. The enunciation in *Martin F. D'Souza (supra)* resonated as hereunder:

"40. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightaway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse."

In the same vein it was held in *Bolam Vs. Friern Hospital Management Committee*, (1957) 2 All ER 118, 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 at the risk of being found negligent. It is well-established law that it is sufficient if he

exercises 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 a medical man conforms with one of those proper standards then he is not negligent."

The preponderant judicial opinion is thus that medical negligence cannot be presumed as a matter of routine ipso facto, if the patient does not respond to the treatment administered or the surgery undergone, in absence of any proof of failure on the part of the doctor concerned to act in accordance with the standard of reasonable competent medical man at all relevant times.

12. Not only in State of Haryana Vs. Santra (supra) there was an admission that the sterilization operation was not successful and that the lady involved was not subjected to complete sterilization, in Smt. Shakuntala Sharma (supra) as well it was not denied that the operation was unsuccessful. Therefore, these decisions turn on their own facts and are thus distinguishable from those as obtain herein.

To reiterate, in the instant case there is neither any admission on the part of the opposite party nor any proof of medical negligence vis-a-vis the petitioner as acknowledged in law. Further, to reiterate, the instant is a proceeding seeking review of a judicial adjudication made on merits.

On an overall consideration of all aspects enumerated hereinabove, we thus see no reason whatsoever to entertain the instant petition and it is thus dismissed.