

(2023) 05 GUJ CK 0028

In the Gujarat High Court

Case No : R/First Appeal No. 164, 479 Of 2004, Civil Application (For Stay) No. 2 Of 2004

Sajjanben Bharatsinh Rathod

APPELLANT

Vs

State Of Gujarat & 3 Other(S)

RESPONDENT

Date of Decision : 05-05-2023

Acts Referred:

Citation : (2023) 05 GUJ CK 0028

Hon'ble Judges : Nikhil S. Kariel, J

Bench : Single Bench

Advocate : MC Bhatt, Surbhi Bhati, HS Munshaw

Final Decision : Dismissed/Disposed Of

Judgement

Nikhil S. Kariel, J

1. Heard learned Advocate Mr. Robin Prasad in both the captioned appeals for learned Advocate Mr. M.C. Bhatt and for learned Advocate Mr. V.J. Thakor on behalf of the appellants respectively, learned AGP Ms. Surbhi Bhati for the respondent-State in both the appeals and learned Advocate Mr. H.S. Munshaw for the respondents No. 2 and 3 in First Appeal No.164 of 2004. None appears for respondents No.4 in First Appeal No. 164 of 2004. None appears for respondents No. 2 and 3 in First Appeal No. 479 of 2004.

2. Since a common issue has arisen in both the first appeals, with consent of parties, the first appeals are taking up for final hearing jointly.

3. Since facts in both the appeals would differ slightly, therefore for the sake of convenience, the same are stated as herein below :

First Appeal No. 164 of 2004 :

4. The present appeal calls into question judgment and order dated 27.11.2002 passed by the learned City Civil Court, Ahmedabad in Civil Suit No. 6081 of 1990.

5. Original plaintiff - appellant herein had preferred the first appeal inter alia contending that the plaintiff had approached the V.S. Hospital under the Ahmedabad Municipal Corporation for family planning operation on 23.07.1984, and whereas it was stated that since the plaintiff was advised that the family planning operation is the safest for prevention of pregnancy and since it is a permanent measure, therefore the plaintiff had agreed to undergo the operation which was performed on 23.07.1984. After the operation the plaintiff was informed that the operation was successful and whereas upon follow up operation the plaintiff was informed that she would not conceive in future. However, the plaintiff had become pregnant in the year 1986 and delivered a female child in the month of June, 1987. The plaintiff had therefore brought about the Civil Suit alleging that on account of the tortious act on the part of the respondents the plaintiff had suffered damages and therefore an amount of Rs. 50,000/- was claimed for bringing up the child and giving her necessary educational amenities and an additional compensation of Rs. 10,000/- was sought for, for the mental shock and suffering by the plaintiff. The suit had been contested by the plaintiff. The learned City Civil Court vide the impugned judgment and order had dismissed the Civil Suit, and hence the first appeal has been preferred assailing the impugned judgment and order.

First Appeal No. 479 of 2004 :

6 The said first appeal calls into question judgment and order passed by the learned 5th Joint Civil Judge, Mehsana in Special Civil Suit No. 160 of 2001, dated 23.12.2003. It is stated that the plaintiffs No. 1 and 2 are husband and wife and whereas the plaintiff No.2 had undergone family planning operation on 09.01.1998 at Primary Health Center, Camp at Kheralu, by the defendant No.3 under an intensive movement of family planning by the Government. That the plaintiff was given to understanding that there was 100% success in the said operation and whereas since the plaintiffs already had 3 children and since they did not want any more children, the plaintiff No. 2 had obtained for the same. It was stated that the operation was performed on 09.01.1998 and on account of the negligence of the doctor, the operation was a failure, resulting in the birth of a child named Akshaykumar on 22.01.2000. The plaintiff had thereupon preferred the Civil Suit in question praying for compensation of Rs. 2,00,000/- and whereas the same had been dismissed by the learned Civil Court vide the judgment and order dated 23.12.2003.

7. Heard learned Advocate Mr. Robin Prasad for the appellants in both the appeals and whereas learned Advocate Mr. Prasad would very fairly contend that as of now, after the decisions of the Hon'ble Apex Court on the issue of compensation for failure in family planning operation, the scope to interfere is very limited. Learned Advocate would submit that the Hon'ble Apex Court in case of State of Haryana Vs. Santra, reported in 2000 (3) GLR 2309, had inter alia observed that the doctor as also the State must be held responsible in damages if the sterilization operation performed by him is a failure on account of

negligence of the doctor who is directly responsible for another work in the family. Learned Advocate would submit that in the said case there were concurrent findings that the sterilization operation performed upon the respondent therein was not complete as in that operation only the right fallopian tube was operated upon while the left tube was left untouched. Learned Advocate would submit that thereafter a Full Bench of the Hon'ble Apex Court in case of State of Punjab Vs. Shiv Ram, reported in 2005(7) SCC 1, had inter alia laid down the law that merely because a woman having undergone a sterilization operation became pregnant and delivered a child the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. According to learned Advocate, the Hon'ble Apex Court further held that the claimant will have to prove negligence on the part of the surgeon and that the surgeon had assured 100% success on account of which the plaintiff was pursued to undergo surgery. Learned Advocate would submit in this regard that in a later decision, the Hon'ble Apex Court in case of Kusum Sharma Vs. Batra Hospital and Medical Research Center, reported in 2010 (3) SCC 480 had inter alia laid down the principles to determine medical negligence by a medical professional and whereas according to learned Advocate, the said principles also would hold the field insofar as the present issue is concerned. Learned Advocate would submit that since in both the impugned decisions the fact of the concerned plaintiff having undergone sterilization operation is not in dispute, therefore the failure of such sterilization operation could directly be attributable to the negligence on the part of the doctor and whereas under such circumstances, the plaintiffs - appellants herein were entitled to be compensated by the respondents.

8. These appeals are vehemently contested by learned AGP Ms. Surbhi Bhati on behalf of the respondent-State. Learned AGP Ms. Bhati would submit that the issue is in a very narrow compass inasmuch as according to learned AGP, the appellants for being entitled for any compensation had to prove that the sterilization operation had failed on account of negligence of the doctors, who had performed the operation which had resulted in the appellants conceiving and whereas only if such an aspect is proved would the appellants be entitled for any relief. Learned AGP would further submit that in both the appeals, the appellants had not proved the aspect of negligence of the operating doctors and whereas the said aspects have been elaborately discussed by the learned Judges of the Trial Courts and whereas the appellants have not been able to prove before this Court also that the operation had failed on account of negligence. Learned AGP would therefore submit that under such circumstances, no interference whatsoever is called for.

9. Learned Advocate Mr. Munshaw appearing for the respondent Nos. 2 and 3 in First Appeal No. 164 of 2004, has adopted the submissions of learned AGP Ms. Bhati and would submit that the learned Trial Courts after having elaborately discussed the evidence having reached the conclusion as regards there being no negligence on the part of the operating doctors and whereas since it appears that

the appellants even before this Court having not been able to prove the same, therefore no interference is called for.

10. Heard learned Advocates for the respective parties and perused the record including the impugned judgments of the learned Trial Courts as well as the record and proceedings of both the appeals.

11. The following questions arise for determination of this Court.

(1) Whether the appellants are able to prove that the operating doctors had been negligent resulting in the failure of the sterilization operation? (2) Whether the impugned decisions i.e. the judgment and order dated 27.11.2002 passed by the learned City Civil Court, Ahmedabad in Civil Suit No. 6081 of 1990 corresponding with First Appeal No. 164 of 2004, and the judgment and order dated 23.12.2003 passed by the learned 5th Joint Civil Judge, Mehsana in Special Civil Suit No. 160 of 2001 corresponding with First Appeal No. 479 of 2004, call for interference?

(3) What order ?

11.1 My answers to the questions raised for determination are as follows :

(1) In Negative.

(2) In Negative.

(3) As per final order.

Issue Nos. 1 and 2 :

12. Since issue Nos. 1 and 2 are co-related, both the issues are taken up for consideration jointly.

13. At the outset, it would be relevant to discuss the law on the issue of negligence of doctor with regard to failed sterilization operation. The Hon'ble Apex Court in case of State of Haryana Vs. Raja Rani reported in 2005(7) SCC 22 at Para No.3 has observed as thus :

"(3.) A 3 -Judge Bench of this Court has held in State of Punjab V/s. Shiv Ram & Ors. that child birth in spite of a sterilization operation can occur due to negligence of the doctor in performance of the operation, or due to certain natural causes such as spontaneous recanalisation. The doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several text-books on medical negligence have recognized the percentage of failure of the sterilization operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed by a proficient doctor successfully by adopting a technique recognized by medical science. Thus, the pregnancy can be for reasons de hors any negligence of the surgeon. In the

absence of proof of negligence, the surgeon cannot be held liable to pay compensation. Then the question of the State being held vicariously liable also would not arise. The decrees cannot, therefore, be upheld."

13.1 As noted in the above quoted paragraph, the Hon'ble Apex Court relying upon an earlier decision of the Hon'ble Apex Court in case of State of Punjab Vs. Shiv Ram (supra), had observed that in case of child birth in spite of a sterilization operation, the doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise.

14. This aspect has been slightly elaborated by the Hon'ble Apex Court in case of Civil Hospital and Ors. Vs. Manjit Singh and Anr. (decision dated 06.09.2022 in Civil Appeal No. 6208 of 2022), more particularly relying upon the decision in case of State of Punjab Vs. Shiv Ram (supra). Relevant observations of the Hon'ble Apex Court are reproduced hereinbelow for benefit.

"The reliance is placed on the judgment of this court reported as State of Punjab Vs. Shiv Ram & Ors., (2005) 7 SCC 1 to contend that the failed tubectomy surgery is not a case of medical negligence as the sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. This Court held as under:-

"28. The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice....."

30. 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 child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.""

14.1 From the above quoted decision of the Hon'ble Apex Court, it would evident that relying upon the law laid down by the Hon'ble Apex Court in case of State of Punjab Vs. Shiv Ram (supra), the Hon'ble Apex Court had inter alia observed that in case of a failed sterilization operation, in addition to negligence, the sterilized woman can also become pregnant due to natural causes. If such a woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. If the couple, having gathered the knowledge of conception in spite of the sterilization operation opts for bearing the child then the child ceases to be unwanted and whereas compensation for maintenance and

upbringing of such a child cannot be claimed.

15. Now considering the facts situation in the perspective of the law laid down by the Hon'ble Apex Court as noted hereinabove, it would appear that both the learned Trial Courts have come to the conclusion that the appellants i.e plaintiffs therein have failed to prove negligence. It also requires to be noted here that the learned Advocate for the appellants had also submitted that in view of the law laid down by the Hon'ble Apex Court in case of Kusum Sharma Vs. Batra Hospital and Medical Research Center, reported in 2010 (3) SCC 480, the principle of *res ipsa loquitur* would have to be applied inasmuch as the birth of a child after a sterilization operation, implies negligence on part of the operating doctor.

16. In the considered opinion of this Court, if one were to consider the observations of the Hon'ble Apex Court in case of State of Punjab Vs. Shiv Ram (supra), it would appear that no prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative Text Books on Gynecology and empirical researches which have been carried out recognize the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognized and accepted once. The Hon'ble Apex Court had further observed that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. Relevant observations at Para Nos. 17 and 24, wherein the Hon'ble Apex Court has inter alia observed as above, are reproduced hereinbelow for benefit.

"(17.) It is thus clear that there are several alternative methods of female sterilization operation which are recognized by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is foolproof and no prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative Text Books on Gynaecology and empirical researches which have been carried out recognize the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognized and accepted ones. The technique which may be foolproof is removal of uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be performed for purposes other than merely family planning.

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(24.) We are, therefore, clearly of the opinion that merely because a woman

having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy Bolam's test. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to here-in-above, ordinarily a surgeon does not offer such guarantee."

17. At this stage, it would be relevant to also refer to the law laid down by the Hon'ble Apex Court in case of Kusum Sharma (supra), where the Hon'ble Apex Court at Para No.94 had inter alia enumerated certain principles to be kept in view while dealing with a case of medical negligence. The said Paragraph is reproduced hereinbelow for benefit.

"(94.) On scrutiny of the leading cases of medical negligence both in our country and other countries specially United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence 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.

XI. 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."

17.1 A perusal of the general principles would reveal that at no place does the Hon'ble Apex Court propound the theory of *res ipsa loquitur* in proving medical negligence, rather as could be discernible from the Point Nos. I to IV, it would appear that there has to be a negligence which has to be established by the prosecution, more particularly the conduct of the medical practitioner should be established as being below that of the standards of a reasonable competent practitioner in his field for establishing liability.

18. From the impugned decisions of the learned Trial Courts as well as on appreciation of the material placed before the learned Trial Courts while it would be evident that there had been a sterilization operation, both the appellants have failed to prove that the failure of the operation was on account of the negligence by the operating doctors. It also does not appear that any evidence had been led to show that immediately upon the woman missing her menstrual cycle, she had immediately approach the doctor for appropriate advise. As it is, as far as the appellant of First Appeal No. 164 of 2004 is concerned, it would appear that she had visited the hospital for follow up check up after three months and she did not have any complains. Though it was submitted that the appellant had thereafter visited the hospital and consulted the doctor for termination of pregnancy, but the doctor had advised against such a procedure and whereas there was no material produced in support of such contention.

18.1 On the other hand, insofar as the appellant of First Appeal No. 479 of 2004 is concerned, it appears that the appellant-plaintiff had not brought anything on record to show that upon the appellant-plaintiff missing her menstrual cycle, she had immediately consulted the doctor, more particularly in view of the fact that the child birth had happened approximately two years after the operation in question.

19. In view of the discussion above, more particularly in view of the fact that the appellants had not led any evidence in line with the law laid down by the Hon'ble Apex Court as discussed hereinabove, and whereas since it appears that upon the appellants-plaintiffs missing their menstrual cycle, they had not approached the doctor concerned and furthermore since negligence per se has not been established, therefore the issue Nos. 1 and 2 are answered in negative.

Issue No. 3 :

20. In view of the discussion hereinabove, in the considered opinion of this Court, no interference is called for in judgment and order dated 27.11.2002 passed by the learned City Civil Court, Ahmedabad in Civil Suit No. 6081 of 1990 corresponding with First Appeal No. 164 of 2004, and in judgment and order dated 23.12.2003 passed by the learned 5th Joint Civil Judge, Mehsana in Special Civil Suit No. 160 of 2001 corresponding with First Appeal No. 479 of 2004, hence the present appeals fail and are hereby dismissed.

21. In view of the order passed in the main appeal, the Civil Application No. 2 of 2004 would not survive, hence the same is disposed of accordingly.

22. Registry to transmit the record and proceedings back to the learned Trial Courts concerned.