

(2002) 07 MP CK 0013
In the Madhya Pradesh High Court
Case No : Writ Petition No. 627 of 2001

Smt. Jyoti Kewat	Vs	APPELLANT
State of M.P. and Another		RESPONDENT

Date of Decision : 08-07-2002

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 227

Citation : (2003) 1 MPHT 482

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : A.K. Tiwari, Manish Datt, Amicus Curiae, for the Appellant; S.K. Yadav, Government Advocate for Respondent No. 1 and Satish Chandra Sharma, for the Respondent

Final Decision : Partly Allowed

Judgement

Dipak Misra, J.—Gone are the days of yore when the mythical King Sagar was instrumental in procreation of 60,000 sons who were burnt to ashes by the wrath of Kapil Muni and the great devotee King Bhagirath, by his incomparable and inimitable penance, brought Goddess Ganges from the heaven for their salvation. The presentation may be a myth, a symbol or a metaphor or an image to convey an idea or it may be a portrayal of a larger than life situation to strike home a point. The phenomenon as has been depicted may be accepted in a symbolic manner but it cannot be literally construed either to give a denotative meaning or a connotative expanse for the simple reason that no one by whatever reason, at present, be permitted to get himself or herself engaged in procreation of this magnitude as that would lead to untold and unimaginable cataclysm and catastrophe.

2. At this juncture I may clarify at the cost of repetition that the purpose of putting forth the aforesaid myth is only to indicate that a distinct scene has emerged in the last few decades in "Bharat" where the primary duty of every citizen has been emphasized to have limited number of children. The welfare

state has taken number of measures to facilitate the said action so that the country is not overblown by the growth of population perpetuating maladies like non-availability of nutritious food, non-getting of proper hygienic living atmosphere, non-employment and violence to nature. The active and effective step taken by the State Government is Family Planning and in this planning numerous facets are highlighted to curtail the growth of population by lessening the procreation of the off-spring beyond a particular number. One such measure is introduction of operation on the husband - the male sterilization. In medical terminology it is called Vasectomy. The centrum question that arises for adjudication in the present writ petition is if the operation results in failure whether the wife who has been compelled to bear a child despite of her desire, because of the trust reposed in the consequence of operation would be entitled to damages or compensation or should she suffer the ignominy and indignity by hearing unwarranted whispered comments from the collective ? Should the State as well as the operating surgeon be allowed to get off scot-free ?

3. Presently to the factual setting. The petitioner who had already given birth to two children, a son, named Amit and a daughter, named Neelu, amicably decided with the consent of her husband not to have any more children as they felt it was extremely difficult on their part to provide appropriate facilities to the already begotten children. To concretise the decision taken, as per the scheme floated by the State Government, the husband of the petitioner, Sharda Prasad, decided to undergo the Vasectomy operation. The operation took place on 14-11-1996 at the Medical College, Jabalpur and the same was carried out by the respondent No. 2. The certificate bearing registration No. 2266 indicating that the operation had taken place on 14-11-1996 has been brought on record as per Annexure P-1. After the operation the husband of the petitioner carefully and scrupulously followed the advice rendered by the doctor. Despite the care taken by the spouse of the petitioner the trouble cropped up and the petitioner got herself examined. It was perceived that she was pregnant and eventually a female child was born on 30-11-1998. The petitioner prayed to the authorities of the Medical College complaining that she was facing immense trouble in the society and had been mentally anguished and physically affected. The doctors gave a mechanical reply that due to the failure of the operation the child was born. They prescribed certain medicines and assured that she would not pave on the path of procreation in the future. The petitioner felt assured but the assurance given by the doctors died early and she again became pregnant and another child was born on 16-10-1999. The birth certificate issued by the Government Medical College Hospital, Jabalpur in the Department of Obstetrics and Gynaecology has been brought on record as Annexure P-3.

4. It is pleaded that at that juncture the petitioner got herself examined by the authorities of Netaji Subhash Chandra Bose Medical College, Jabalpur and in the examination it was mentioned that it was a case of V.T. failure. Thereafter she filed an application before the Dean, Medical College, Jabalpur, on 7-9-1999 indicating her plight. She sent a registered notice claiming compensation of Rs.

2.5 lacs. One lac each for maintenance of each child and Rs. 50,000/- for the physical suffering, social shame and mental agony faced by her. Though the notice was received by the respondents, a sphinx like silence was maintained. According to the writ petitioner she has suffered ignominy due to the negligence of the doctor who had carried out the operation and he being employed under the State she is entitled to be awarded compensation by the State. It is put forth in the petition that in spite of the operation of Vasectomy having already been carried out on the husband, she gave birth to two children. She has undergone unwarranted insult, uncalled for humiliation, unimaginable shame and incurable demoralisation and hence, it is the bounden obligation of the State to maintain the children. The dignity, as set forth by her, has been affected and a purposeful and meaningful life has been denied to her as she has been subjected to such indignity. It is urged in the petition that she is a poor lady living with her husband and they have no source for livelihood and it is extremely difficult to maintain the children by providing them adequate requisite facilities and, therefore, she should be granted compensation of Rs. 2.5 lacs. It is worth noting to mention here that a plea is advanced that people are raising eyebrows against her indicating that the children are not legitimate and she is leading an adulterous life as she has begotten children though her husband had undergone a sterilization operation.

5. A counter affidavit has been filed by the respondent No. 2, the doctor who had conducted the operation. It is put forth that the Vasectomy is performed on the male person and it is not the petitioner who had been operated. According to the said respondent he had conducted 102 Vasectomy operations between the year 1987 till 1992. The factum of operation of the petitioner has not been disputed. It is pointed out that any operation done by a Resident Surgical Officer is supervised by the consultant surgeon. In the present case the operation was done by him on the husband of the petitioner under the guidance and supervision of Dr. L.P. Ahirwar and thence the Resident Surgical Officer cannot be blamed and the responsibility of failure of the operation, if any, is on the Consultant Surgeon under whose guidance and supervision a Resident Surgical Officer performs his duties. It is put forth that so far as Vasectomy operation is concerned, there is possibility of its failure. Certain extracts from the text books have been brought on record to highlight that there is possibility of failure. It is also set forth by him that the patient who undertakes the operation in question has to comply with the instructions given to him by the doctor and he is required to report for periodical check-ups as directed. The husband of the petitioner was operated on 1441-1996 and before being operated upon he gave an undertaking in which it was clearly mentioned that in the event of failure of the operation the hospital administration/Surgeon would not be responsible. The undertaking given by the husband of the petitioner has been brought on record as Annexure R-4. The husband of the petitioner never appeared for the post-operational check-ups as directed, and therefore, it was not possible on the part of the respondent No. 2 to carry out any physical check-up of the husband of the petitioner and to give

him necessary advice. As the husband of the petitioner had exhibited a lackadaisical attitude it is he who is to be blamed and not the respondent. The patient has not taken due precautions as directed. It is also set forth whether there had been failure of the operation can only be ascertained after clinical examination of the patient but no document has been filed regarding the failure of Vasectomy operation which has resulted in birth of two children. It is contended in the return that in absence of any special clinical test conducted upon the husband of the petitioner it cannot be said that the operation performed on him by the respondent No. 2 had resulted in failure. Further the case of the respondent No. 2 is that the petitioner's husband served a legal notice on the respondent No. 1 which was duly enquired into by Dr. B.K. Raina, who at that point of time was the Professor in the Department of Surgery and he submitted a report pertaining to the operation. In the report dated 10-5-2000 Dr. Raina had informed that the husband of the petitioner though was operated never came for post-operative examination to avail the follow-up treatment. Report of Dr. Raina dated 10-5-2000 has been brought on record as Annexure R-5. Though the petitioner had come to know about the failure of the operation in question on her husband she did not take any care nor did she get her husband operated again. The sheer negligence on the part of the petitioner and her husband makes them guilty and, therefore, they are not entitled for any compensation. Callousness on the part of the petitioner has been emphasized in the return to exposit that the negligence squarely rests on the petitioner and her husband and they cannot be given benefit of their own negligence.

6. It is noteworthy to mention here that an application has been filed by the respondent No. 2 for taking additional facts and documents on record. In the said application it has been set forth that the operation was performed on 14-11-1996 and the first delivery took place on 13-11-1998 after almost 24 months and the petitioner, though fully aware of the failure entered into second pregnancy knowingly and deliberately. Highlighting this it has been stated that the fault exclusively lies on the petitioner but a maladroitness attempt has been made to put the blame on the respondent No. 2. It is also stated that the husband of the petitioner chose not to avail post-operative medical check-up nor did he follow the instructions given to him. No semen analysis was done after the operation. When the petitioner became pregnant for the first time she did not care to inform this fact to the medical authorities otherwise MTP/LTT/VT (Redo) could have been done. Certain texts relating to medical termination of pregnancy have been brought on record as Annexures R-6 and R-7. It is also the case of the respondent No. 2 that it is not established whether the Vasectomy operation had failed or not. In case of immediate failure pregnancy could have been occurred earlier which has not taken place in the present case. Late pregnancy occurs in case of late failure which can be on account of recanalization. It is also put forth that in absence of semen analysis or DNA test of children it cannot be conclusively proved that Vasectomy operation has failed.

7. On a perusal of the pleadings that has been put forth by the parties three

questions emerge for consideration, namely, whether the failure in the operation had occurred due to negligence on the part of the respondent No. 2; secondly whether the husband of the petitioner had contributed by his conduct to be a catalytic factor in causation of failure of the operation; and thirdly whether the State is liable to compensate the petitioner for negligence caused by its employee. Be it noted that if it is proven that the operation had failed due to the negligence on the part of the respondent No. 2, the legal consequences are to follow.

8. Before I proceed with regard to the nature of operation, the chances of failure, the role of the person who has undergone the operation to see that the operation is successful and such other ancillary factors I think it apposite to notice certain decisions which relate to the concept of negligence of a doctor carrying out an operation. In the case of *Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another*, , the Apex Court while dealing with an action for negligence in tort against a surgeon held as under :--

"The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task 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 require."

9. In this context I may profitably reproduce a passage from Mason's Law and Medical Ethics, 4th Edition as has been produced by their Lordships in the case of *Indian Medical Association Vs. V.P. Shantha and Others*, . It reads as under :--

"A patient who has been injured by an act of medical negligence has suffered in a way which is recognised by the law and by the public at large as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of a future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident."

In the said case the Apex Court in para 24 held as under :--

"24. It would thus appear that medical practitioners, though belonging to the medical profession are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act

and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected."

10. In the case of A.S. Mittal and Another Vs. State of U.P. and Others, , while taking note of the fact that irreparable damage had been done to the eyes of some of the patients who were operated on at an eye camp the Apex Court held as under :--

"A mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one."

11. It is worthwhile to note here that in the case of V.P. Shantha (supra) the Apex Court had approved a passage from Jackson and Powell of professional negligence and expressed thus :--

"The approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services."

12. In the case of Achutrao Haribhau Khodwa and Others Vs. State of Maharashtra and Others, , a two Judge Bench of the Apex Court in Paragraph 14 held as under:--

"14. The skill of medical practitioners differs 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 advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and 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 the Court finds that he has 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 the doctor to be guilty of negligence."

13. In the said case the Apex Court referred to the concept of vicarious liability of the State and expressed the view as under :--

"Two recent decisions where the State has been held to be vicariously liable on account of the negligent acts of its employees are those of N. Nagendra Rao and Co. v. State of A.P. and State of Maharashtra v. Kanchanmala Vijaysingh Shirke. In Nagendra Rao case some goods had been confiscated pursuant to an order passed u/s 6A of the Essential Commodities Act, 1955. The said order was annulled but due to the negligence of the officers concerned goods were not found to be of the same quality and quantity which were there at the time of its confiscation. The owners of the goods refused to take delivery and filed a suit

claiming value of the goods by way of compensation. The High Court of Andhra Pradesh held that the State was not vicariously liable for negligence of its officers in charge of their statutory duties. Negating this, this Court while allowing the appeal observed as follows :--

"In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even material. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc., which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in *Viscount Cantebury*. But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State."

In the said case considering the totality of circumstances the judgment of the Trial Court whereby damages were granted was restored and reversal thereof by the High Court was set aside.

14. In this context, I may also refer to the decision rendered in the case of *Sudha Gupta Vs. State of M.P. and Others*, wherein the Full Bench held as under :--

"40. If the State action results in individual damage to a particular citizen, the State has to provide redress whether or not there is a fault committed by the public officers concerned. The State in such matters is an insurer of what is often called an essential risk. If the impugned act is not referable to any delegation of sovereign power of the State would be liable for the tortious act committed by a public servant in discharging its official function or in the course of his employment. The State is not immune from the liability merely because the act complained of may have been done in exercise of Governmental power. The State is liable for the tortious act of its servants in that circumstance, that makes the relation between the State and that of servant identical with the circumstances of private employment. However, unless it is shown that the employee was acting in exercise of sovereign power delegated to him by some law or rule and was doing something which could not be done by a private individual the State cannot claim immunity. The mere fact that the act may or

may not have been done in a course of Governmental activity is inconclusive. In deciding whether a particular act was done by a Government servant in discharge of a sovereign power delegated to him the proper test is whether it was necessary for the State for the proper discharge of its sovereign functions to have the act done through its own employee rather than through a private agency."

15. In this regard I may refer with profit to the decision rendered in the case of Poonam Verma Vs. Ashwin Patel and others, , wherein the Apex Court considered the facet of medical negligence and expressed the view as under :--

"40. 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."

16. The medical ethics has been regarded to have the paramount role in the society. Starting from the days of Hippocrates till the days of the moderns immense signification and importance have been given on medical ethics. Under no circumstances it can be regarded as a triviality. Marginalisation of the same would amount to anathema of basic human morality. One may conceive that doctors are targetted but the same has no place in the world of actual practice where medical ethics are to be the governing factor. In this regard I may profitably refer to the decision rendered in the case of Spring Meadows Hospital and Another Vs. Harjol Ahluwalia through K.S. Ahluwalia and Another, , wherein it has been held as under :--

"In the case in hand we are dealing with a problem which centres round the medical ethics and as such it may be appropriate to notice the broad responsibilities of such organisations who in the garb of doing service to the humanity have continued commercial activities and have been mercilessly extracting money from helpless patient and their family members and yet do not provide the necessary services. The influence exerted by a doctor is unique. The relationship between the doctor and the patient is not always equally balanced. The attitude of a patient is poised between trust in the learning of another and the general distress of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and it is, therefore, the function of

medical ethics to ensure; that the superiority of the doctor is not abused in any manner. It is a great mistake to think that doctors and hospitals are easy targets for the dissatisfied patient. It is indeed very difficult to raise an action of negligence. Not only there are practical difficulties in linking the injury sustained with the medical treatment but also it is still more difficult to establish the standard of care in medical negligence of which a complaint can be made. All these factors together with the sheer expense of bringing a legal action and the denial of legal aid to all but the poorest operate to limit medical litigation in this country..... In recent days there has been increasing pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever increasing complexity of therapeutic and diagnostic methods and all this together the responsible for the medical negligence. That apart there has been a growing awareness in the public mind to bring the negligence of such professional doctors to light. Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a Court can accept that ordinarily human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonable skill of a competent doctor."

17. It is obligatory on my part to refer to a two Judge Bench decision rendered in the case of State of Haryana and Ors. v. Smt. Santra AIR 2000 SC 1888, which has been placed reliance upon by Mr. Tiwari. In the said case their Lordships spoke thus :--

"In a country where the population is increasing by the tick of every second on the clock and the Government had taken up the family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, 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 his negligence which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilization. "Negligence" is a "tort". Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as "implied undertaking" by a member of the medical profession that he would use a fair, reasonable and competent degree or skill. Where a person is guilty of negligence per se, no further proof is needed. The Medical Officers entrusted with the implementation of the Family Planning Programme cannot, by their negligent acts in not performing the complete sterilisation operation, sabotage the scheme of national importance."

It is appropriate to state here that in the case of Smt Santra (supra) the Apex Court addressed itself with regard to the aspect relating on whom the expenses shall be saddled for bringing up the unwanted children. Their Lordships referred

to many a decision rendered by various Courts in the globe and also took note of the decision rendered by this Court in the case of State of Madhya Pradesh and Others Vs. Asharam, and thereafter in Paragraphs 40 and 41 held as under :--

"40. Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up the family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of him negligence, which is directly responsible for another birth in the family creating additional economic burden on the person who had chosen to be operated upon for sterilisation.

41. The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilisation operation cannot be accepted. In view of the law settled by this Court in N. Nagendra Rao and Co. Vs. State of Andhra Pradesh, , Common Cause, A Registered Society Vs. Union of India and Others, and Achutrao Haribhau Khodwa v. State of Maharashtra 1996 Acc CJ 505 : (AIR1996 SCW 919 : Achutrao Haribhau Khodwa and Others Vs. State of Maharashtra and Others, . The last case, which related to the fallout of a sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a Govt. hospital. The theory of sovereign immunity was rejected."

Eventually in Paragraph 42 their Lordships directed that the respondent Santra was entitled to claim full damages from the State Government to enable her to bring up the child who was a girl at least till she attained puberty.

18. Mr. Tiwari, learned Counsel for the petitioner has also drawn inspiration from the Division Bench decision rendered in the case of Smt. Shakuntala Sharma and another Vs. State of U. P. and others, In the said case the petitioner, Shakuntala Sharma had filed the writ petition for issue of a writ in the nature of mandamus commanding the State of U.P. to pay her and her newly born child compensation for a sum of Rs. 10 lacs for indignity and loss of reputation which they suffered on account of birth of a child which they never wanted as her husband had undergone vasectomy operation. It was pleaded in the said case the petitioner-Shakuntala became pregnant after the operation as a result of which she suffered loss of reputation and even her husband doubted her character. When her tormentation increase she insisted her husband to get his semen examined. On the examination 60% of spermatozoa were found present. The examination revealed that the operation was not successful. She pleaded that the operation conducted by the doctor was a failure due to callous and negligent manner in which the operation, was. carried out. The aforesaid stand was combatted by filing a counter affidavit by the doctor who had conducted the operation that the husband of the petitioner was informed by post examination check-ups and other examinations from time to time and he was satisfied that such operation may not

be 100% successful. He had also filled up a form in which it was mentioned that at times such operation may be unsuccessful. A further stand was put forth that after operation the husband of the petitioner never attended for removal of stitches and for follow up check-ups and treatment. It was pleaded that he was advised to use condoms or any other method of birth control for atleast twenty ejaculations or three months after the vasectomy operation but he never contacted the doctor in connection for any advice. The whole blame was put on the conduct of the husband. It was also set forth that as a factual dispute had arisen it was appropriate on the part of the petitioner therein to file a civil suit. In the rejoinder affidavit the allegations made in the counter affidavit were controverted.

19. It is worth noting to mention here that the Division Bench distinguished the earlier decision rendered by the said Court in the case of Kumari Anupa Verma v. Secretary, Medical and Health (Writ Petition No. 6513/1988, decided on 18-9-1998) on the ground that in that case the petitioner had undergone tubectomy operation and Article 12 of the Constitution was not canvassed before the Court. The Division Bench made a distinction between two types of operations and took note of the fact that a charge of adultery can be made against a woman if a child is born after the vasectomy operation. The filling up of the form by the patient was not accepted to exonerate a surgeon from taking necessary care and precautions to see that operation is successful.

20. At this juncture, I think it apposite to refer to certain medical literature which has been brought on record by the respondent No. 2 in his own defence. Prior to that I think it appropriate to indicate how the operation is conducted. In this context, I quote a passage from the book entitled Farquharson's Textbook of Operative Surgery edited by R.F. Rintoul :

"Ligation or division of the vas deferens.--As an independent operation this may be carried out in order to effect sterilisation. More commonly it is performed in association with prostatesctomy, with the object of preventing spread of infection from the posterior urethra along the vas or its lymphatics to the epididymis.

Technique.--The vas is identified by palpation through the thin skin on the postero-lateral aspect of the neck of the scrotum, and is fixed by underpinning with a needle. It is then delivered through a small incision, and is cleared of its coverings. It is divided between forceps, and its ends are ligatured. If desired a segment of the vas may be excised."

21. A reference to Rob & Smith's Operative Surgery edited by Hugh N. Whitfield is apposite. The principles and necessity for post operative care and complications as provided therein read as under :--

"Vasectomy is very commonly performed as a method of contraception. A patient who requests a vasectomy for this purpose must be counselled carefully. No hard and fast rules can be laid down about the criteria to be expected of those wishing

to undergo a vasectomy. The influence of age, marital status and previous children is best left for the patient and his surgeon to discuss. Psychological screening is difficult if not impossible in a relatively short consultation and the recommendation of the patient's general practitioner is important.

The medicolegal cases which arise following vasectomy serve to illustrate the vital importance of covering the following points during counselling :--

(1) The operations should be regarded as irreversible. Sperm banks may offer the chance to retain "fertility". Successful vasectomy reversal in terms of the presence of spermatozoa will occur in 90% of cases, but the pregnancy rate is approximately 50%.

(2) Bleeding and infection are both recognized as short-term complications. No long term sequelae has been confirmed, although a number have been suggested, e.g., atheroma, testicular cancer.

(3) Other methods of contraception must be employed until two consecutive samples of semen have been demonstrated to be completely azoospermic.

(4) The decrease in ejaculatory volume will be of the order of 10%.

(5) A vasectomy does not improve or impair libido and erections.

(6) A recanalization risk exists which is of the order of 3-5 per 1000 cases.

Post-operative care :

The patient should wear tight underpants for a week to support the scrotum and should avoid baths, showers and strenuous physical activity for 48-72 h. Semen analyses should be performed, starting 6 weeks after the operation, until two consecutive specimens have shown a complete absence of spermatozoa in a centrifuged aliquot.

Complications :

Bleeding occurs occasionally, but is rarely severe enough to cause a scrotal haematoma which requires evacuation. Such bleeding is usually due to a failure to secure the artery to the vas deferens. Infection can arise, but will usually respond to antibiotics. Spermatozoa are found in about 25% of patients but very few provoke symptoms. The incidents of recanalization of the vas deferens is in the order of 1 in 3000-4000 cases, but whether this is due to a technical failure on the part of the surgeon or to true recanalization is never possible to ascertain for certain."

22. In this context I may usefully refer to Park's Textbook of Preventive and Social Medicine. The relevant paragraphs are Male sterilization, causes of failure and post-operative advice. They read as under :--

"Male sterilization or vasectomy being a comparatively simple operation can be performed even in primary health centres by trained doctors under local

anaesthesia. When carried out under strict aseptic technique, it should have no risk of mortality. In vasectomy, it is customary to remove a piece of vas at least 1 cm after clamping. The ends are ligated and then folded back on themselves and sutured into position so that the cut ends face away from each other. This will reduce the risk of recanalisation at a later date. It is important to stress that the acceptor is not immediately sterile after the operation, usually until approximately 30 ejaculations have taken place. During this intermediate period another method of contraception must be used. If properly performed, vasectomies are almost 100 per cent effective.

Following vasectomy, sperm production and hormone output are not affected. The sperm produced are destroyed intraluminally by phagocytosis. This is a normal process in the male genital tract, but the rate of destruction is greatly increased after vasectomy. Vasectomy is a simpler, faster and less expensive operation than tubectomy, in terms of instruments, hospitalization and doctor's training. Cost-wise, the ratio is about 5 vasectomies to one tubal ligation.

Causes of failure :

The failure rate of vasectomy is generally low, 0.15 per 100 person-years. The most common cause of failure is due to the mistaken identification of the vas. That is, instead of the vas, some other structure in the spermatic cord such as thrombosed vein or thickened lymphatic has been taken. Histological confirmation has therefore been recommended on all vasectomy specimens by some authors in developed countries. In developing countries, histological confirmation is ruled out because of lack of facilities for such an examination. A simpler method has been recommended, that is, microscopic examination of a smear prepared by gentle squeezing of the vas on a glass slide and staining with Wright's stain. The vas can be identified by the presence of columnar epithelial cells that line the lumen of the vas. In some cases, failure may be due to spontaneous recanalization of vas. Sometimes there may be more than one vas on one side. Pregnancy could also result from sexual intercourse before the disappearance of sperms from the reproductive tract.

Post-operative advice :

To ensure normal healing of the wound and to ensure the success of the operation, the patient should be given the following advice :--

- (1) The patient should be told that he is not sterile immediately after the operation; at least 30 ejaculations may be necessary before the seminal examination is negative.
- (2) To use contraceptives until aspermia has been established.
- (3) To avoid taking bath for at least 24 hours after the operation.
- (4) To wear a T-bandage or scrotal support (langot) for 15 days : and to keep the site clean and dry.

(5) To avoid cycling or lifting heavy weights for 15 days; there is, however, no need for complete bed rest.

(6) To have the stitches removed on the 5th day after the operation."

23. I may profitably refer to Campbell's Urology, Seventh Edition wherein Methods of Vasal Occlusion and Vasectomy Failure find place. The same is as under :--

".... Documented counselling, diligent follow-up to obtain at least Mo azoospermic semen specimens post-operatively, and careful selection of appropriate candidates for vasectomy in the first place provide the best protection from mal-practice suits."

There is also a paragraph which deals with the post-operative semen analysis. It reads as under :--

"Post-operative Semen Analysis :

No technique of vasal occlusion, short of removing the entire scrotal vas, is 100% effective. Follow-up semen analysis with the goal of obtaining two absolutely azoospermic specimens 4 to 6 weeks apart is essential. If any motile sperm are found in the ejaculate 3 months after vasectomy, the procedure should be repeated. If rare non-motile sperm are found, contraception may be cautiously discontinued and repeat semen analysis performed every 3 months. Rare complete sperm in a spun semen analysis pellet are found in 10% of semen specimens at a mean of 10 years after vasectomy (Lemack and Goldstein, 1996)."

24. Submission of Mr. Satish Sharma, learned Counsel for the respondent No. 2 is that the aforesaid literatures go a long way to show that if the patient has not availed the post operative care by no stretch of reasoning the operative surgeon can be held liable. It is putforth by him that when the husband of the petitioner had filled up the form vide Annexure R-4 knowing well that there can not be 100% success in the operation in question, the wife can not come forward to seek compensation. Mr. S.K. Yadav, learned Government Advocate has supported the stand of the respondent No. 2.

25. On a fair reading of the medical literature certain facets are absolutely clear, namely, a vasectomy operation cannot be 100% successful in all cases; that failure rate is low; that a patient is required to make himself available for post operative care; that there may be recanalization in 3 to 5 cases per 1000 cases; that in certain circumstances other methods of contraception are also necessary; and that documented counselling is also essential. Quite apart from the above as has been found in Campbell's Urology there is insistence by some urologists in removing of a segment from vas primarily for medicolegal reasons. I may hasten to add that it has also been mentioned that even from the legal point of view a pathologist's report confirming the presence of vas in the vasectomy specimen offers no protection from the litigation. Thereafter it has been mentioned which I

think it necessary to quote at the cost of repetition :

".... Documented counselling, diligent follow-up to obtain at least two azoospermic semen specimens post-operatively, and careful selection of appropriate candidates for vasectomy in the first place provide the best protection from mal-practice suits."

26. In this regard I may also quote a passage from Farquharson's Textbook of Operative Surgery edited by R.F. Rintoul. It reads as under :--

"It is important to tell patients requesting vasectomy that they must regard themselves fertile, and take other contraceptive precautions until two negative seminal analyses have been obtained (the first at least 3 months after the operation and the second at least 3 weeks after the first); that occasionally the fluids do not become negative, and the operation has to be redone, and that 1 or 2% of patients get more bruising than others and may be uncomfortable for some time."

27. At this juncture I may mention, as stated by Dr. K. Park which has been quoted hereinbefore, that contraceptives are to be used to get aspermia established. The patient has to be given number of advices and if aspermia does not take place after a reasonable period of time and after 30 ejaculations there can be a presumption that the operation has not been properly conducted. There can be spontaneous recanalization and the vas is no exception. The surgeon has a duty to explain this aspect to the patient.

27-A. On the anvil of aforesaid medical guidance the present factual matrix is to be tested. As has been stated earlier the husband of the petitioner had undergone the operation on 14-11-1996 at the Government Medical College Hospital, Jabalpur. Annexure P-4 which has been brought on record, has been issued by the Netaji Subhash Chandra Bose Medical College, Jabalpur which is run by the State Government. It is mentioned therein that it is a case of vasectomy failure. Quite apart from the above the first child was born in November, 1998 and second child was born in October, 1999. The only possible contention that is available to the respondent No. 2 is that there can be recanalization. The matter would have been different if the pregnancy had taken place at an earlier point of time. The blame could have been put on the patient that he had not taken adequate care and involved himself in sexual intercourse before 30 ejaculations took place or aspermia had been established. The gap is more than 16 months. If the operation had been successful the petitioner could not have been pregnant except in case of spontaneous recanalization. Whether there is spontaneous recanalization or not is difficult to find out at this juncture. This is not possible by scanning or any other method. The only mode is to open the operated area to find out the development. In my opinion, that is neither advisable nor warranted. Submission of Mr. Sharma is that when no semen test or DNA test has been done the allegation made by the petitioner can not be sustained.

28. The real crux of the matter is whether proper diligence was exercised by the respondent No. 2 or not. It is worth noting here that in the counter affidavit the respondent No. 2 has endeavoured to put the blame on the consultant surgeons, namely, Dr. J.K. Tandon and Dr. L.P. Ahirwar and hence, he cannot be blamed. Quite apart from the above he has also stated that without any clinical test upon the husband of the petitioner, operating surgeon could not be put to blame. What is not disputed by filing a rejoinder affidavit by bringing documents is that the husband of the petitioner had availed post operative care. The heart of the matter is whether the petitioner was apprised to avail these post-operative cares. I may hasten to add here that I am not going to address myself in regard to spontaneous recanalization. Whole thing rests on the foundation whether due diligence was exercised by the respondent No. 2 in carrying on of the operation. In its ambit and sweep it includes the factum of supervision to the effect that the operation is successful by taking care of post operative measures. A patient is to be told in detail about the post operative measures to be taken by him. As has been quoted above in Campbell's Urology emphasis has been laid on removing a segment of vas for pathological verification. I am conscious that the said act is not an absolute defence, but in the present case the same was not done. There is emphasis on "documented counselling". The hub of the matter is whether there has been documented counselling or not. Mr. Sharma has placed reliance on Annexure R-4 annexed to the counter affidavit. Annexure R-4 as has been described in the affidavit is an undertaking given by the petitioner. The said document is in Hindi. On being translated it reads as under :--

"Kindly arrange for my family planning operation. My age is 26 years and my husband's/wife's age is 24 years.

We are married and my wife/husband is alive. We have 1 (boy), 1 (girl) surviving. The age of youngest child is 2-1/2 years.

I have decided for family planning operation independently of my own, without any pressure, allurements or force. I know that other contraceptive methods are available to me. I know that this operation is permanent for all practical purposes and no more child would be born. My husband/wife had not been operated for family planning. I also know that the operation I am undergoing has risk factors. The norms for eligibility of this operation have been made clear to me and I take oath that I am eligible for this operation as per these norms. I agree for any type of anaesthesia which is appropriate for me according to the surgeon for this operation and for any type of medicines to be administered by the doctors in this regard."

On reading of the same it transpires that patient's husband was made aware of his eligibility and cautioned about the failure of operation. As has been indicated in the Text Books which have been relied upon by the respondent No. 2 and which I have also perused (the original texts have been produced by the learned Counsel for the respondent No. 2 with the assistance of Mr. Manish Datt) it is plain as day that there has to be "documented counselling". One can not be

oblivious of the fact that as the medical knowledge shows that vasectomy is one of the reliable means to prevent conception. True it is some sperms still remain in the main system following the vasectomy operation and hence, the resulting sterilization is not immediate. Once the doctor confirms absence of sperm the chance of pregnancy is minimum. The risk of vasectomy failure is sometimes due to severed acts of vas deferens have rejoined to allow the sperm through but this occurs in rare cases. Certain eminent doctors state that the case of failure are due to the fact that the doctors do not confirm that the vasectomy has been successful and that the ejaculation does not contain sperms. Advice is to be given to use other birth control devices after surgery. It is also advised that vasectomy though not a major surgical operation it should be conducted by expert urologists. A study of United States and United Kingdom as well as other developed countries shows that the rate of failure of the operation is 1 to 3 per 1000. They have also expressed the opinion that getting all the sperms out of the semen takes 3 months or about 30 ejaculations. I have referred to this aspect though I have also quoted that the percentage can slightly be higher. In the instant case I am not concerned with the percentage of failure or factum of recanalization. What this Court is concerned is whether the respondent No. 2 has performed his duties properly or not. Has he followed the guidelines of the Text Books ? Has he been properly guided by essential requirements that have been prescribed by the medical ethics for the surgeons ? Had he apprised the patient about the obligations to be performed by him after the operation ? As has been stated earlier the husband of the petitioner only signed a document expressing no objection wherein it was mentioned that the operation may be a failure. As has been held by the Allahabad High Court it is not sufficient. I am in respectful agreement with the aforesaid view. In the instant case there is no document to show that the petitioner was told in writing about the care to be taken by him. Advice has to be well documented. In absence of documented counselling and further care to be taken by the doctor the blame can not be totally put on the husband of the petitioner. The respondent No. 2 has put the blame on the consultant surgeons and tried to justify the action. In my considered opinion the justification given by the respondent No. 2 does not meet the requirement and in fact such a justification is of no avail to the said respondent.

29. Another aspect which can not be lost sight of is that the petitioner did not bring it to the notice of the doctor after the first pregnancy occurred. Second child was born to her. What is worthnoting here that the respondent No. 2 has also pleaded that in absence of semen analysis and the DNA test of the child it can not be said that the vasectomy operation has failed. In this particular stand, if I allow myself to say so, the respondent No. 2 has commented on the character of the petitioner, I am not inclined to delve deep into the said aspect but this is a facet to show that the petitioner had definitely faced indignity in the society.

30. In this context it is worthnoting here that in the case of Smt. Shakuntala Sharma (supra) Article 21 was laid emphasis upon to highlight that such a

dealing with the patient affect her right to life. Right to life as well settled in law is to live with dignity. It is to be borne in mind that right to life has been regarded as one of the basic human rights. No authority, however high, is entitled to treat a person as unperson. It is because right to life in its conceptual essence encapsulates to live with human dignity. The meaning of the term "life" can not be construed in a narrow manner and it has to be understood in a broader spectrum. Limitation of this horizon would be violative of the constitutional philosophy as well as Universal Declaration of Human Rights, 1948.

30-A. Testing the factual matrix on the anvil of the aforesaid decisions and taking note of the fact that the respondent No. 2 has not taken due care and not shown due diligence to confirm that the operation had not become a failure, (I have arrived at this conclusion in absence of "documented counselling" and test of vas by a pathologist) it is to be borne in mind that a broad view of law relating to tortious liability has to be taken. Two aspects that arise for consideration are existence of negligence and extent of liability. The aspect relating to negligence includes the duty to take care and failure of the same, its proximity, and the resultant factors. If the Courts arrive at the conclusion fair, just and reasonable care has not been taken in breach of duty, liability can be fastened. It has to be kept in mind that in certain countries it is regarded interference with an individual's decision to procreate a child is violating his/her "bodily integrity" and "sexual privacy". Simultaneously welfare of children is of paramount consideration and if an unwanted child is born either due to failure of sterilisation operation which also includes not being careful to give proper counselling to the patient or to misinterpret the post operative test, the suffering person is entitled to recover damages. When a woman comes forward to claim damages it can not be said that "The Lady Doth Protest Too Much". No one can be permitted to wield anarmoury in that regard.

31. Now to the aspect of quantum. It is averred in the petition that she belongs to the lower strata of the society. She is poverty stricken. She would not have begotten any child and that is why the husband had undergone the operation. Both the children born after the operation have seen the surface of the earth because of the fault of the respondent No. 2. The respondent No. 2 is under the employment of the State Government. The State Government has undertaken the family planning programme and the people have come forward to co-operate with the said programme. When citizens come with immense hope and unshaken faith, they have to be properly guided and any omission in that regard amounts to negligence and the State can not seek absolution. In this context I may quote with profit what the Apex Court said in the case of Smt. Santra (supra) :--

"Ours is a developing country where majority of the people live below poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The principles on the basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public policy or on account of

pleasure in having a child being offset against the claim for damages cannot be strictly applied to the Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence."

32. In view of the aforesaid and the law laid down by the Apex Court in number of decisions referred to hereinbefore I experience no difficulty in coming to the conclusion that the State is liable for fault of its employees and the present case is not an exception. Considering the totality of circumstances I fix the compensation at Rs. 50,000/- (Rupees fifty thousand only) to be paid by respondent No. 1 within a period of three months to the petitioner. I may hasten to add that it would be open to the respondent No. 1 to conduct an enquiry and fix the responsibility in carrying out of the operation and recover the amount from those who are found responsible.

33. The writ petition is accordingly allowed in part. However, in the peculiar facts and circumstances of the case there shall be no order as to costs.