
(2001) 11 P&H CK 0124

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 253 of 1993

Smt. Ram Kali

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 20-11-2001

Acts Referred:

Citation : (2003) ACJ 752 : (2002) 3 CivCC 329 : (2002) 1 RCR(Civil) 278

Hon'ble Judges : R.L. Anand, J

Bench : Single Bench

Advocate : Anil Khetarpal, for the Appellant; Vijay Dahiya, for the Respondent

Final Decision : Allowed

Judgement

R.L. Anand, J.—The unsuccessful plaintiff Smt. Ram Kali has filed the present regular second appeal and it has been directed against the judgment and decree dated 15th September, 1992 passed by the Additional District Judge, Kurukshetra who allowed the appeal of the defendants/State of Haryana and set aside the judgment and decree dated 27th February, 1989 passed by the learned Senior Sub-Judge, Kurukshetra, who granted a money decree for a sum of Rs. 50,000/- in favour of the plaintiff ad against the defendants, besides interest at the rate of 6% per annum from the date of the decree till payment. The suit was filed in forma pauper is.

2. The brief facts of the case are that Smt. Ram Kali filed a civil suit in forma pauperis and prayed for a decree for a sum of Rs. 1,00,000.00 by way of damages against the defendants. The case set up by the plaintiff (appellant herein) in the trial Court was that she was operated upon for sterilization at Civil Hospital, Shahabad Markanda, tehsil Thenesar on 30th January, 1985. In spite of the aforesaid operation, she gave birth to a female child on 18.12.1985. The case of the plaintiff/appellant was that she is a very poor lady and has been burdened with the expenses for bringing up the child, to perform her marriage etc. It was also the case of the plaintiff in the trial Court that she was given birth to a female

child on account of the negligence and carelessness on the part of the doctor of the defendant-State and in these circumstance, the defendant-State is vicariously liable to pay compensation to her, along with interest at the rate of 18% from the date of the operation.

3. Notice of the suit was given to the defendants. Written statement was filed and the suit of the plaintiff was contested. It was admitted that sterilization operation of the plaintiff was performed on 30th January, 1985 in the Civil Hospital, Shahabad and it was also admitted that the plaintiff gave birth to a female child on 18th December, 1985. According to the stand of the respondent, the operation was performed by Dr. Neeraj Gaur who is a Post-Graduate in Surgery and is a competent doctor. The doctor of the defendants never assured the plaintiff that there would be 100% success in the operation. In such type of operations there are chances of failure for the reasons beyond the human control. It was also pleaded by the defendants that the plaintiff could have terminated her pregnancy under the Medical Termination of Pregnancy Act, 1971 when she came to know that in spite of operation she had conceived a child.

4. From the above pleadings of the parties, the trial Court framed the following seven issues:

1. Whether loss and injury has been caused to the plaintiff, if so to what effect? OPP

2. Whether the plaintiff is entitled to compensation? If so to what amount? OPP

3. Whether the suit of the plaintiff is not maintainable in the present form? OPD.

4. Whether the suit of the plaintiff is bad for non joinder and mis-joinder of necessary parties? OPD

5. Whether no cause of action for filing the present suit has accrued to the plaintiff? OPD

6. Whether the plaintiff has not valued the present suit for purposes of court fee and jurisdiction? OPD

7. Relief.

5. The parties led oral as well as documentary evidence in support of their case and, on the conclusion of the proceedings, the suit of the plaintiff was partly decreed and a money decree for the sum of Rs. 50,000/- in favour of the plaintiff against the defendant was granted, besides interest at the rate of 6% per annum from the date of the decree till payment. Since the suit was filed in forma pauperis, therefore, the trial Court also gave the direction that a sum of Rs. 6370.00, be realised for the plaintiff and to that extent the court-fee will be first charged on the decree. The suit of the plaintiff was decreed for the reasons given in para Nos.6 and 7 of the judgment dated 27th February, 1989, which are reproduced as under:

"6. These two issues are inter-connected and the same are being discussed together. Smt. Ram Kali plaintiff appearing as P.W.1 has stated on oath that she was operated upon for sterilization in the Shahabad hospital and was given certificate ex. P1 regarding the same. She has also stated that eleven months after the operation she had given birth to a female child in the village and that she had spent Rs. 4000/- on her birth for purchasing medicines and diet and that she will have to spend rupees one lac for bringing her up and on her marriage. She has deposed that she would have to incur the aforesaid expenditure because of wrong operation. She has also stated that she had sent notice Ex.P1 by registered post, the postal receipts of which are Ex.P3 to Ex. P5 and acknowledgement receipt is Ex.P6. In cross-examination she admitted that the operation was performed with her consent. She denied that the Medical Officer who performed the operation was not to blame. Reghunath PW2 is the husband of Smt. Ram Kali. He has also deposed to the operation performed on her wife and the birth of female child on 18.12.1985. He has also stated that he had spent Rs. 4000/- at the time of birth of the child and that a minimum amount of rupees one lac is required for bringing her up and expenses on her marriage. He also deposed that the child was born because of wrong operation. In cross-examination he stated that he did not know whether the doctor who performed the operation was negligent or not. On the other hand, the defendants have examined Dr. S.K. Wadhwa, DW1. He has stated that he is in service in the State of Haryana as Medical Officer since October, 1981 and has performed a large number of tubectomy operations and that failure rate of such operations varies from place to place and from person to person and that normal rate of failure is 0.6% to 4.9%. He has also stated that the woman undergoing operation in case of failure can get herself operated again and that in case of conception even after the operation she has the facility of medical termination of pregnancy on Government expense under the Medical Termination of Pregnancy Act, 1971. He has also stated that the Medical Officer usually does not tell the woman concerned before operation that it can result in failure although the motivator and the worker following that case inform her about the same. In cross-examination, he denied that cause of failure of tubectomy operation as the negligence of the Medical Officer. Dr. N.K. Gaur, DW2, has stated that he remained posted in the Civil Hospital, Shahabad, from 1981 to 1985 and during that period he had performed more than 10,000/- sterilization operations. He has also stated that he is a post-graduate. Smt, Ram Kali was operated upon by him on 30.1.1985. He has also stated that her motivator was Smt. Sita Devi A.N.M. He has further stated that the operation was performed by him carefully. He has stated that the reason of failure of the operation is not the negligence of the doctor but recanalisation of the bone. He has also stated that if proper care is not taken regarding sexual relations within three months of the operation, the operation can result in failure and that the rate of failure of the operations is 0.6% to 4.9%. In cross-examination he denied that the operation in question had failed because of his negligence. Smt. Sita Devi DW3 has deposed that Ram Kali plaintiff was known to her and that she had motivated her for operation and

taken her for the purpose to Civil Hospital Shahabad. She has stated that she had informed Ram Kali for taking precautions before and after the operation and also that she should not have sexual intercourse with her husband for a period of three months after operation. She has also stated that about three months after the operation she was informed by Ram Kali that she did not have menses and that she had advised her to get herself checked up on the hospital. Smt. Ram Kali again examined herself in rebuttal and stated that Smt. Sita Devi had not informed her about any precautions to be observed regarding the operation, nor had she informed her that the operation could result in failure.

7. It is an admitted fact that the plaintiff was operated upon for sterilization on 30.1.1985. It is also an admitted fact that she gave birth to a female child on 18.12.1985 i.e. after about 10-1/2 months. It is thus clear that the plaintiff had become pregnant after the operation. The plea taken up by the plaintiff is that the operation had failed because of the negligence of the doctor, who had performed the same and that as a result birth of female child, she has been burdened with an expenditure of rupees one lac for bringing up the child, for her marriage and other expenses. In the written statement filed by the defendants, they have pleaded that the operation was done successfully, but added that such operation may fail for the reasons which are beyond the control of human beings. It has also been pleaded that the plaintiff could get the pregnancy terminated under the Medical Termination of Pregnancy Act, 1971. the plaintiff has admitted that she was operated upon with her consent. However, she has also stated that she was never informed that the operation could result in failure, nor was she informed about the pre-cautions to be taken by her after the operation. It is stated by Dr. N.K. Gaur DW2, who had conducted the operation, that in the text-book of gynecology it has been mentioned that cause of failure of an operation is recanalisation of a fallopian tube. No book by any renowned authority of Medical Science has been brought to my notice by either of the parties. In *Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another*, , It has been observed by the Supreme Court that 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 and that such a person when consulted by a person owes 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. It is not disputed that Dr. N.K. Gaur DW2 is a qualified medical practitioner. However, the defendants have failed to produce any evidence to prove that before operating upon Smt. Ram Kali, she was informed that the operation could result in failure. It was necessary for the defendants not only to obtain consent of the plaintiff before operating upon her, but also to inform her in writing that the operation could fail and to operate upon her only if she accepted that condition. It appears from the evidence produced in this cases that the plaintiff was not informed about the chances of failure of the operation, nor she was informed about the precautions to be taken by her after the operation. There is nothing on the file to show that after the operation any

steps were taken by the defendants to verify that the operation had been done successfully. Keeping in view all the circumstances of the case, I am of the opinion that the result of failure of the operation was due to reasons within the control of human beings and that the defendants were also negligent because they had not informed the plaintiff about the chances of failure of such operation as well as the precautions to be taken after the operation. The plaintiff is, therefore, entitled to damages for the loss and injury which she has suffered because of the birth of female child even after the operation. She has claimed rupees one lac on that account. I am of the opinion that keeping in view the fact that the plaintiff is a villager, a sum of Rs. 50,000/- will be sufficient for the bringing up of the child and other expenditure to be incurred on her, including her marriage. In the result, I decide these two issues in favour of the plaintiff and hold that she is entitled to Rs. 50,000/- from the defendants on account of compensation and damages".

6. Not satisfied with the judgment and decree of the trial Court, the defendants field the first appeal before the Court of Additional District Judge, Kurukshetra, who for the following reasons given in para No. 9 of the judgment, set aside the judgment and decree of the trial Court and dismissed the suit of the plaintiff;

"9. After having gone through the follow up study of Laproscopic and Conventional Tubectomy Acceptors in Haryana State 1986-87, placed on record by the appellants it is revealed that the failure rate after laproscopic tubecotomy operation is 2.1% and according to Shaw's Test Book of Gynaecology, the failure rate is 4.9% to 6% which means that the acceptors lady can conceive even after operation of laproscopic tubectomy. While appearing in the witness box the respondent has not stated even a word that the doctor conducting the operation was negligent in any manner nor any reason has been assigned to the doctor with regard to his negligence in conducting the operation of the respondent. The only grouse of the respondent is that she was not advised to use precaution after the operation. For that, I would like to refer one of the most important book on the subject Laproscopy by Siddhartha D. Khandwala. In Chapter 6 at Page 60, the 3rd benefit of laproscopy sterilization enumerated as "it entails minimal disruption in the woman's daily routine viz diet, work, sext, etc. "By reading this, it can be said with certainty that after the operation the acceptor lady is free to do her daily routine job and there is no abstinence with regard to diet, work sex. etc. Though it has come in the statement of Sita Devi (DW3) who was posted as Auxiliary Nurse Mid-wife that while motivating the respondent for operation she had advised Ram Kali to use precaution but I go a step further that even no advice had been given to Ram Kali. By going through the book, referred to above, I am of the opinion that there was no necessity of giving any particular advice to the respondent. It is pertinent to note here that family planning operation in our country is getting popular day by day and people in general know what the family planning is The trial Court had taken the view firstly that the respondent should have given in writing that the operation could fail and after obtaining her consent, the said operation should have been conducted. I

totally differ with the approach of the learned trial Judge. The learned counsel for the respondent could not show me any administrative instructions issued by the State to the doctor to obtain such consent before conducting such like operations. I am also fortified by the findings given in population reports, in which reasons have been given for which woman can conceive after the operation and those are when rings break during insertion even when properly applied, do not block the tube, rings can slip off the tube, spontaneous recanalisation may also occurs. A plain reading of this shows that even if any one think out of these happens in a properly operated case, the negligence can not be attributed to the doctor conducting operation. It has come in the statement of Dr. Neeraj Gaur, D.W.2 that he had conducted more than ten thousand operations during his tenure and the operation of the respondent was conducted by him with all precautions and care. So, in this view of the matter in no way, we can fasten the liability of Dr. Neeraj Gaur for not conducting the operation efficiently."

Thus, not satisfied with the judgment and decree of the first appellate Court, the present appeal by the unsuccessful plaintiff/appellant.

7. I have heard Shri Anil Khetarpal, learned counsel appearing on behalf of the appellant and Shri Vijay Dahiya, learned Assistant Advocate General on behalf of the respondent-State and, with their assistance, have gone through the record of this case.

8. It was vehemently argued by the learned counsel for the appellant that the first appellate Court fell in error in dismissing the suit of the plaintiff. He submits that it is established on record that the family planning operation was performed upon the plaintiff on 30th January, 1985 and she also gave birth to a female child on 18th December, 1985. The counsel submits that it was a case of sheer negligence on the part of the doctor. Had he taken necessary and proper care in the performance of the operation there would have been no loss and injury to the plaintiff when she delivered the unwanted child on 18th December, 1985. In support of his contention, the learned counsel for the appellant has relied upon a recent judgment of the Hon'ble Supreme Court reported as *State of Haryana and Others Vs. Smt. Santra*, and a judgment of this court reported as *Punjab State Vs. Smt. Surinder Kaur*, .

9. On the contrary, Mr. Vijay Dahiya, the learned counsel appearing on behalf of the respondents, submitted that the judgment of the first appellate Court is correct. The plaintiff was advised not to share the bed with her husband for a period of three months after operation and the advice of the doctor was not adhered to and, as result of which the plaintiff conceived the child. The plaintiff herself was negligent because she did not accept the advice of the doctor. Mr. Dahiya further submitted that the family planning operations are not 100% fully perfect. There is always some scope of error which is not attributed to the human factor. While doing such like operation, the doctor takes all precautionary measures according to his ability and in spite of that if any woman conceives a

child, that is the will of the God. Until and unless a negligence is established and proved on the part of the doctor, the State cannot be burdened with any compensation. It was also argued by the learned counsel for the respondents that in the present case the operation of the plaintiff was performed by a competent doctor who had lot of experience in this filed. He had performed thousands of such like operations. In spite of that if the plaintiff had conceived the child, negligence cannot be attributed on the part of the doctor. In support of his contention, the learned counsel has also invited my attention to the statement of Dr. N.K. Gaur who appeared as D.W.2.

10. After considering the rival contentions of the parties, I am of the opinion that the findings of the first Appellate Court cannot prevail for the simple reason that the case which has been advanced now by the learned counsel for the respondents was never put to the plaintiff when she appeared in the witness-box. There is not an iota of suggestion given to the plaintiff that at the time of the discharge the plaintiff was advised not to share the bed with her husband for a period of three months. On the contrary, the plaintiff who is an illiterate lady can always conceive an idea in her in that after performing the family planning operation upon her she is secured. A sense of security is involved when a woman or a male person undertakes such type of operation. No documentary evidence has been produced on the file to show that the plaintiff was advised not to share the bed with her husband for a period of three months. It is a common case of the parties that the plaintiff did conceive a child and the child was delivered on 18th December, 1985. The plaintiff is a poor lady. She has also filed a suit in forma pauperis. The coming of the unwanted child in the family will certainly add the burden of the family. In these circumstances, I am inclined to reverse the judgment of the first appellate Court. The Hon''ble Supreme Court in Smt. Santra's case (supra) has held that when birth of an unwanted child takes place, negligence can be attributed to the doctor. It was also observed by the Hon''ble Supreme Court that since it is the statutory liability of the parents to maintain the child under the Hindu Adoptions and Maintenance Act and Mohammedan Law, therefore, there is no bar on the part of the mother to claim damages. Learned counsel for the respondent has tried to distinguish this judgment by urging that in the cited case it was proved that the doctor had not stitched the left Fallopian tube. In the present case, there is no such evidence. Therefore, the plaintiff is not entitled to any decree. The submissions of the learned counsel for the respondent cannot be accepted. In the present case it was within the knowledge of the doctor who performed the operation to say that under what circumstances, the plaintiffs operation had failed. No cogent reasons are forthcoming. It was difficult for the plaintiff to say or proved as to what had happened inside her body or uterus at the time of the operation. The delivery of the child itself is a suggestion and proof of negligence on the part of the doctor who performed the operation. In Surinder Kaur's case (supra), this Court has held that the State and its functionaries are liable to pay damages. In this case, the doctor who operated upon the woman was performing his duties during the

course of his employment and, therefore, it was observed by the High Court that the master is always responsible for the vicarious liability of the acts committed on the part of the employee.

11. Resultantly I allow this appeal, set aside the judgment and decree of the first appellate Court and grant a money decree for a sum of Rs. 50,000.00 in favour of the plaintiff and against the defendants with interest at the rate of 6% per annum from the date of the decree of the trial Court up to the date of payment. There would be no order as to costs in the present appeal. Directions are also given to the State to deduct a sum of Rs. 6,370/- and Rs,2832.00 on account of the court-fees payable by the plaintiff-appellant in the trial Court as well as in the High Court on the decretal amount,