
(2000) 01 AHC CK 0164
In the Allahabad High Court
Case No : Writ Petition No. 748 of 1991 (M/B)

Smt. Shakuntala Sharma and another	APPELLANT
Vs	
State of U. P. and others	RESPONDENT

Date of Decision : 07-01-2000

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 32

Citation : (2001) ACJ 620 : AIR 2000 All 219 : (2000) 2 AWC 1455 : (2000) 3 RCR(Criminal) 726 : (2000) 2 UPLBEC 1804

Hon'ble Judges : S. H. A. Raza, J;R. D. Mathur, J

Bench : Division Bench

Advocate : S. K. Kalia, for the Appellant; C. S. C., for the Respondent

Final Decision : Disposed Of

Judgement

S. H. A. Raza, J.—The greatest danger to this country comes from the population explosion. In spite of the developmental activities during the last fifty years, our Industrial production has considerably increased. Due to the green revolution which has ushered mostly in those areas where proper irrigation facilities were made available, the food production has not only increased but India has become more or less self-reliant. It is a matter of great pleasure for all the Indians that India although often imports oil seeds and foodgrains, but also exports foodgrains particularly rice, but in spite of that fact our export is much below than the export of Hong Kong, which a century before was a small island. Its export has increased to such an extent that this country having a population of hundred crores is unable to surpass even Hong Kong.

2. Whatever development has taken place in industrial and agriculture sector, its effect becomes negligible due to population explosion.

3. In view of the aforesaid reasons, the Government of India with the assistance of World Health Organisation and other agencies has launched vigorous campaign for family planning. The family planning movement is publicised in the

media and incentives are given to those who get them operated, so a child is not born even if the husband and wife perform their marital obligations.

4. With this prelude, we have to examine the factual matrix of the case as set out in the writ petition. Smt. Shakuntala Sharma and her newly born child Vicky have filed this petition praying for issue of a writ in the nature of mandamus commanding the State of U. P. to pay them a sum of rupees ten lakhs as compensation for the indignities and loss of reputation which they have suffered on account of birth of a child who was never wanted, inspite of the fact that her husband Sri Ghanshyam underwent vasectomy operation.

5. Smt. Shakuntala was married to Ghanshyam about twenty five years back. Out of the wedlock of the petitioner and her husband, three children (two sons and a daughter) were born. Smt. Shakuntala and her family were enjoying happy and peaceful life.

6. On account of the blitz krieg launched in the medial for family planning, the husband of the petitioner got himself operated, which is termed as "Vasectomy Operation", at District Hospital, Sitapur on 4.11.1989. One Dr. Zaheer Hasan. Surgeon District Hospital. Sitapur conducted the operation which is evident from the certificate issued by the Hospital.

7. According to the petitioner, she was led to believe that after the said operation no child would be born, but even after the said operation, the petitioner No. 1 became pregnant. After coming to know this fact, she was mentally disturbed. Her reputation in the family as a devoted Hindu wife became suspicious. Even her husband started doubting about the character of the petitioner No. 1. Her relations with in laws became strained. The comments and remarks o[their neighbours became unbearable and she had to live under mental agony and torture.

8. When her tormentation increased, she persuaded her husband to get his semen examined in District Hospital, Lakhimpurkheri, as well as at the private clinic, who submitted a report indicating that 60% spermatozoa were present. The examination revealed that the operation was not successful.

9. According to the petitioner No. 1, she had been put to disrepute on account of callous and negligent operation conducted by Dr. Zaheer Hasan, a Surgeon in the District Hospital. Sitapur. The petitioner being mentally disturbed due to the insult and humiliation which she has suffered approached, various authorities including the Hon''ble the Chief Justice of India, who was pleased to send her representation to Uttar Pradesh Legal Aid and Advisory Board. Jawahar Bhawan, Lucknow, but no action was taken. Thereupon the petitioner No. 1 personally met Hon''ble the Chief Justice of India, who through the Registrar of the Supreme Court wrote to the Member Secretary U. P. Legal Aid and Advisory Board to provide her legal assistance. The Legal Aid and Advisory Board provided to the petitioner No. 1 the legal assistance and an eminent counsel of the Bar, Mr. S. K. Kalia filed the present writ petition.

10. The petitioner has asserted that she never wanted another child because her husband was physically handicapped and was given a paltry sum of Rs. 60 per month as pension. The petitioner asserted that in the circumstances of the case, it is the obligation of the State to maintain the petitioner No. 2 who at the time of filing the writ petition was only twenty nine days" old.

11. A counter-affidavit was filed on behalf of opposite parties which was sworn by Dr. Zaheer Hasan who admitted that he was the Surgeon in the District Hospital at that time and he performed the Vasectomy Operation of Sri Ghanshyam Sharma. It was submitted that advertisement was published and wide publicity was given informing public in general about the advantage of a planned family and for purposes of undergoing surgery, certain amount would be paid to such persons who opted for surgery.

12. It was averred in the counter-affidavit that Sri Ghanshyam Sharma was informed about post operative check ups and other examinations from time to time and Sri Sharma was satisfied that such operation may not be 100% successful and he underwent the operation knowing that fact and thereafter he gave consent for the vasectomy operation. He filled up a form in which it was mentioned that at times such operation might be unsuccessful. It was also mentioned in the said form which Sri Ghanshyam Sharma had signed that before the said operation, no operation earlier was conducted either to his wife or to him. The terms of the said form which Sri Ghanshyam Sharma had filled up also provided that the operation may be hazardous. It was averred by the deponent filing the counter- affidavit that Mr. Ghanshyam Sharma was never assured by him that a child would not be conceived.

13. It was also stated that after the operation, Sri Ghanshyam Sharma, never attended as outdoor patient for removal of stitches and for follow up check up and treatment. According to the averment made in the counter-affidavit, Sri Ghanshyam Sharma was advised to use condoms or any other method of birth control for atleast twenty ejaculations or three months after the vasectomy operation. It was also submitted that Sri Ghanshyam Sharma never contacted the said Surgeon or any other hospital authority in connection for any advice.

14. It was also asserted in the counter-affidavit that Sri Ghanshyam Sharma never got his semen examined in District Hospital, Sitapur, as well as in any clinic of Sitapur. It was also stated that examination of semen was done at Lakhimpurkheri and report of the semen sample brought by Smt. Shakuntala Sharma herself shows that a private clinic at Lakhimpurkheri examined the semen of Sri Ghanshyam Sharma. The analysis showed that the operation was not successful. It was averred that if the operation was not successful, Shri Ghanshyam Sharma ought to have contacted the Surgeon or other hospital authorities and sought to have made complaint in writing, but nothing was done in the matter which raised a doubt about the allegations made in the writ petition.

15. It was also asserted that Shri Ghanshyam Sharma continued conjugal

relations with his wife knowing fully well that semen was positive and, therefore, it cannot be said that due to callous attitude of the Surgeon a child was born. According to the averments, the child was born on 5.1.1991 which means that child was conceived in or about 1st week of March. 1990. First semen examination was done on 22.2.1990 and, therefore, it would mean that child was conceived with full understanding and consent of the couple. The second semen examination was done on 4.7.1990 out of the sample brought by petitioner No. 1 and at that time, the pregnancy was of about three months, but no steps were taken in the matter. It was also submitted that the proper remedy for the petitioner would have been to file a civil suit and in that regard, a Judgment of the Division Bench of this Court was referred to.

16. In the rejoinder-affidavit, the averments made in the counter-affidavit were denied to the extent that after her husband was operated upon and she became pregnant, she rushed to the authorities of the hospital, but they did not listen the cries of the petitioner.

17. In a country like ours, even a prudent man would reach to an opinion, that after the Vasectomy Operation the chance of birth of another child was not possible. In a society which upholds its traditions, ladies enjoy respect, and any stain on the character of a woman results not only in ruination of her life, but it also affects the peace and happiness of the entire family. After the birth of the child even after the "Vasectomy Operation", we can presume that a finger would have been raised against the character of the petitioner No. 1 and she would have been subjected to insult, humiliation and shame when the child would have been born to her. Everybody would have thought that she was leading an adulterous life.

18. The pain and agony which she might have suffered can be well imagined. The right to life enshrined under Article 21 of the Constitution means something more than survival or animal existence. It would include the right to live with dignity and all those aspects of the matter which make a persons' life meaningful and complete.

19. Our attention has been drawn towards the Division Bench Judgment of this Court in Kumari Anupama Verma v. Secretary. Medical and Health, Writ Petition No. 6513 of 1988 decided on 18.9.1998. Taking a cue from certain passages of that judgment, Mr. Krishna Chandra, learned standing counsel, argued that in a writ jurisdiction under Article 226 of the Constitution of India such dispute cannot be adjudicated upon the only alternative left to the petitioner is to file a civil suit, before a competent court of civil jurisdiction as an indigent person.

20. The factual matrix of the present case are entirely different inasmuch as it was the mother of the petitioner Kumari Anupa Verma who underwent Tubectomy Operation. The mother of the petitioner was given a certificate to that effect on 19.9.1983. On 23rd August. 1985, Kumari Anupa Verma was born. The Division Bench found that the averments were correct. The mother of Anupa

Verma was a class IVth employee and her father was a vaccinator. The Court observed that it was pity that inspite of the fact that the petitioner's mother became pregnant on account of sheer alleged negligence of Dr. Siddhartha, an employee of the State Government, this Court was not in a position to grant the relief prayed for in proceedings under Article 226 of the Constitution. The Division Bench expressed an opinion that the proper remedy of the petitioner was to claim damages against the doctor concerned as well as the State Government. For getting this relief, the petitioner will have to institute a suit in the regular civil court. There is another judgment of similar nature of Gujarat High Court in a civil appeal, where the appeal filed by the State Government against the award of damages was allowed and the judgment of the single Judge was set aside. Both the cases cited by learned standing counsel pertain to "Tubectomy Operation". In those cases, the provisions of Article 21 of the Constitution of India were not at all canvassed before the Courts. Further more the petitioners of those writ petitions, who underwent Tubectomy Operation did not carry a mark of shame which the petitioner on account of the birth of the child would have faced. Nobody would have doubted about the fidelity of the women who underwent "Tubectomy Operation", but in a male chauvinistic society, where the women are more vulnerable, a charge of adultery can be levelled against a woman if a child is born after the Vasectomy Operation. Hence the facts of the aforesaid two cases which have been referred to by learned standing counsel are not applicable to the facts of the present case.

21. Even a pin-prick can cause death of a person and whenever a person has to undergo operation, it is general practice in the hospitals, that either the patient or its relatives had to fill up a form in which it is printed that in case the patient dies or suffers from any adverse consequences, after the operation the hospital authorities would not be responsible. In a similar fashion, the signature of the petitioner No. 1's husband was obtained on a printed form. Does it mean that the Surgeon making operation should not take all the necessary care and precaution to see that operation is successful. If it is proved that the death or injury or any other adverse consequences has resulted after the operation, then either the patient if survives then he/she, or if the result of the operation was disastrous and patient dies then damages can be claimed by relations on account of the negligent act of a Surgeon or doctor.

22. The question which calls for consideration before this Court is as to whether this Court in exercise of its powers under Article 226 of the Constitution can grant relief by providing damages to an aggrieved person. Ordinarily this Court does not adjudicate upon questions of fact although in exceptional circumstances even under Article 226 of the Constitution, the Court can embark upon to decide disputed questions of fact and can even permit taking of evidence to dispense with Justice.

23. In the instant case, this fact has not been denied in the counter-affidavit that the operation was not successful. It is admitted that the operation resulted into a

failure, although the follow up treatment was not taken by the petitioner. Normally, this Court in exercise of its jurisdiction under Article 226 of the Constitution or the Supreme Court under Article 32 of the Constitution of India does not grant compensation, but in appropriate case, the Court can grant the damage. The Hon'ble Supreme Court in *Bhim Singh, MLA Vs. State of Jammu & Kashmir and Others*, , has awarded compensation, because Bhim Singh was illegally detained. In *Consumer Education and Research center and others Vs. Union of India and others*, , Hon'ble Supreme Court held :

"The jurisprudence of personhood or philosophy of the rights to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality. The expression "life" assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure."

In the above case the Supreme Court awarded compensation of rupees one lakh payable by the factory although under normal course the matter would have gone to Industrial Tribunal.

24. We are of the view that a woman carrying a stigma on her character cannot live a meaningful life with dignity and respect. Such a lady will have to live under the trauma of insult, humiliation and shame. The petitioner was subjected to these indignities not because of her own fault. There is nothing on record to indicate any stain on her character but due to the negligence of the doctor who conducted Vasectomy Operation a child was borne to her.

25. In *Murti Devi Vs. State of Delhi and Others*, , an undertrial prisoner in jail due to the injuries sustained by him by the jail authorities a petition was filed. In that circumstances, the Supreme Court held :

"Because of the gross negligence on the part of the jail authorities, R, an undertrial prisoner was subjected to serious injuries inside the jail which ultimately caused his death. It has been stated by the petitioner, M, the mother of the said deceased, that R was the only bread earner in the family and on that day she had become a helpless widow with three sons to be maintained. As it was the bounden duty of the jail authorities to protect the life of an undertrial prisoner lodged in the jail and as in the instant case such authorities had failed to ensure safety and security to the said unfortunate undertrial accused, the State is directed to pay a sum of Rs. 2,50,000 to the petitioner within a period of six weeks. Out of the said amount, rupees two lakhs should be kept in fixed deposit in the name of M in a nationalised bank for a period of five years so that she can maintain herself and members of the family, out of the interest accruing on the said fixed deposit. The balance sum of Rs. 50,000 should be handed over to M within the period of six weeks against proper receipts. After the said period of

five years the petitioner M or her legal heirs and successors as the case may be, will be free to utilise the said sum of rupees two lakhs according to their desire."

26. In Rudul Sah Vs. State of Bihar and Another, , Hon"ble Supreme Court awarded compensation to six convicts who were blinded by the police although they were alleged to be the hardened criminal. Similarly in Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc., , Hon"ble Supreme Court although suits for compensation were pending in various Courts in Bhopal, in appeal against an interlocutory order, ordered payment of compensation to the victims of Gas tragedy. When the Punjab Police put tattooing marks on the foreheads of certain ladies, who were alleged to have committed thefts, Hon"ble Supreme Court awarded to such ladies compensation and the State was directed to get those marks removed at the expense of the State.

27. There are catena of cases, which we need not cite, where the Supreme Court as well as this Court, in exceptional circumstances awarded compensation to the victims, who suffered on account of the act or omission of the State.

28. In the case of In Re: Appointment and Transfer of Judges, Hon"ble Supreme Court has expressed a view that under Article 226 of the Constitution of India the High Court having regard to the facts of case had the discretion to entertain or not to entertain a petition, but High Court if any efficacious remedy is not available can exercise its jurisdiction. The alternative remedy is available only in three contingencies, where the writ petition has been filed and the order is without Jurisdiction, is against the violation of natural Justice or vires of an Act is challenged.

29. The petitioner in this case has clearly established that her right to live has been guaranteed by the Constitution hence considering the peculiar facts and circumstances of the case Hon"ble the Chief Justice of India taking a sympathetic and compassionate view referred the matter of the petitioner to the legal Aid and Advisory Board, which has taken up and provided legal assistance to the petitioner to file this writ petition before this Court.

30. One would have thought that the State would have not contested this petition and would have awarded some compensation to the petitioner, but it seems that the State Government has increased the tormentation of the petitioner by raising technical pleas. If the honour and dignity of the woman is Jeopardised, it is the duty of the Court to interfere, may be for that reason initially a sum of rupees twenty five thousand was granted as interim compensation to the petitioner.

31. In view of what we have indicated hereinabove, the writ petition succeeds. A writ in the nature of mandamus is issued directing the opposite parties to award a sum of rupees one lakh to the petitioner No. 1 for mental agony and torture, insult and humiliation, which she had faced as well as for the expenses, she has incurred in bringing up the child. In addition to what has already been paid.

32. As the petitioner No. 1 never wanted another child who was born due to the callous and negligent attitude of the Surgeon, who is an officer of the State, it is the duty of the State to maintain the child. Hence the State Government is directed to award a sum of rupees fifty thousand to petitioner No. 2, which shall be deposited in a fixed deposit in any nationalised bank in the name of petitioner No. 2 under the guardianship of the petitioner No. 1. Out of the said amount the petitioner No. 1 shall draw only the interest, which shall be spent for the food, clothes and education of petitioner No. 2 till he attains majority.