
(2002) 02 GUJ CK 0086
In the Gujarat High Court

State of Gujarat and Others

APPELLANT

Vs

Bai Sudha

RESPONDENT

Date of Decision : 12-02-2002

Acts Referred:

Citation : (2002) 4 GLR 2810

Hon'ble Judges : N.G. Nandi, J;B.J. Shethna, J

Bench : Division Bench

Judgement

B.J. Shethna, J.—This matter was listed before us on 25-1-2002. Mr. Sen, learned A.G.P., argued the same for a considerable time, but he was not having copy of evidence of all the witnesses with him. At his request, we kept it today. Today, Mr. Sen produced before us the relevant material for our consideration.

2. Respondent-plaintiff-Bai Sudha filed Special Civil Suit No. 135 of 1996 before the Court of 6th Joint Civil Judge (S.D.), Mehsana claiming compensation of Rs. 1,50,000/- on the ground of failure of family planning operation, which she undergone on 15-2-1992 at Government Dispensary, Vijapur. According to her, her husband is a labourer and she is mother of five children having two sons and three daughters. After undergoing the family planning operation on 15-2-1992, she once again conceived and against her will she gave birth to another male child on 2-9-1994. Therefore, she has filed suit for compensation of Rs. 1,50,000/-.

3. In support of her case, she has examined Dr. Rameshbhai Patel, who has stated that plaintiff-Sudhaben had undergone family planning operation. It was T.L. Laprosopy operation. Because of the failure of that operation Sudhaben conceived male child. As per his evidence, when he opened the part of the body, which was operated earlier by Dr. Ramesh Shah, he found that left side tube was intact. There was no ring on either left side or right side of the tubes and because of that family planning operation failed and she conceived. In the instant case, Dr. Ramesh Shah Exh. 57 who performed family planning operation has been examined. He stated that there was no negligence on his part and he had

taken sufficient care while doing the family planning operation. According to him, whenever operations are done as per Laproscopic System, then there are always chances of 2-3 operations fail out of 1000. To support his say, he has relied upon ?Tilinday? book. However, he was not able to prove that there was a ring on left side tube after operation was performed.

4. Considering the entire evidence led before him, the learned Judge came to the conclusion that the plaintiff was able to prove her case that due to the failure of family planning operation, she conceived and delivered male child because of the negligence of Dr. Ramesh Shah. However, instead of Rs.1,50,000/-, he awarded only Rs. 60,000/- with 10% simple interest on it.

5. The aforesaid judgment and decree dated 20-2-2001 is challenged in this appeal by the appellants.

6. Learned A.G.P. Shri Sen for the appellants submitted that at the time of operation no guarantee was given about the success of operation, therefore, the failure of any such operation cannot be made the basis for paying compensation. In support of his submission, Mr. Sen has relied upon the judgment of the learned single Judge of this Court delivered in Special Civil Application No. 2419 of 1990 on 14-6-2001.

7. Mr. Sen has also placed reliance upon the judgment delivered by Division Bench of this Court in case of Bharuch District Panchayat and Ors. v. Kanubhai Rajibhai Patel and Ors. reported in 1996 (1) GLH 584 and submitted that there are always chances of 2-3 operations fail out of 1000 operations and in absence of negligence being proved no compensation can be awarded.

8. In Kanubhai's case (supra) Doctor who performed family planning in four to five cases out of 1000. According to him, percentage might be less than 1% i.e., hardly 0.1. to 0.4%, but it is certain that these 0.4% of the operations are likely to fail and it would not be possible to say that it is necessarily due to negligence of the Doctor. In some extreme cases of medical negligence, the doctrine of *res ipsa loquitur* may apply, but in this kind of operations where thousands are successful and only a small fraction of portion is failing, it cannot be any means be taken as a proof of negligence by the doctrine of *res ipsa loquitur*.

9. In the case before the learned single Judge, petition was filed by Lok Adhikar Sangh on behalf of Savitaben C. Vasava, praying for compensation on the ground of failure of family planning operation. Reply-affidavit was filed to the petition, wherein it was contended that at the time of operation no guarantee was given about the success of the operation, therefore, failure of any such operation cannot be made the basis for asking any compensation. Reference was also made to the report contained in the booklet "practice of Fertility Control" written by Shri S.K. Chaudhary wherein also it is stated that failure of such operation is in one out of four hundred.

10. It was further contended in the reply-affidavit in that case that the petitioner

should have availed of services for medical termination of pregnancy and that "the petitioner herself being responsible for such omission, no compensation can be claimed". Considering the facts of that case and the judgment of the Division Bench of this Court, in Kanubhai's case (supra), learned single Judge of this Court held that it is not possible to hold that the operation in question has failed on account of any medical negligence and that "the doctrine of *res ipsa loquitur* could be invoked".

11. Coming to the facts of this case, it is amply proved by the respondent-plaintiff through the evidence of Dr. Ramesh Patel that there was a sheer negligence on the part of Dr. Ramesh Shah Exh. 57, who performed family planning operation, as there was no ring applied on the left side of the tube and because of that the family planning operation failed. Thus, in the instant case, there is a clear-cut evidence in the form of another expert doctor and this was not controverted in the evidence of Dr. Ramesh Shah, who performed the family planning operation. In that view of the matter, it cannot be said that the plaintiff in the instant case failed to prove negligence on the part of Dr. Ramesh Shah, who performed the family planning operation in 1992.

12. Considering the evidence on record of the present case, if the learned Judge has come to the conclusion that the plaintiff has successfully proved her case, then we are not in a position to take any different view of the matter in this appeal.

13. In view of the above, we are of the considered opinion that the aforesaid judgment cited and relied upon by learned A.G.P. Mr. Sen will have no application to the facts of the present case.

14. In view of the above discussion, mis appeal fails and is summarily dismissed. The appellant shall now deposit the decretal amount before the trial Court within a period of two months from today. On depositing the said amount, the trial Court shall pay the same to the respondent-plaintiff by account payee cheque. As the main appeal is dismissed, Civil Application for stay is dismissed.