

(2014) 04 SHI CK 0025

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 310 of 2002

State of Himachal Pradesh

APPELLANT

Vs

Kalpana Chauhan

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Medical Termination of Pregnancy Act, 1971 — Section 3

Citation : (2014) 2 ShimLC 896

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : V.K. Verma and Minakshi Sharma, Additional Advocate Generals and Parul Negi, Deputy Advocate General, Advocate for the Appellant; V.D. Khidtta, Advocate for the Respondent

Final Decision : Allowed

Judgement

Tarlok Singh Chauhan, J.—The present appeal has been preferred by the appellants/Defendants against judgment and decree dated 21.7.2001 passed in Civil Appeal No. 87-S/13 of 2000 by learned Additional District Judge, Shimla, Circuit Court at Rohru whereby he reversed the judgment and decree dated 3.9.1999 passed by learned Sub Judge 1st Class, Court No. 1, Rohru, District Shimla, H.P. in Civil Suit No. 95-1 of 1997. The facts, in brief, are that the respondent No. 1/plaintiff (hereinafter referred to as the "plaintiff") instituted a suit for damages/compensation against the appellants and proforma respondent (hereinafter referred to as the "defendant No. 3") to the tune of Rs. 2,00,000/- on account of failure of the family planning operation conducted on the plaintiff by defendant No. 3. It is averred in the plaint that the husband of the plaintiff is serving as multipurpose health worker in Health Department and officials of the Health Department persuaded the plaintiff to opt for family planning operation, which was to be conducted according to the latest techniques. The plaintiff on the persuasion of the officials, agreed to go for laparoscopy operation which was done on 11.12.1991 by defendant No. 3. After the aforesaid operation, the

doctor issued operation card-cum-identification card to the plaintiff. It is averred in the plaint that later on the plaintiff came to know that her operation in fact was not properly done and due to the negligence on the part of defendant No. 3 the plaintiff again became pregnant. The plaintiff ultimately gave birth to a female child on 17.11.1992 at Civil Hospital, Rohru. Before the laparoscopy operation the plaintiff was assured by the defendant No. 3 that in future after operation she will not conceive and no risk is involved in the same. The plaintiff never wanted the child and the plaintiff was advised by the doctor not to terminate the pregnancy as it will be risky to her. Subsequently, the plaintiff was admitted in Kamla Nehru Hospital, Shimla where she delivered a child. The plaintiff was to face humiliation and also mentally disturbed, which resulted in the separation of family of her husband in the form of family partition from joint family.

2. It is further averred in the plaint that the plaintiff again went for second operation of family planning at Kamla Nehru Hospital by way of Tubectomy operation and after the performance of this operation, the plaintiff became unable to perform all the domestic and agriculture works. The husband of the plaintiff engaged one woman to perform the domestic and agriculture work. It is alleged that the plaintiff was still under medical treatment and was feeling pain in her back bone due to the second operation. It is alleged in the plaint that the plaintiff spent thousands of rupees on her treatment and the plaintiff is entitled to recover damages from the appellants and defendant No. 3 i.e. Rs. 15,000/- on account of treatment, Rs. 50,000/- labour charges as well as damages on account of mental and physical pain and Rs. 1,35,000/- on account of education and up bringing of the third child. It is further averred that the plaintiff filed a writ petition in the High Court and the High Court directed the plaintiff to approach the civil Court for appropriate relief and the said writ petition was dismissed on 23.12.1996.

3. The appellants/defendants No. 1 and 2 contested the suit by filing joint written statement in which preliminary objections of limitation, estoppel and non-service of valid notice u/s 80 CPC were taken. On merits, it was averred that the plaintiff opted for Family Planning Operation out of her own sweet will and volition. It was further averred that the laparoscopy operation does not at all induce any kind of health hazard and it is wrong to attribute negligence on a doctor who is an efficient and experienced surgeon. However, in rare of rarest cases, the laparoscopy operation being a failure has been accepted worldwide. It has been averred that the plaintiff voluntarily gave her consent for such operation and now the plaintiff was estopped from filing the present suit. It was further averred that there was no assurance for non-conception of pregnancy given by the defendants. There was no connection between the health of the plaintiff and the alleged operation. The defendants No. 1 and 2 prayed that the plaintiff was not entitled for any damages. The defendant No. 3 was served and proceeded ex parte when he chose not to appear and contest the suit.

4. The plaintiff filed replication to the written statement of defendants No. 1 and

2 and re-affirmed all the allegations contained in the plaint and denied those of the written statement.

5. On the pleadings of the parties, the learned trial Court framed the following issues:

1. Whether the plaintiff is entitled to damages as claimed for? OPP
2. Whether notice u/s 80 CPC was issued? OPP
3. Whether the suit is within limitation? OPP
4. Whether the plaintiff is estopped from filing the suit? OPD
5. Whether the plaint lacks better particulars? OPD
6. Relief.

6. After recording the evidence, the learned trial Court dismissed the suit of the plaintiff vide judgment and decree dated 3.9.1999. Aggrieved against the said judgment and decree, the plaintiff preferred an appeal before the learned lower Appellate Court, who vide his judgment and decree dated 21.7.2001 has been pleased to set-aside the judgment and decree of the learned trial Court and passed a decree for a sum of Rs. 1,10,000/- as damages to the plaintiff while the defendants/appellants have been held vicariously liable to pay the same alongwith interest at the rate of 9% per annum from the date of filing of the suit till realisation of the decretal amount. It is against this judgment and decree, which has been challenged by the appellants/defendants No. 1 and 2 before this Court.

7. On 19.7.2002, this Court admitted the appeal on the following substantial questions of law:

1. Whether the impugned judgment and decree of the first appellate Court is dehors the evidence on record?
2. Whether the plaintiff has estopped from filing the suit in view of the document Ex. PW-1/E?

8. Since both the aforesaid substantial questions of law are interrelated and interconnected, therefore, I proceed to determine the same through common reasoning.

9. The learned Additional Advocate General has contended that the judgment and decree passed by learned lower Appellate Court is without application of mind as it failed to take into consideration that there was no negligence on the part of the operating surgeon and, therefore, the State could not have been held vicariously liable. The mere fact that the family planning operation resulted in failure would not perse entitle the plaintiff to damages especially when no evidence regarding negligence has been led by the plaintiff. The learned lower appellate Court has failed to take into consideration the documentary evidence

more particularly the "consent form" which postulates certain specific instructions which were duly accepted by the plaintiff. It is further strenuously contended that the learned lower Appellate Court has not taken into consideration that it was universally accepted fact that there could be failure in such kind of operation and the evidence in this regard has already been led by the State when it chose to examine Gynaecologist as D.W. -1. Lastly it was argued that the learned lower Appellate Court has completely ignored the legal position as stated by the various pronouncements of various High Courts as well also Hon"ble Supreme Court.

10. On the other hand, Mr. V.D. Khidtta, learned Counsel for the plaintiff/respondent No. 1 sought to support the judgment and decree passed by the learned lower Appellate Court on the ground that the birth of the child in itself was sufficient proof of negligence and this is a fit case where the principles of "res ipsa loquitur" would apply. According to him, this case is squarely covered by the judgment of the Hon"ble Supreme Court in State of Haryana and Others Vs. Smt. Santra, . He further contended that since the surgeon who performed the operation has not appeared to contest the suit nor he appeared as a witness so as to subject himself to cross-examine by the plaintiff, therefore, adverse inference is required to be drawn against the State and defendant No. 3.

11. At the outset, it may be pointed out that the plaintiff has raised two conflicting claims in the plaint which would be clear from the perusal of paras 2 and 3 of the plaint which are reproduced hereinbelow:

2. That after conducting the operation, the medical authority issued operation card cum identification card to the plaintiff which shows that operation conducted upon the plaintiff. It is pertinent to note that before conducting the said operation the plaintiff was keeping a sound health and was doing all the domestic affairs of her husband including agriculture works. Since to keep the size of family small and keeping in view of the financial sources of her husband the plaintiff conducted the said operation so that she could maintain her two children within limited source of her husband. But due to the negligent act of the defendant No. 3, who is an expert of defendants No. 1 and 2 and was working as an incharge of family planning at Civil Hospital, Rohru. Subsequently, this operation proved in successful due to the negligence on the part of defendant No. 3 which resulted once again pregnancy to the plaintiff and the plaintiff gave birth another female child on 17.11.1992 in the Civil Hospital, Rohru. However, the plaintiff was assured by the defendant No. 3 before operation that in future after operation she will not conceived any pregnancy. Ultimately, this negligence committed upon the plaintiff great mental and physical damage to the plaintiff.

3. That it is also pertinent to mention here that before conducting the family planning operation upon the plaintiff, she was thoroughly examined by the staff of defendant and after getting fully satisfied the said leproscopy operation was conducted. The defendant No. 3 assured that this type of operation is the safest one under the latest medical science. But all in vain. After conceiving pregnancy

the plaintiff visited Civil Hospital Rohru and got checked up for the said problem. The plaintiff was assured by the doctor not to terminate the pregnancy as it will be risky to the life of plaintiff. She was also advised to deliver the child at Shimla in view of the problems which was likely to be faced by the plaintiff. Subsequently, the plaintiff was admitted in Kamla Nehru Hospital, Shimla on 16.11.1992 where she was delivered a third child. The plaintiff faced humiliation and her family life got disturbed for petty long time. She became physically unfit and health was decreased totally. She became unable to perform the domestic obligations which resulted in the separation of family of her husband in the shape of family partition from joint family.

12. As would be seen, in paragraph 2 of the plaint, the plaintiff has averred that she gave birth to another female child on 17.11.1992 in Civil Hospital, Rohru. While in paragraph 3, she has stated that she was admitted in Kamla Nehru Hospital, Shimla on 16.11.1992 where she delivered a third child. Be that as it may.

13. I have given my deep and thoughtful consideration to the rival contentions of the learned Counsel for the parties. It is admitted fact that the plaintiff has not led any evidence about the negligence on the part of the doctor. However, Mr. V.D. Khidta, learned Counsel for the respondent No. 1/plaintiff would contend that lack of proper care and skill is inherent and is to be presumed when despite sterilization, the plaintiff had conceived a child which in itself was sufficient proof of negligence. He further contended that a patient does not know whether the doctor, who is going to operate him/her is having required skill and the requisite qualification, therefore, it is for the doctor to prove that he had required skill and requisite qualification and further that there was no negligence on his part in performing the operation. Since the doctor has not appeared in the witness box, thus according to him, an adverse inference is required to be drawn against him.

14. I am afraid that these submissions made on behalf of the plaintiff cannot be accepted. In a claim for damages as a tortious liability, the negligence is necessarily required to be proved and established by the plaintiff. The Hon'ble Supreme Court in State of Haryana and Others Vs. Raj Rani, has held as under:

"Child birth in spite of a sterilization operation can occur due to negligence of the doctor in performance of the operation, or due to certain natural causes such as spontaneous recanalisation. The doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several textbooks on medical negligence have recognized the percentage of failure of the sterilization operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed by a proficient doctor successfully by adopting a technique recognized by medical science. Thus, the pregnancy can be for reasons dehors any negligence of the surgeon. In the absence of proof of

negligence, the surgeon cannot be held liable to pay compensation. Then the question of the State being held vicariously liable also would not arise".

15. Mr. V.D. Khidtta, learned Counsel for the plaintiff then sought to invoke and apply the principles of "res ipsa loquitur". It may be observed here that even the rule of "res ipsa loquitur" is to be applied with extreme care and caution in cases of professional negligence and in particular that of doctors as held by the Hon"ble Supreme Court in Jacob Mathew Vs. State of Punjab and Another, , as under:

No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.

At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the "smoking gun".

The jurisprudential concept of negligence defies any precise definition. In current forensic speech, negligence has three meanings. They are; (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings.

Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence, as recognized are three; "duty", "breach" and "resulting damage", that is to say;

(1) the existence of a duty to take care, which is owed by the defendant to the complainant;

(2) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

(3) damage, which is both casually connected with such breach and recognized by the law, has been suffered by the complainant.

If the claimant satisfies the Court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.

16. Mr. V.D. Khidtta, learned Counsel for the plaintiff thereafter contended that the birth of the child inspite of sterilization in itself is sufficient proof of negligence.

While dealing with the case of failure of sterilization operation allegedly caused due to the negligence of the doctor merely because the woman having undergone sterilization operation becomes pregnant and thereafter delivers a child the operating surgeon or his employer cannot be held liable on account of unwanted pregnancy or unwanted child. Relying upon the authentic text of various studies and books on medical jurisprudence, the Hon''ble Supreme Court in State of Punjab Vs. Shiv Ram and Others, held as under:

11. Dealing with reliability of the sterilization procedures performed and commonly employed by the gynecologists, the text book states (at p.621):--

Reliability

The only sterilization procedures in the female which are both satisfactory and reliable are: resection or destruction of a portion of both fallopian tubes; and hysterectomy. No method, however, is absolutely reliable and pregnancy is reported after subtotal and total hysterectomy, and even after hysterectomy with bilateral salpingectomy. The explanation of these extremely rare cases is a persisting communication between the ovary of tube and the vaginal vault.

Even when tubal occlusion operations are competently performed and all technical precautions are taken, intrauterine pregnancy occurs subsequently in 03 per cent of cases. This is because an ovum gains access to spermatozoa through a recanalized inner segment of the tube.

There is clinical impression that tubal resection operations are more likely to fail when they are carried out at the time of caesarean Section than at any other time. The fact that they occasionally fail at any time has led many gynaecologists to replace the term "sterilization" by "tubal ligation" or "tubal resection" in talking to the patient and in all records. This has real merit from the medicolegal standpoint.

13. In "The Essentials of Contraceptive Technology", written by four doctors and published by Center for Communication Programs, The Johns Hopkins School of Public Health in July, 1997, certain questions and answers are stated. Questions 5 and 6 and their answers, which are relevant for our purpose, read as under:

5. Will female sterilization stop working after a time? Does a woman who had a sterilization procedure ever have to worry about getting pregnant again?

Generally, No. Female sterilization should be considered permanent. Failure rates are probably higher than previously thought however. A major new US study found that the risk of pregnancy within 10 years after sterilization is about 1.8 per 100 women -about 1 in every 55 women. The risk of sterilization failure is greater for younger women because they are more fertile than older women. Also, some methods of blocking the tubes work better than others. Methods that cut away part of each tube work better than spring clips or bipolar electro coagulation (electric current). Effectiveness also depends on the skill of the provider.

The same US study found that 1 of every 3 pregnancies after sterilization was ectopic. If a woman who has had sterilization ever thinks that she is pregnant or has an ectopic pregnancy, she should seek help right away.

6. Pregnancy after female sterilization is rare but why does it happen at all?

The most common reason is that the woman was already pregnant at the time of sterilization. Pregnancy also can occur if the provider confused another structure in the body with the fallopian tubes and blocked or cut the wrong place. In other case pregnancy results because clips on the tubes come open, because the ends of the tubes grow back together, or because abnormal openings develop in the tube, allowing sperm and egg to meet."

23. In *Thake v. Morris*, [1986] 1 All ER 497 (CA) the claim for damages was founded on contract and not in torts. The Court of Appeal firmly rejected the possibility of an enforceable warranty.

Neill L.J. said:

The reasonable man would have expected the defendant to exercise all the proper skill and care of a surgeon in that speciality: he would not have expected the defendant to give a guarantee of 100% success.

24. Nourse L.J. said:

of all sciences medicine is one of the least exact. In my view, a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms.

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

referred to hereinabove, ordinarily a surgeon does not offer such guarantee.

The Bolam's test affirmed by the apex Court in Jacob Mathew (supra) was reaffirmed as under:

7. The relevant principles culled out from the case of Jacob Mathew (supra) read as under:

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal and Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damage".

(2) A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

This Court has further held in Jacob Mathew's case (supra):--

Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated (See, Black's Law Dictionary, 7th Edition).

Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse it with the consequence of negligence.

17. Faced with such a situation, Mr. V.D. Khidta, learned Counsel for the plaintiff then sought to rely upon the judgment in Santra's (supra) to contend that the Hon'ble Supreme Court had upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child because of failure of sterilization operation. I am afraid even this contention of Mr. Khidta cannot be accepted because the Hon'ble Supreme Court in subsequent judgment rendered by three Hon'ble Judges in Shiv Ram (supra) case has clearly held Santra's case to be not laying down any law in the following manner:

Mrs. K. Sarada Devi, the learned Counsel appearing for the plaintiff-respondents placed reliance on a two-Judge Bench decision of this Court in State of Haryana and Others Vs. Smt. Santra, wherein this Court has upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child on account of failure of sterilization operation. The case is clearly distinguishable and cannot be said to be laying down any law of universal application. The finding of fact arrived at therein was that the lady had offered herself for complete sterilization and not for partial operation and, therefore, both her fallopian tubes should have been operated upon. It was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in these circumstances, that a case of medical negligence was found and a decree for compensation in tort was held justified. The case thus proceeds on its own facts.

18. In fact, the Hon'ble Supreme Court in Shiv Ram (supra) case has laid the following pertinent observations:

28. The method of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. A reference to the provisions of the Medical Termination of Pregnancy Act, 1971 is apposite. Section 3 thereof permits termination of pregnancy by a registered medical practitioner, notwithstanding anything contained in the Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation II appended to Sub-section (2) of Section 3 provides:

Explanation II.--Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of

limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

29. And that provides, under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

30. The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of childbirth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone the sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.

Thus, it can be safely concluded that the methods of sterilization are not 100% safe and secure and the cause of action for claiming compensation in cases of failed sterilization operation arises only "on account of negligence of the surgeon and not on account of childbirth."

19. The learned Counsel for the State referred to a judgment of a co-ordinate Bench of this Court Hon"ble Mr. Justice Surinder Singh, J. (as his Lordship then was) in State of H.P. v. Nand Lal and another, RFA No. 114 of 2001 decided on 7.10.2010 wherein it was held:

9. It is well established that the negligence in the context of the medical profession necessarily calls for a treatment with a difference. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A physician would not assure the patient of full recovery of every case. Similarly, a surgeon cannot or and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100%, for the person operated upon. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect.

10. Judged by the above standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite

skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills " in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence. A case of occupational negligence of the medical doctor is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment would also be available or simple case a more skilled doctor would not have chosen to follow or resort to that practice or procedure, which the accused followed, [see *Jacob Mathew Vs. State of Punjab* and *Another*, and *Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Others*,].

His Lordship has further held:

14. In fact, the negligence is the breach of a duty caused by the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent or a reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: "duty", "breach" and "resulting damages".

20. The learned lower Appellate Court in order to hold the State to be liable to pay damages has simply relied upon the judgment of the Hon"ble Supreme Court in *Santra's* case which judgment as stated hereinabove has been held by larger Bench of the Hon"ble Supreme Court to be distinguishable and not laying down any law of universal application.

21. Another fact which cannot be lost sight of by this Court is that before undergoing the sterilization operation, the plaintiff had filled up her consent form Ex. PW-1/E, the relevant portion whereof reads as under:

.....The decision to undergo sterilization operation has been taken independently by me without any outside pressure, inducement or force. I am aware that other methods of contraception are available to me. I know that for all practical purposes this operation is permanent and that I can not have any more children. I also know that there are some chances of failure of the operation for which government hospital/operation surgeon will not be held responsible by me or by my relatives or any other person whatsoever. My spouse has not been sterilized previously. I am also aware that I am undergoing an operation which carries an

element of risk. The eligibility criteria for the operation have been explained to me and I affirm that I am eligible to undergo the operation according to these criteria. I agree to undergo the operation under any kind of an aesthesia which the surgeon thinks suitable for me and to administration of other medicines as considered appropriate by the doctor concerned.

22. The learned Additional Advocate General is absolutely right in his submission that this document Ex. PW-1/E has not at all been considered by the learned lower Appellate Court while decreeing the suit of the plaintiff. The contents of Ex. PW-1/E clearly operate as an estoppel against the plaintiff from filing the suit particularly when the plaintiff has failed to lead definitive evidence regarding the negligence of defendant No. 3, so as to fasten the liability upon the defendant No. 3 and therefore even the State cannot be held vicariously liable for payment of damages.

23. The learned lower Appellate Court has further erred in drawing an adverse inference against the defendants since the defendant No. 3 did not appear as a witness in the present case. The defendant No. 3 was required to appear as witness only in case the plaintiff had succeeded in proving and establishing her plea of negligence. The doctor could be held liable in cases where the failure of the operation was attributable to his proved negligence and not otherwise. [Raj Rani (supra)]. Otherwise also, it is settled law that the plaintiff has to stand on its own legs and cannot take advantage of the weakness in the defence.

24. In view of the detailed discussion made hereinabove, the substantial questions of law No. 1 and 2 are answered in favour of the appellants/defendants. Accordingly, the judgment and decree dated 21.7.2001 passed by the learned lower Appellate Court is ordered to be set-aside while the judgment and decree dated 3.9.1999 passed by the learned trial Court is affirmed, leaving the parties to bear their own costs.