

(2014) 10 SHI CK 0032

In the High Court Of Himachal Pradesh

Case No : Regular First Appeal No. 296 of 2005

State of H.P.

APPELLANT

Vs

Madhu Bala

RESPONDENT

Date of Decision : 13-10-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (2014) 10 SHI CK 0032

Hon'ble Judges : Sureshwar Thakur, J

Bench : Single Bench

Advocate : Vivek Singh Attri, Deputy Advocate General, Advocate for the Appellant; Vinod Chauhan, Advocate for the Respondent

Judgement

Sureshwar Thakur, J.—The instant appeal has arisen out of the judgment and decree rendered on 5.3.2004 by the learned District Judge, Una, H.P., in Civil suit No. 14 of 2000, whereby the suit of the plaintiff is decreed for a sum of Rs. 1,00,000/- (Rupees one lac only) with 6% interest from the date of filing of the suit till its realization.

2. Brief facts of the case are that plaintiff/respondent No. 1 has filed a suit for recovery of Rs. 4,90,000/with 18% interest per annum, against the defendants. The plaintiff is a house wife and owing to low source of income, she opted for sterilization operation as she already have two children. She consulted the Doctor at Primary Health Centre, Takka, where she had been advised to consult the doctors at District Hospital, Una. Thereafter, plaintiff visited the District Hospital, Una and defendant No. 3 asked the plaintiff for sterilization operation under Family Planning Scheme of Govt. of Himachal Pradesh. Consequently, on the advise of defendant No. 3 on 14.6.1996 laparoscopic sterilization procedure was performed upon her. A certificate was also issued regarding the success of operation of the plaintiff. The defendant No. 3 also assured the plaintiff that she would not conceive in future. Later on, the plaintiff suspected the pregnancy owing to stoppage of menstruation cycle. She went for her medical check up on

22.3.1999 in the hospital where the urine test was conducted and the report was shown to be negative. Thereafter plaintiff got herself checked up from Nurse (Daee) and was shocked to know that she was pregnant. The plaintiff suffered serious shock, mental agony, harassment and pain as she was already having two children and was not desirous for any other child. She gave birth to third female child on 4.11.1999. The birth of the child is result of the negligency on the part of defendant No. 3. The plaintiff has claimed damages of Rs. 4,90,000/- from the defendants as she never wanted any more child and opted for operation in accordance with the policy prepared by the Govt. of Himachal Pradesh.

3. The suit of the plaintiff was resisted and contested by the defendants. Defendants No. 1 and 2 filed a joint written statement taking preliminary objections that the suit is time barred, not legally maintainable, estoppel and no legal and valid notice has been served as required under Section 80 CPC upon the defendants. It is alleged on merits that the consent of the plaintiff was obtained for sterilization operation as she disclosed that she is labourer by profession having income of Rs. 700/- per month. It has been admitted that sterilization operation was performed upon her with her consent by the doctor. Defendant No. 3 had also suggested to her other methods of contraception but the plaintiff voluntarily agreed for sterilization operation. She was also apprised of the risk of failure and to take necessary precautions. It has also been alleged that on 22.3.1999 she had come to District Hospital and was advised pregnancy test, which was found to be negative after analysis as she had not given the proper sample of urine. It has also been alleged that the pregnancy could have been got terminated by her under MTP Act. There is no fault of the doctor in performing the sterilization operation, since there are always chances of failure in such like operations and this fact was well within the knowledge of the plaintiff and as such, she is not entitled for any amount of damages. Defendant No. 3 filed a separate written-statement, wherein he had denied most of the averments made in the plaint. It has also been alleged that he had left the services of Govt. of Himachal Pradesh, as such cannot say anything much regarding the averments made in the plaint. It is admitted by him that the number of operations were being performed by different teams of doctors during family welfare operations. After sterilization operation the plaintiff never visited him nor consulted him. He further alleged that the during his career he has performed so many operations and all were successful. He further averred that he is a qualified surgeon and in case the patient does not take the precautions, during the follow up period, there are chances of failure of operation.

4. The plaintiff filed replication to the written-statement of the defendants, wherein, she denied the contents of the written-statement and re-affirmed and re-asserted the averments made in the plaint.

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

1. Whether the plaintiff is entitled to the recovery of Rs. 4,90,000/- from the

defendants for medical negligence under the law of Torts as alleged? OPP

2. Whether the suit is not properly valued for the purpose of court fee and jurisdiction as alleged? OPD 2

3. Whether the suit is time barred as alleged? OPD 1 & 2.

4. That the suit is not maintainable in the present form as alleged? OPD 1 & 2.

5. Whether the plaintiff is estopped from filing the suit by her acts and conduct as alleged ? OPD 1 & 2.

6. Whether no legal and valid notice u/s. 80 CPC has been served upon the defendants as alleged? OPD 1 & 2.

7. Relief.

6. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff.

7. Now the defendants No. 1 and 2/appellants have instituted the instant Regular First Appeal before this Court, assailing the findings recorded by the learned trial Court in its impugned judgment and decree. The learned Deputy Advocate General has concertedly, and, vigorously contended, that, the findings recorded by the learned trial Court, are, not based on a proper appreciation of evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the judgment and decree passed by the learned District Judge be quashed and set aside.

8. On the other hand, the learned vice counsel appearing for plaintiff/respondent No. 1, has, with considerable force and vigour, contended that the findings recorded by the Court below, are, based on a mature and balanced appreciation of evidence on record, and, do not necessitate interference, rather merit vindication.

9. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

10. The plaintiff/respondent No. 1 admittedly underwent sterilization operation as divulged by medical certificate comprised in Ex. PW-2/A. However, despite her having undergone a sterilization operation, she begot a child named Kumari Shikha. The factum of Kumari Shikha having been born subsequent to the plaintiff having undergone a sterilization operation, is proved by Ex. PW-3/C, which is the birth certificate of the aforesaid. In the face of the sterilization operation conducted on the plaintiff/respondent No. 1 by defendant No. 3/ Performa respondent having failed, she has been enjoined with the burden to nurse and maintain an unwanted child. Consequently, she proceeded to file a suit for compensation/damages arising from the purported tort of negligence of defendant No. 3/performa respondent in carrying out a failed sterilization operation. The judgment of the Hon''ble Court in Fulla Devi alias Fullo Devi Vs.

State of Haryana and Others, enjoins the trite legal principle of there being an enjoined duty cast upon a Doctor to act with a reasonable degree of care and skill in performing a sterilization operation. Besides the aforesaid judgment also postulates a per se presumption of negligence attachable/imputable to the Doctor in performing a failed sterilization operation or when despite its performance, it sequels the birth of an unwanted child. However the said presumption would have come to be rebutted or the Doctor performing a failed sterilization operation would not invite culpability for committing the tort of negligence, only in the event of cogent and satisfactory proof having been brought on record by the Doctor, demonstrative of the fact of his having adopted the permissible state-of-art/latest techniques in vogue to obviate an unwanted pregnancy. However, an incisive perusal of the evidence adduced does not constitute evidence personifying the fact that the Doctor as a matter of fact did adopt the "legation method" which comprises the latest technique for obviation of an unwanted pregnancy. In a case reported in State of M.P. Vs. Smt. Sundari Bai and Another, , the Hon''ble Court had exculpated the liability of a Doctor who performed a failed sterilization operation on the score that the performing Doctor had by adopting legation method had hence observed a reasonable degree of care and caution in carrying out the operation. The relevant paragraph is extracted hereinafter:-

"16. Now examining the facts of the present case on the touchstone of the above mentioned principles it can be safely held that there was no negligence on the part of the Doctor. In the present case the plaintiff had two sons when the sterilization was performed. Her physical condition was not good. The Legation method which is a well recognized mode of sterilization was adopted. This method was used by the doctor in hundreds of cases and there was no failure of this mode. Even in case of the plaintiff this method worked well for six years and the pregnancy was prevented. Thus the doctor acted with reasonable degree of care and skill. There were more than one "perfectly proper standards" and if the doctor chose one then she cannot be said to be negligent. There might have been an error of judgment while acting with ordinary care and skill and that cannot be equated with negligence. It is one thing to say that it would have been better if "Section method" had been chosen for sterilization but the adoption of "legation method" on the facts of the present case is not negligence per se. The defendant No. 1 though quite experienced was working in a Primary Health Centre and she used a fair, reasonable and competent degree of skill."

11. However, in the instant case, with the judgment reported in State of Haryana versus Smt. Santra, AIR 2000 SC 1888, postulating the imputation of per se rebuttable presumption of per se negligence to the Doctor who carries out a failed sterilization operation. However, when there is neither apt nor cogent evidence demonstrative of his having rebutted the said presumption comprised in his having proved to have adopted a latest in vogue state of art/technique, to obviate an unwanted pregnancy, in as much as his having adopted the permissible exculpatory "legation technique". Consequently, with evidence on

record portraying that he had not adopted the in vogue state of art technique in as much as he has omitted to adopt the legation method, to carry out the sterilization operation, hence, in sequel, the presumption of per se negligence attracted to the act of the doctor who performed a failed sterilization operation, in the instant case, stands un-rebutted. As a natural corollary, the presumption of per se negligence attachable or attractable to his act of performing a failed sterilization operation stands invincibly established. The relevant paragraph of the aforesaid judgment is extracted hereinafter:-

9. 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 of skill. In *Bolam v. Friern Hospital Management Committee* (1957) 2 ALL ER 118, Mc Nair, J. summed up the law as under:-

"The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonable competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards then he is not negligent."

12. In aftermath, it has to be also concluded, as aptly done by the learned court below, that the performing doctor had omitted to adhere to standards of reasonable care and caution in performing the sterilization operation, as a corollary, it resulted in its failure. The said failure has wholly arisen on account of commission of tort of negligence on the part of performing doctor. Further obviously for the lack of adherence by the performing doctor with the standards of due care and caution, he has to be held liable for the tort of negligence. However, since he was at the relevant time under the employment of defendants No. 1 and 2/appellants, consequently on the principle of liability of master for the tort of negligence of servant as the defendant No. 3 was under the appellants No. 1 and 2, both of whom are respectively his masters, the latter have been aptly adjudged by the trial Court to be vicariously liable for defrayment of compensation to the plaintiff/respondent No. 1, arising from the aforesaid tort of negligence committed by Performa respondent during the course of his employment under the appellants. Even though the learned Deputy Advocate General contends before this Court that with the awakening of the plaintiff/respondent No. 1 to the factum of failure of sterilization operation which she underwent as marked by Ex. PW-3/B, the appellants are liable to be exculpated from the vicarious tort of negligence committed by defendant No. 3. However, the said instruction comprised in Ex. PW-3/B is rather countervailed and overcome by the, findings/conclusion arrived at, hereinabove which abundantly

portray the sheer negligence of the performing doctor in his conducting and carrying out the failed sterilization operation upon the plaintiff/respondent No. 1. Moreover the contention of the learned Deputy Advocate General that there was non-observance by the plaintiff/respondent No. 1 with the precautions enjoined to be adhered to by for subsequent to the performance of a sterilization operation which she underwent as such, for such non-adherence on her part, with the enjoined instructions the operation failed. Consequently, it is further argued that in sequel the liability of the appellants in purportedly having committed the tort of negligence remains un-attracted. The above submission gathers no momentum in the face of it having divulged by DW-1, Health Worker, Health Centre, Takka, that the plaintiff/respondent No. 1 had repeatedly consulted her. In aftermath, the aforesaid evidence when marking the fact of hence, plaintiff/respondent No. 1 having impliedly obeyed and adhered to the precautions comprised in Ex. PW-3/B, she hence is not to be concluded to have contributed towards the failure of sterilization operation. With the forming of the above conclusion, the obvious inference is that the responsibility for failure of sterilization operation in its entirety is to be fastened upon the performing doctor in as much as his having omitted to perform it while adhering to the standards of due care and caution. The manner of computation of compensation payable as damages to the plaintiff/respondent No. 1 by the learned trial Court is anvilled upon a close studied scrutiny as well as on an incisive application of apposite case law to the apposite factual matrix. Consequently, the computation of damages payable to the plaintiff/respondent No. 1 by the learned trial Court for hers being enjoined to rear/nurse an unwanted child arising from the failure of sterilization operation cannot be faulted. That apart the learned trial Court in recording its findings on all the issues over which the parties were at contest has appreciated the evidence apposite to them in a studied, careful and balanced manner. The manner of appreciation of evidence as done by the learned court below, hence does not suffer from any absurdity or perversity of mis-appreciation or non-appreciation of evidence on record. In aftermath, this Court does not deem it fit and appropriate that the findings, recorded by the learned trial Court, merit inference. Consequently, the appeal, preferred by the appellants is dismissed and the judgment and decree, rendered by the learned trial Court, is affirmed and maintained. No order as to costs.