
(2003) 01 MP CK 0071
In the Madhya Pradesh High Court
Case No : First Appeal No. 245/93

State of M.P.

APPELLANT

Vs

Smt. Sundari Bai and Another

RESPONDENT

Date of Decision : 23-01-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2005) ACJ 868 : AIR 2003 MP 284 : (2003) 1 MPHT 528 : (2003) 2 MPLJ 504

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Kiran Mehta, for the Appellant; Ashish Shrotri and Rajesh Nema, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Khare, J.

This is first appeal u/s 96, CPC by defendant No. 2 State of Madhya Pradesh against the judgment and decree by which compensation of Rs. 50,000/- has been awarded to the plaintiff for "failure of sterilisation".

It is no longer in dispute that plaintiff Sundaribai had two sons. At the time of the birth of second son on 27-8-1980 she got her "sterilisation" done so that there is no further pregnancy. The operation was performed by defendant No. 1 Dr. R. Rathore, Assistant Surgeon, Ashta in the Government Hospital "by ligation method". She conceived again in the year 1986 and gave birth to a female child on 8-12-1986.

The plaintiffs case is that she is a poor and illiterate lady. She was told by the lady doctor that she would not have any further pregnancy. According to the plaintiff the defendant No. 1 acted negligently in performing the tubectomy operation. She claimed Rs. 50,000/- as compensation for "failed sterilisation" for expenses incurred in the delivery, for rearing the female child and her marriage,

against the doctor and the State Government.

The case of the defendants is that the sterilisation was done by "tying the fallopian tubes" on account of personal peculiar physical condition of the plaintiff. Her physical condition could not allow the cutting of the fallopian tubes. She was advised to avoid hard work, physical strain and sexual intercourse for sometime. It has been denied that there was any negligence on the part of the doctor. According to the defendants the sterilisation failed because of the act of the plaintiff herself. It is scientifically and universally recognised that the sterilisation operation can fail in some cases. The defendants are not liable to pay any compensation as there was no negligence of the doctor who was very competent and experienced.

The Trial Court has held that there was negligence on the part of the lady doctor as she did not cut the fallopian tubes and merely "tied" them by adopting "ligation method". It has also been held that the State Government is vicariously liable for the negligence of the doctor. The compensation of Rs. 50,000/- with interest at the rate of six percent per annum has been awarded.

In this appeal it has been argued that the findings of the Trial Court that there was negligence of the doctor is not correct. It is submitted that "ligation method" is one of the recognised modes of sterilisation and if keeping in view the personal and physical condition of the plaintiff the doctor in her judgment adopted this method it cannot be held by the Courts that she acted negligently.

The point for determination is whether there was negligence on the part of the doctor in performing the sterilisation operation on the plaintiff.

Sundaribai (P.W. 1) has deposed that before the birth of her second son she expressed before the lady doctor that she does not want a third child and therefore she should perform sterilisation operation. She was told by the lady doctor after the operation that there would be no further pregnancy. She was advised to take rest and not to lift the weight for 3-4 months. In cross-examination in para 10 she has stated that she does not know what was the mistake which was committed by the doctor on account of which she became pregnant again. The plaintiff has not examined any other witness to establish that there was any negligence on the part of the doctor.

Dr. Rajwati Rathore (D.W. 1) has deposed that she was Assistant Surgeon in Primary Health Centre, Ashta in the year 1980 and she conducted the sterilisation operation on Sundaribai. She adopted "ligation method" in performing the sterilisation operation as shown in figure No. 2 in Ex. P-11. This is an extract from Williams' Obstetrics 14th Edition (1971) Page 1097. Dr. Rathore (D.W. 1) has further deposed that there was no negligence on her part. She has performed about 5000 to 6000 operations and there has not been failure in any other case. In cross-examination she has stated that she had tied the fallopian tubes of the plaintiff and she did not cut the loops. She has further explained in para 6 that the plaintiff also underwent caesarean operation for the delivery of

the child and she adopted the ligation method and not the section method. She has added that if she had cut the loops it would have led to excessive bleeding. According to her there is likelihood of bleeding because of congestion. In para 8 she has denied the suggestion that it was necessary for her to cut the fallopian tubes. She has further stated that many sterilisation operations are performed without cutting the tubes. She has done about twenty five percent of the operations performed by her by ligation method without cutting the tubes.

From the evidence of the lady doctor it is found that she adopted one of the recognised methods of sterilisation and that was "ligation method". She has given reasons for not cutting the fallopian tubes. According to her testimony, there has been no failure of sterilisation in any other case except that of the plaintiff. The testimony of the lady doctor is reliable. It cannot be said that she was negligent because she did not adopt the section method of sterilisation. She was an experienced doctor and she could exercise her discretion as to which method she should adopt for the purpose of sterilisation. As already stated no evidence has been adduced by the plaintiff to prove negligence of the doctor except her own testimony.

The Trial Court has held defendant No. 1 Dr. Rathore negligent as she did not adopt the section method for sterilisation. The view taken by the Trial Court is not correct. It was for the doctor to decide which method of sterilisation she should adopt in the case of the plaintiff. The Trial Court in para 23 of its judgment has accepted the proposition that there is a possibility of failure of the sterilisation operation. The Trial Court has not rejected the evidence of the lady doctor on this point that she has performed a large number of sterilisation operations (about 1500--25% of 6000) through "ligation method" and there has been no failure in any other case and therefore this version of the lady doctor is true. Even in case of the plaintiff the ligation method was successful for about six years and during this period she had no conception. According to the doctor the physical condition of the plaintiff was such that cutting of the tubes was not considered desirable. The plaintiff had two children and it is likely that the tubes were tied and not cut so that if the need arises there could be the reversal of the process of sterilisation.

William's Obstetrics 21st Edition Pages 1556 to 1560 deal with "sterilisation". This edition which is available at present is of the year 1997. In the present case sterilisation was done in the year 1980 and at that time as per 1971 Edition the ligation method of tubal sterilisation was quite acceptable. Now more safe techniques have been developed. It is stated at page 1559 of 1997 Edition : "No method of tubal sterilisation is without failure". "Soderstrom (1985) concluded that most sterilisation failures were not preventable. A similar conclusion was reached by the American College of Obstetricians and Gynecologists (1996), which stated, "pregnancies after sterilisation may occur without any technical errors". "Finally, the lifetime increased cumulative failure rates overtime are supportive that failure after one year are not likely due to technical errors". Thus,

according to this authoritative book the failure of tubal sterilisation is not necessarily on account of negligence of the doctor. In the present case the tubal sterilisation failed after six years and it cannot be attributed to the negligence of the doctor.

The learned Counsel for the appellant has cited the decision of the Supreme Court in *State of Haryana and Others Vs. Smt. Santra*, . In that case the plaintiff having seven children underwent sterilisation operation. It was found that in her case the right fallopian tube was operated upon and the left fallopian tube was left untouched. The negligence of the doctor was writ large as it was necessary to operate both fallopian tubes to avoid further pregnancy. It is because of this negligence per se the damages were awarded to the plaintiff. The Supreme Court observed that every doctor who enters 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. The test known as "Bolam test" laid down in *Bolam V. Friern Hospital Management Committee* (1957) 2 All ER 118, has been cited with approval. In this case the law was summed up 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 at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular Article..... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time..... there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent."

The decision of the House of Lords in *Whitehouse v. Jordan* (1981) 1 All ER 267, has also been relied upon in which the legal position has been stated as : "the true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that (such) a man, acting with ordinary care, might have made, then it is not negligence".

The Supreme Court said in *Dr. Laxman Balkrishna Joshi Vs. Dr. Trimbak Bapu Godbole and Another*, : "Neither the very highest nor very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires". In *Smt. Vinitha Ashok Vs. Lakshmi Hospital and Others*, , the entire case law has been dealt with and it has been concluded that the doctor is not liable for negligence if the course adopted by him is "reasonable" and his view is not "illogical".

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 sterilisation was performed. Her physical condition was not good. The "ligation method" which is a well recognised mode of sterilisation 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 sterilisation but the adoption of "ligation 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.

Surgical sterilisation is a procedure directed at ending the ability to reproduce. In males this is most commonly achieved by vasectomy, in which the vas deferens is cut or tied; in females, the most frequently used methods involve the dividing or clipping of the fallopian tubes, thus preventing the passage of the ova between the ovary and the womb. Sterilisation is usually permanent although, in a few cases, it is possible to reverse the procedure and restore reproductive capability. Sterilisation is highly effective as a method of contraception although the success of the procedure cannot be guaranteed in every case. Failure may occur even without negligence on the part of the doctor performing the operation. (Butterworths Medico Legal Encyclopaedia by J.K. Mason and R.A. McCall Smith page 532).

In *Roe v. Ministry of Health* (1954) 2 All ER, it was remarked by Lord Denning : "Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure".

It is not necessary for the doctor to warn the plaintiff of the "risk of failure of sterilisation" because it is well known that there is such failure though in very limited number of cases. It is not necessary to give the warning of something which is well known and well recognised. In *Gold v. Haringey Health Authority* (1988) 1 QB 481, a doctor was not held negligent in failing to warn the plaintiff of the failure rate for female sterilisation.

A doctor does not give a contractual warranty. He is not an insurer against all possible risks. He or she does not provide insurance that there would be no pregnancy after sterilisation operation. As demonstrated above there is a chance of sterile being turned into fertile even after the operation has been done with due care and caution. A doctor is not liable in negligence because someone of greater skill and knowledge would have prescribed different treatment or

"operated in a different way". She has to show only a reasonable standard of care. She cannot be held guilty for error of judgment. Considerable deference is paid to the practices of the professions (particularly medical profession) as established by expert evidence and the Court should not attempt to put itself in the shoes of the surgeon or other professional man. In the present case the plaintiff had two sons only. A female baby was born to her after six years. She should accept her with grace as gift of God. The parents are primarily liable to give birth to this child. They should not hold the doctor liable when they have been blessed with this baby. She should not have a feeling that she is an unwanted child. The birth of this baby should be considered a blessing and cause for rejoicing. A healthy female baby after the two sons, a lovely creature, must have brought decency, discipline and sobriety in the family. The doctor not being negligent cannot be fastened with liability to pay damages and therefore the Government is also not vicariously liable.

In the result, the judgment and decree of the Trial Court are set aside and the suit of the plaintiff for compensation of Rs. 50,000/- is dismissed.