IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2662 of 1997 (O&M)
Date of decision: 08.07.2020

Dr. (Mrs.) Sushma Chawla ... Appellant

Versus

Smt. Jasbir Kaur ... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present : Mr. TN Gupta, Advocate
for the appellant.

Ms. Sumiti Arora, Advocate
for the respondent.

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REKHA MITTAL, J.

Challenge in the present appeal has been directed against concurrent findings recorded by the Courts whereby suit for recovery of Rs.1,50,000/- for negligence of the appellant/defendant was decreed by the trial Court vide judgment and decree dated 04.02.1994 and appeal against the same was partly allowed by the Additional District Judge, Jalandhar.

The case of the respondent/plaintiff is that she had three children namely Sukhjeet Kaur 9½ years, Ranjeet Kaur 6 years and Amrinder Singh 2½ years. 4th child was born to her in the clinic of appellant on 23.03.1987. On pursuation of the appellant, she gave consent for tubectomy operation to be performed at the time of delivery. The appellant performed bilatoral tibal ligation (tubectomy) operation on 23.03.1987. She was discharged on 31.03.1987. The appellant assured the

respondent/plaintiff that after tubectomy operation, she will never conceive in future. The respondent had pregnancy for the last more than two months at the time of filing suit. Had full assurance not been given by the appellant, she would not have undergone tubectomy operation. She got 5th child due to professional negligence of the appellant. The pregnancy has caused great mental agony and pain as she feels ashamed in the eyes of relatives and general public and has to undergo mental/bodily pain and sufferings to give birth to another child. The respondent calculated damages to the tune of Rs.1,50,000/-.

The appellant/defendant filed the written statement and submitted that respondent was admitted in her nursing home on 23.03.1987 for delivery at 2.15 am. During examination, it was observed that she had major surgery in some other hospital during child birth. She had to be operated upon since normal delivery was not coming forth. Consent for operation was taken from her husband as it was case of high risk ranging from morbidity to mortality. Her husband gave consent for tubal ligation at 3.15 am knowing fully well that pregnancy may cause major problems to the respondent. She was operated upon for lower segment cesarean section and during operation, tubal ligation was also carried out to prevent further pregnancy. Operation was carried in the presence of Chief Anaesthetic Brgd. Daljeetam Singh, Dr. Mrs. Malwinderwant Kaur FRCS and Dr. Manjit. The patient was discharged on 31.03.1987. Her husband was explained at the time of operation that tubes are likely to slip thereby

exposing chances of further pregnancy since at the time of child delivery due to enlargement of uterus, tubes get enlarged which regress to their normal size after delivery. It was denied that the appellant asked the plaintiff to go in for tubectomy operation. Operation was carried out as per standard procedure followed in her hospital. It is further denied that respondent was assured by the appellant that she will never have future pregnancy. It was also denied that appellant was negligent in performing operation. The respondent could terminate the pregnancy if the same was unwanted. All other material averments were denied and so also entitlement of the respondent to claim the disputed amount.

The respondent filed replication and reiterated her stand taken in the plaint.

The trial Court framed following issues for determination:-

1. Whether the plaintiff is entitled to recover the suit amount as damages on grounds mentioned in the plaint?OPP.
2. Relief.

The parties adduced evidence in support of their respective contentions. Having heard counsel for the parties in the light of materials on record, the trial Court decreed the suit for recovery of Rs.1,50,000/- with costs. The Court fee required to be affixed on the plaint i.e. Rs.3808/- is made first charge on the decretal amount.

A relevant extract from para 8 of the judgment of trial Court, reads as follows:-

> 8. It is not the case of the defendant that she had done the second operation free of cost in this case without charging any fee for the same. As an expert it was obligatory upon her to advise the plaintiff to wait for some time more to get the tubectomy operation done, since chances of failure of the operation were more in doing the operation as in this case at the time of delivery than that had the operation been done ¾ months after the delivery thereby giving time for uterus and intestines to come to their normal size. Chance of knot on tube tied in the former case slipping is much more due to expansion of organs whereas same is far from remote in the latter case if operation is done after organs have come to their normal size. The defendant is definitely negligent in the instant case and as such, the plaintiff is entitled to the amount of damages as claimed.

The appellate Court concurred with findings of the trial Court by taking into consideration averments made in the written statement, noticed in para 12 of the judgment and then holding that had these facts been brought to notice of the plaintiff, they might or might not have agreed for performance of operation. Further held that the Court cannot give a finding on its own without any evidence that there was no negligence on the part of defendant and it was an act of God. The appellant had stated that at the time of tubectomy during delivery, size of uterus as well as that of tubes are enlarged than normal size. The enlargement subsides during six weeks after delivery. If that was the case, the operation should have been performed after six weeks of the delivery. There was no emergency in

performing tubectomy operation at the time of delivery of child.

Counsel for the appellant would argue that there is no evidence adduced by the respondent that the appellant was negligent in conducting tubectomy operation simultaneously with delivery of child through cesarean section. It is further argued that findings of the Courts that tubectomy operation should not have been carried out at the time of delivery or the same was required to be carried out after sometime of delivery are not supported by any medical text/opinion. The respondent/plaintiff did not examine any medical expert to say that conducing of tubectomy operation at the time of delivery amounts to medical negligence which can form the basis for grant of compensation/damages. It is argued with vehemence that findings of the Courts with regard to medical negligence on the part of appellant, a reputed professional, are liable to be set aside when examined in the light of judgment of Hon'ble the Supreme Court **State of Punjab Vs. Shiv Ram and others, 2005(7) SCC 1.** Further reference has been made to another judgment of Hon'ble the Supreme Court **State of Haryana Vs. Smt. Santra, 2000(2) RCR (Civil) 739**.

Counsel representing the respondent, on the contrary, has supported consistent findings recorded by the Courts with regard to medical negligence of the appellant. It is argued that had the facts noticed in para 12 of the judgment of appellate Court been brought to notice of the respondent or/and her husband, they might or might not have agreed for

tubectomy operation at the time of delivery and might have decided to get that operation performed sometime after delivery.

I have heard counsel for the parties, perused the paper book and records.

The precise issue involved in the present appeal is 'Whether the appellant can be attributed medical negligence merely because she did not explain to the respondent or/and her husband that at the time of delivery of child, uterus is of size of the child and because of enlargement of uterus, the tubes get enlarged which regress to their normal size after delivery and during regress, tubes are likely to slip thereby exposing chance of further pregnancy, as has been so held by the appellate Court'.

Before adverting to the submissions made by counsel for the parties, it is necessary to extract certain paras from the judgment in **Shiv Ram and others's case (supra)** relevant in the present context. Paras 6 and 7 read thus:-

> 6. Very recently, this Court has dealt with the issues of medical negligence and laid down principles on which the liability of a medical professional is determined generally and in the field of criminal law in particular. Reference may be had to **Jacob Mathew v. State of Punjab & Anr. (2005) 6 SCC 1**. The Court has approved the test as laid down in **Bolam v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582**, popularly known as Bolam's Test, in its applicability to India. 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 & 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."

7. The plaintiffs have not alleged that the lady surgeon who performed the sterilization operation was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognized by medical science. It is a pure and simple case of sterilization operation having failed though duly performed.

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In this judgment, there is reference to certain authoritative medical texts dealing with percentage of failure of sterilization conducted through different methods.

In Shaw's Textbook of Gynaecology [Edited by V. Padubidri & Shirish N. Daftar, Eleven Edition] it is stated that "Failure rate of sterilization varies from 0.4% in Pomeroy's technique, 0.3 – 0.6% by Laparoscopic method to 7% by Madlener method. Pregnancy occurs either because of faulty technique or due to spontaneous recanalization." In paras 15, 21 and 22 it has been held, quoted thus:-

> 15. It is thus clear that there are several alternative methods of female sterilization operation which are recognized by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is foolproof and no prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative Text Books on Gynaecology and empirical researches which have been carried out recognize the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognized and accepted ones. The technique which may be foolproof is removal of uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be performed for purposes other than merely family planning.
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> 21. 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.
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> 22. The cause of failure of sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by x-ray examination, or by pathological examination of the materials removed at a subsequent operation of re-sterilisation. The discrepancy between operation notes and the result of x-ray films in respect of the number of rings or clips or nylon sutures used for occlusion of the tubes, will lead to logical inference of negligence on the part of the gynaecologist in case of failure of sterilisation operation.

Reverting to the case at hand, counsel for the respondent/plaintiff has not referred to any medical text or opinion much less expert opinion of a professional in gynecology/sterilization that it is not advised to perform tubectomy along with cesarean section. He has also not referred to any medical text that chances of failure of sterilization are more than even 7% if tubectomy is performed with cesarean section for delivery of child. There is no evidence that sterilization, in the instant case, has failed merely because it was performed at the time of delivery.

Respondent/plaintiff has not adduced any evidence either by getting laparoscopy inspection of uterine tubes or x-ray examination or by pathological examination of the materials removed at a subsequent operation of re-sterilization to prove that negligence for failure of tubectomy can be attributed to the appellant. On the contrary, the respondent and her husband had admitted that the operation was conduced properly and there was no negligence on the part of surgeon in performing the operation. Taking a cumulative view of the aforesaid discussion in the light of observations of Hon'ble the Supreme Court in **Shiv Ram and others's case (supra)** it is difficult to sustain findings of the Courts that tubectomy operation failed because of negligence attributable to the doctor, entitling the respondent to receive compensation under the heads allowed by the Courts. In this view of the matter, it can safely be held that findings of the Courts attributing negligence to the appellant and consequently fastening liability for payment of damages suffer from perversity, thus, cannot be allowed to sustain and accordingly set aside.

In view of what has been discussed hereinbefore, the appeal is allowed; judgments and decrees passed by the Courts are set aside and suit filed by the respondent/plaintiff is dismissed leaving the parties to bear their own costs.

08.07.2020 **(REKHA MITTAL)**
ashok **JUDGE**

Whether speaking/reasoned: Yes / No
Whether reportable: Yes / No