

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.3085 of 2005

Date of Decision: 20.07.2015

Punjab State through Secretary Health & Family Welfare Department.

... Appellant

Versus

Smt. Gurmit Kaur & ors.

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Rupam Aggarwal, DAG, Punjab,
for the appellant.

None for the respondents.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.(Oral)

The State is the defendant in the suit and is in second appeal having lost in both the Courts. The issue in the suit is an unsuccessful Tubal Sterilization surgical procedure performed on the plaintiff by the defendant doctors and tying up the fallopian tubes as a permanent method of contraception. Despite sterilization an unwanted child was born to the plaintiff for which alleged negligence a claim for damages was brought to court against the defendants. The suit has been decreed in both the courts below.

In **State of Punjab v. Shiv Ram & ors.**, 2005 AIR (SC) 3280, 2005(7) SCC 1, the Supreme Court had occasion to deal with a situation similar to the one here, of a trial in a suit for damages brought by a married woman who delivered a child after undergoing a sterilization operation. The Supreme Court held that the surgeon or the employer cannot be held liable for compensation on account of unwanted pregnancy or the birth of an

unwanted child after an unsuccessful tubectomy operation performed by the defendants, who are Government doctors. Negligence is imputed to the defendants for the failure.

It stands settled that a claim in tort can be sustained only if there was proven negligence on the part of the surgeon in performing the operation. So long as the operating medical practitioner follows a practice acceptable to the medical profession, 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 performing doctor followed. Para. 20 of reported judgment in *Shiv Ram's case (supra)* would be useful to reproduce for a better understanding of the moot point. It reads as under:-

“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.”

In view of above, there appears to be no life in this appeal and the issue raised is not res integra. The Supreme Court *Shiv Ram's case*

observed after noticing medical literature that: “The methods 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.” The leading case on medical negligence re: **Bolam v. Friern Hospital Management Committee**, [1957] 1 W.L.R. 582 and the tests laid down therein have been approved by the Supreme Court in [Jacob Mathew v. State of Punjab & Anr.](#), (2005) 6 SCC 1 in its applicability to India. The Court culled out the following acid tests from *Bolam* holding in summary as follows in *Shiv Ram*:-

“(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.”

The subordinate courts have allowed the suit and a decree has been passed in favour of the first respondent Smt. Gurmit Kaur, wife of Dilbagh Singh, resident of Village Pididi, Tehsil Tarn Taran, District Amritsar. The judgment in the appellate Court was passed on 2nd April, 2005. But the Bolam's Test has not been applied although they were available to the courts a quo, which if applied to the facts and the evidence on record would have made the difference.

Mr. Rupam Aggarwal, the Learned State counsel argues that there is no credit worthy and dependable evidence on record to prove that reasonable care was not taken and due skill required of the surgeon performing the sterilization operation was wanting in any manner. If may

be noted that the judgment in *Shiv Ram's case (supra)* was pronounced 4 months after the decision in first appeal, then obviously the binding decision of the Supreme Court was not available to help the courts a quo to have taken the correct view of the law. Therefore, the judgments of the courts below are not sustainable either on law or on facts.

For the foregoing reasons, the appeal is allowed. The decrees of both the courts below are set aside. The suit is dismissed without costs. However, since no one has put in appearance on behalf of the contesting respondents, they would remain at liberty to apply to this Court, in case they still feel aggrieved. Office to send a copy of this order to the respondents.

20.07.2015
monika

(RAJIV NARAIN RAINA)
JUDGE