

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.03.2017

CORAM:

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

Second Appeal No.921 of 2011

1. Union of India
rep. by Chief Secretary to Government,
Union Territory of Pondicherry,
Chief Secretariat,
Pondicherry.
 2. The Director of Health & Family Welfare
Services, Government of Pondicherry,
Pondicherry.
 3. Medical Superintendent,
Government Maternity Hospital,
Pondicherry. Appellants/Appellants/Defendants
- Vs
1. Subramani
 2. Sharmila Respondents/Respondents/Plaintiffs

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 29.08.2007 passed in A.S.No.260 of 2006 on the file of the Principal District Judge, Puducherry, confirming the judgment and decree dated 25.02.2004 in O.S.No.130 of 2002 on the file of the Additional Sub Judge, Puducherry.

For Appellants Mrs.D.Reena Iswariya,
Government Advocate (Pondicherry)
For Respondents .. No appearance

J U D G M E N T

The unsuccessful defendants before the Trial Court as also before the First Appellate Court, are before this Court by way of the present Second Appeal mainly on the ground that the Courts below failed to appreciate in a proper perspective the medical literature and the oral evidence of the Doctors that there was no negligence in conducting the sterilization operation.

2. The plaintiffs viz. Subramani and Sharmila, who are husband and wife are the respondents herein. They initially filed pauper O.P.No.18 of 2001 against the appellants/defendants, seeking to declare them as indigent persons to sue the petition as *informa pauperis*, and for a judgment and decree directing the defendants to pay them a sum of Rs.15,00,000/- as damages with interest from 15.02.2000. Subsequently, the said O.P. was ordered to be filed as suit in O.S.No.130 of 2002.

3. According to the respondents/plaintiffs, on 03.08.1992, the 2nd plaintiff, viz. Sharmila gave birth to a male child viz. Harikrishnan and subsequently, on 23.11.1995, she gave birth to another male child viz. Santhosh. After the birth of the second child, at the request of the plaintiffs, sterilization operation was done to the 2nd plaintiff on 23.11.1995. But, to the shock and dismay of the plaintiffs, the 2nd plaintiff conceived and got admitted for delivery on 15.02.2000 in the Government Maternity Hospital, Pondicherry and delivered twin female babies, viz. Vishnupriya and Shanmugapriya. Thereafter, another sterilization operation was done to the 2nd plaintiff. Therefore, it is the case of the plaintiffs that the conception of the 2nd plaintiff even after the sterilization operation done on 23.11.1995 is absolutely due to medical negligence. According to the respondents/plaintiffs, they are agricultural coolies below the poverty line and they are unable to rear two female children born to them after the sterilization operation done to the 2nd plaintiff. Hence, for the medical negligence of the appellants/defendants, they claimed damages against the defendants to the tune of Rs.15,00,000/- on the ground of tortuous liability in O.S.No.130 of 2002.

4. In defence, it is the contention of the defendants before the Trial Court that any method of tubectomy operation, however being done properly, there are chances of failure by 1.8%, which is acceptable even at the international level. According to the defendants, the said operation was performed by a trained Doctor with diligent care and in a meticulous manner and there was no fault on the part of the Surgeon. Moreover, when the plaintiffs signed the consent form, they have been aware of the fact that 1.8% failure rate is a small percentage of known complication of tubectomy, and the same is not due to medical negligence.

5. The Trial Court, on examination of the oral and documentary evidence available on record and after hearing the arguments advanced on either side, decreed the suit for Rs.80,000/- as damages. Aggrieved by the same, the defendants preferred an appeal before the Principal District Judge,

Puducherry in A.S.No.260 of 2006 and the First Appellate Court, by a judgment dated 29.08.2007 dismissed the appeal, thereby confirming the judgment and decree of the Trial Court. Challenging the concurrent judgments of the Courts below, the defendants are before this Court.

6. The substantial questions of law that arise for consideration in this appeal are:

(a) Whether the judgment and decree of the Court below is vitiated for holding that failure of sterilization operation tantamounts to medical negligence?

(b) Whether the 2nd respondent/2nd plaintiff would be entitled to damages for the sufferings undergone by her on account of failure of sterilization operation?

7. Heard the learned Government Advocate (Pondicherry) appearing for the appellants. She mainly contended that as far as tubectomy operation is concerned, there are more chances of failure than success, despite conducting the surgery properly and that there is no question of medical negligence in the case on hand. She further submitted that the damages of Rs.80,000/- ordered by the Trial Court has been deposited on 17.08.2004 and only after depositing the said amount, the appellants herein preferred an appeal before the First Appellate Court.

8. To substantiate her stand, learned Government Advocate (Pondicherry) has relied on the following decisions:

(i) In State of Punjab vs. Shiv Ram & others (2006 (1) L.W. 331), the Apex Court has allowed the appeal filed by the State, holding that no prevalent method of sterilization is fool proof and guarantees 100% success. Relevant portion of the said judgment is extracted hereunder:

"18. 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.

26. 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."

(ii) In yet another similar circumstance, the Apex Court, in the case of State of Haryana and others vs. Raj Rani (2006 (1) L.W. 580), has held that Doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise.

"3. ...

Thus, the pregnancy can be for reason 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. The decrees cannot, therefore, be upheld."

9. The fact that the 2nd respondent/2nd plaintiff underwent sterilization operation and that after sterilization operation, she gave birth to twin female babies, is not in dispute. As a welfare measure, the Government suggests sterilization operation, which is undergone by women based on the assurance given by the Government that it would be

successful. But, unfortunately, in the case on hand, it ended in failure, thereby, the 2nd respondent/2nd plaintiff became pregnant after conducting tubectomy. But, it cannot by any stretch of imagination be called as 'medical negligence', more particularly, in the light of the above two decisions relied on by the counsel for the appellant.

10. Hence, this Court while answering the first substantial question of law in favour of the appellants/defendants holds that that the sterilization in this case does not amount to medical negligence.

11. As far as the second substantial question of law is concerned, this Court holds that for the sufferings undergone by the 2nd plaintiff, she is entitled to compensation as awarded by the Courts below. Thus, the second substantial question of law is answered in favour of the respondents/plaintiffs.

12. Since it is pointed out that the entire amount of compensation has been deposited by the Government, the respondents/plaintiffs are at liberty to withdraw the same along with accrued interest, in accordance with law. The respondents/plaintiffs are also directed to pay necessary Court fee, as per law.

In fine, the Second Appeal is partly allowed. No costs. Consequently, connected M.P.No.1 of 2011 is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To:

1. The Principal District Judge,
Pondicherry.
2. The Principal Sub Judge,
Pondicherry.

+lcc to the Government Pleader Sr.19450

S.A.No.921 of 2011

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