

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 56/2006**

% **Reserved on : 31st July, 2018**
Pronounced on : 6th August, 2018

LOK NAYAK HOSPITAL Appellant

Through: Mr. Zahid Hanief, Adv. for Mr.
Naushad Ahmed Khan, Adv.
for GNCTD.

versus

PREMA Respondent

Through: Mr. O.N. Sharma and Ms.
Pratima Parihar, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit/Lok Nayak Hospital, Govt. of N.C.T. of Delhi, impugning the Judgment of the Trial Court dated 16.8.2005 by which the trial court decreed the suit for recovery of monies filed by the respondent/plaintiff and passed a decree for a sum of Rs. 2,20,000/-. Out of the amount of Rs. 2,20,000/- a sum of Rs. 2,00,000/- has been directed to be put in a

fixed deposit in the name of the child Aman and till his attaining age of 18 years, and interest would be withdrawn by the respondent/plaintiff. Suit has been decreed on account of the case of the respondent/plaintiff of medical negligence that the appellant's/defendant's Doctor performed a sterilization operation on the respondent/plaintiff but it was not successful and resultantly the respondent/plaintiff conceived again.

2. The facts of the case are that respondent/plaintiff filed the subject suit by pleading that she was operated upon on 15.5.2001 in the appellant's/defendant's hospital by the concerned doctor namely Dr. Deepa. Respondent/plaintiff pleaded that she took all post operative care including taking all prescribed medicines as also precaution but after a few months of the operation she suspected that she had conceived and therefore when she went to the Physical Health Centre at Dayalpur, Delhi, on 21.10.2002 and has got herself examined on 23.10.2002, it was discovered that respondent/plaintiff was pregnant as the tubectomy operation performed on her had failed. Respondent/plaintiff pleaded that Dr. Deepa (defendant no. 1 in the suit) fell short in taking reasonable and due care while performing the

sterilization operation, resulting in defect and deficiency in the operation, therefore respondent/plaintiff became pregnant again to have her 7th child. After serving a legal notice/Ex. P-3 and which was replied to by the appellant/defendant no.2 vide reply dated 24.1.2003, Ex. P-2, the subject suit was filed.

3. The suit was contested by the appellant/defendant and it was denied that there was any negligence while performing the sterilization operation. The appellant/defendant pleaded that the respondent/plaintiff before performing her operation had signed two forms on 14.5.2001, and which forms were also counter-signed by the sister-in-law/Bhabhi of the respondent/plaintiff namely Ms. Suman, and that in these forms Ex. PW-1/D-1 and Ex. PW-1/D-2, it was specifically mentioned by the appellant/defendant that the operation need not be always successful and there are always some chances of failure, and if the operation is not successful the appellant/defendant or the concerned Doctor will not be held responsible. The contents of these documents were explained to the respondent/plaintiff in Hindi in the presence of her sister-in-law/Bhabhi, namely Ms. Suman. It was denied that the appellant's/defendant's doctors had given an assurance

that the operation would be 100% successful. Appellant/defendant contended that the respondent/plaintiff was herself responsible because she could have got done the abortion in time, but she did not get such abortion done. The suit was therefore prayed to be dismissed.

4. After pleadings were complete, trial court framed the following issues :

- “1. Whether the plaintiff is entitled to damages, as claimed in the suit? OPP
2. Whether the plaintiff is entitled to any interest, if so at what rate and for what period? OPP
3. Relief.”

5. The only relevant issue was issue no. 1 and the trial court has decided this issue in favour the respondent/plaintiff. Trial court has held that the respondent/plaintiff had not signed the forms Ex. PW-1/D-1 and Ex. PW-1/D-2 inasmuch as she has specifically denied the signing of these forms by her and her sister-in-law/Bhabhi/Ms. Suman, and consequently, the trial court believed such stand of the respondent/plaintiff. Trial court has also held that since the concerned doctor namely Dr. Deepa, defendant no. 1 in the suit, did not depose and adverse inference has to be drawn against the appellant/defendant.

Trial court has also observed that the signing of the forms Ex. PW-1/D-1 and Ex. PW-1/D-2 by the respondent/plaintiff were not believable because the forms are dated 14.5.2001 and the operation was conducted on 15.5.2001. Trial court therefore held that the appellant/defendant was guilty of negligence in performing tubectomy operation which resulted in the birth of the respondent's/plaintiff's 7th child, and therefore the suit was decreed for the sum of Rs. 2,20,000/- . Some of the relevant observations of the trial court are contained in paras 14,15,17 and 21 of the impugned judgment and which paras read as under:-

“14. During the cross examination she admitted that on the day of tubectomy operation she went to the hospital with her Bhabhi Ms. Suman. However, she denied that she has put her thumb impression on Ex.PW1/D1 and Ex.PW1/D2 i.e. the consent form or that her Bhabhi Suman had signed the said form. She has volunteered that her Bhabhi is illiterate and does not know how to write. She had further denied that at points A & B on Ex.PW1/D2 she had put her thumb impression or her Bhabhi had put her signatures. In cross examination, she has deposed that she went to the hospital firstly on 6.5.01 then she was advised to come after one week for the operation. She then visited on 15.5.01 on which date the operation was performed. She denied that she visited the hospital on 14.5.01 i.e. the date on which the consent form for sterilization operation which is Ex.PW1/D1 and PW1/D2 have been allegedly signed by her and her Bhabhi Suman. She has specifically deposed during cross examination that “it is wrong to suggest that I had put the thumb impression and my Bhabhi had signed the paper which have been shown to me today in the court. Vol. my Bhabhi is illiterate and she cannot sign any paper. To specific suggestion she has answered “it is wrong to suggest that Doctor had told to me that the family planning operation could result into failure as mentioned in Ex.PW1/D1 and D2. Doctor had not advised me to come to the hospital again if the operation is not successful. She has

stated that “it is wrong to suggest that I did not visit the hospital after the operation had failed. Vol. I visited the hospital thrice after I felt about my pregnancy due to vomiting sensations and other symptom. I remember that I had visited the hospital on 10.10.2002 for the first time after I became aware of my pregnancy due to failure of operation. On 10.10.02 the OPD slip was issued to me by the hospital. Doctor whom I attended on 10.10.02 had torn the OPD slip was issued to me by the hospital. Doctor whom I attended on 10.10.02 had torn the OPD slip and advised me to come next date with the papers which I had, regarding my Family planning operation. On 11.10.02 I visited the hospital again with the original papers regarding operation. I do not remember the name of the doctor whom I met on 11.10.02. She has then deposed, “Doctor did not perform operation again and the doctor even torn the papers which I had taken to him on the advise of the hospital. I had picked up the torn pieces of papers which i have filed before this Court. Even the nurse present in the hospital had pushed me down and I had got my tooth broken in this incident.” To a specific suggestion she has stated, “I did not get the abortion done of my subsequent pregnancy. It is wrong to suggest that doctor had suggested me the abortion. Vol. in fact I had requested the doctor for my abortion and operation but the doctor said come to the hospital with four bottles of blood and this not the hospital of your father.” Again, to a suggestion she has stated, “it is wrong to suggest that I have not approached the hospital authorities in this connection. Vol. in fact I had gone to the extent of meeting the doctor in lunch room from where I was pushed out.”

15. It is not disputed by the defendant that the sterilization operation of the plaintiff was not conducted by the defendant no. 1 in the defendant no.2/hospital Dr. Rachna Sharma who appeared as DW.1 has deposed that “according to Medical Record, Sterilization operation of Smt. Prema was done on 15.5.01. I am of the confirmed opinion that the said operation was conducted by Dr. Deepa who has been transferred from the said hospital and now I am Incharge of the said Gyaneer Department of the said hospital and well conversant with the facts and circumstances of the case and also competent to depose on behalf of the defendants”. She has deposed that consent form and condition about chances of failure of the operation is Ex. PW.1/D.1 and Ex. PW.1/D2 which bear thumb impression of the plaintiff and signatures of her sister-in-law (Bhabhi) Mrs. Suman. It is further deposed by DW.1 that patient and her relation Ms. Suman who signed the consent form were told about the failure chances of the said sterilization operation and they were advised that in case of failure, plaintiff was to come again for free abortion, but the plaintiff failed to do so and did not visit the hospital after getting pregnancy inspite of sterilization operation.

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17. It is the duty of the parties to bring the best evidence before the court and if any of the party fails to bring the best evidence and does not give proper reason for not examining the witnesses having personal knowledge, the adverse view has to be taken against such party. Plaintiff had specifically deposed about the defective and deficient service provided by the defendant no. 1. It was the duty of the defendants to call the defendant no. 1 as witness who has performed the operation. It is admitted position that the tubectomy operation was performed on 15.5.2001 whereas the consent form appear to have been got signed on 14.5.01. Under these circumstances, when the plaintiff herself has denied having visited the hospital on 14.5.01 and having put her thumb impression on Ex. PW.1/D.1 and D.2, I have no reasons to disbelieve the plaintiff that she was not informed of the chances of failure of sterilization operation. I also do not have any reason to disbelieve the reply of the plaintiff being Pw.1 to the questions put by Ld. counsel for the defendants during the cross examination, which go to show that when she visited the defendant no. 2 hospital, she was ill treated by the doctor and the hospital staff and was not properly attended. Had she been attended properly by the hospital staff of the defendant no. 2, she could get unwanted pregnancy terminated which resulted into birth of the child which took place on 4.4.03. When the operation was done on 15.5.01 and birth of child took place on 4.4.03 i.e. after 22 months there is no substance in the argument that the plaintiff did not take precaution of avoiding intercourse for three months after the tubectomy operation.

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21. In view of my discussion on the facts which have been proved by the plaintiff, I find that the plaintiff has satisfactorily proved that defendants had been negligent in performing her tubectomy operation which resulted into birth of her 7th child. Poverty and illiteracy are the biggest curse for a person. The plaintiff is an illiterate and poor woman and her entire family depends upon the earning of her husband who is doing menial job of Halwai. Her health also, is obviously not good, as couple of times she had fell unconscious in the court itself and once she was to be hospitalised also. She has been put to extra burden of rearing her 7th child Aman. Under the circumstances now it becomes the responsibility of State to bear the expenses of bringing up child Aman who has born due to negligent act of the defendants. The issue is accordingly decided in favour of the plaintiff and against the defendant. However, the claim of the plaintiff for Rs.4,90,000/- is on the higher side and unrealistic. She had admittedly not paid anything to the defendants for operation and the birth of her 7th child Aman also took place in a Govt. Hospital, therefore, she is not entitled to any damages on this score. Her claim about expenses is not supported by any bill/cash memo. However, compensation on account of

her physical and mental sufferings and expenses on special diet can reasonably be estimated at Rs.20,000/-. The financial burden on plaintiff arising out of birth of her 7th child is estimated at Rs.2,00,000/- being the cost of food, clothing and education etc. Thus I hold that the plaintiff is found entitled to recover from the defendants a total sum of Rs.2,20,000/-. out of the said sum, Rs.2,00,000/- be kept in a FDR in nationalized bank in the name of minor child Aman till he attains the age of 18 years. The interest will be available to the plaintiff on 6th monthly basis for upkeep of the child. The remaining sum of Rs.20,000/- be paid to the plaintiff.”

6. The only issue to be decided by this Court is whether the trial court has rightly held that the appellant/defendant was guilty of negligence on account of the sterilization operation conducted on the respondent/plaintiff being unsuccessful.

7. In my opinion, this appeal is liable to be and is accordingly allowed for the reasons stated hereinafter.

8. Firstly, it is to be noted that the only allegation of negligence alleged by the respondent/plaintiff against the appellant/defendant is that the tubectomy/sterilization operation failed. Since medically there is never a 100% chance of success in sterilization operations, the mere fact that the operation was not successful, that by itself cannot be a reason to hold the appellant/defendant and its doctors guilty of negligence. This aspect is no longer *res integra* and is so held by a Division Bench of this Court in the case of **Smt. Madhubala Vs. Govt.**

of NCT of Delhi, 118 (2005) DLT 515 (DB). The relevant paragraphs

of this judgment are paras 5,7 and 8 and these paras read as under :

“5. During arguments, the learned counsel for the appellant contended that the very fact that the appellant conceived even after having gone through sterilization was sufficient enough to establish negligence on the part of the hospital. He also, in support, sought to lean on the judgment of the Supreme Court in State of Haryana v. Smt. Santra AIR 2000 SC 1888.

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7. It is Dr. (Mrs.) S B Mahanty who had conducted the surgery. She has stated in clear terms that she had educated and advised the appellant not only before but even after the surgery about the possibilities of pregnancy and that in case of irregular mensural cycle, she should report to the hospital. Admittedly, appellant did not so report. She has further stated that there was no negligence, and on this aspect, she finds support from the evidence of another doctor, namely, Dr. Kamla Adarsh (DW 1). It is further in the evidence of Dr. Kamla Adarsh that even where sterilization surgery is performed by best of doctors, the risk of conceivment and post-sterilization delivery remains in 1 to 4 per thousand women undergoing sterilization procedure. The appellant was informed about it as stated by Dr. S. B. Mahanty. Even the "Consent and Application for Sterilization Operation" signed by the appellant makes it clear when it inter alia states :-

"I also know that there are some chances of the failure of the operation for which Government hospital/ operation surgeon will not be held responsible by me or my relatives or any other person whatsoever....."

there is no evidence that the doctor concerned was negligent in performing her duty or that she flipped, failed or fluttered as, for example, in the case of State of Haryana v. Smt. Santra referred to above, where the operation was not complete in that though the right fellopian tube was operated upon, the left was left untouched. There is no such allegation in the case before us. Moreover, in the said case before the Supreme Court, the doctor appearing as a witness had admitted the negligence in performing the surgery. Mere conception and delivery post-sterilization operation is no indication of negligence, more so, in the teeth of the evidence, that risk of such conceptions and deliveries still remains. What is more, the statement of Dr. S.B. Mahanty does not show that she had not exercised reasonable degree of care. The appellant has thus failed to prove negligence on the part of the hospital or the doctor concerned. And, in

view of the evidence noticed above, it is surely not a case of res ipsa loquitur. This is not all. The appellant is asking for damages and yet she was herself negligent enough. She, as already noticed, did not rush to the hospital on missing the menstrual cycle though she ought to have. Some remedial measures could still be taken. By her negligence, or call it failure, the opportunity to take such measures was lost.

8. The learned Additional District Judge has highlighted the evidence relevant to the points in issue and has approached the same analytically. The conclusion arrived at by him seems to us to be pre-eminently just.”

(emphasis is mine)

9. Therefore, the mere fact that the respondent's/plaintiff's sterilization operation was not successful cannot mean that the appellant/defendant and its doctors can be held liable for negligence. It is not the case of the respondent/plaintiff that there was any specific negligence committed by the doctor namely Dr. Deepa in conducting the operation. Once there is no specific allegation of negligence it cannot be held that in fact or law the appellant/defendant is liable. In order to appreciate lack of necessary pleadings and deposition, this Court would reproduce relevant paras of the affidavit by way of evidence filed by the respondent/plaintiff and which is in line with the averments made by the respondent/plaintiff in the plaint, and these paras of the affidavit by way of evidence are paras 4 to 7 and these paras read as under:

- “4. That I went to Lok Nayak Hospital i.e. respondent No.2 in 2001, where I had disclosed all information regarding my family and I also specifically mentioned that I and my husband do not want further delivery, later on I was referred to respondent No.1 Dr. Deepa for tubectomy operation. After my check up by the respondent No.2 I was operated on dated 15/05/2001. It is pertinent to mention here that I am illiterate lady, opt for operation as suggested to me by the respondent No.1. The respondent No.1 at the time of operation had assured to me that after this operation there will be no pregnancy in future. I also received certificate of operation issued to me by the hospital, is Ex.PW-1/B1 to B4.
5. That, thereafter, I had take all prescribed medicine and follow all the precautions as suggested to me by the said hospital. But after few months, I raised suspicion went to PHC at Dayalpur, Delhi on dated 21/10/2002 and I myself examined and on 23/10/2002. I got information that I am pregnant as my tubectomy operation was failed badly. I had also faced problem in the loop which was operated, report Ex.PW-1/C1 to C8
6. That I was badly mentally and physically harassed due to deficiency in providing services to me by the respondent. The respondent No.1 utterly failed in discharging her duties towards the respondent No.1 failed in taking reasonable and due care while performing the said operation. It is due to her defect and deficiency that the operation failed. I become pregnant again. That the respondent No.1 had not taken the standard of reasonable medical care and skill, due to which provide defective and deficient service to me, resulting into my pregnancy again. I am now forced to have her 7th child. The deponent is a poor lady and could not support this child. I was never interested to be pregnant again, only to avoid pregnancy she opted for said operation.

7. That the respondents had exploited me by defectively operating her and not rightly educate me about said operation process and even misguided me by saying that she is not required any other kind of preventive method as this operation is sufficient to prevent pregnancy. Respondents fallen short of the standard of reasonable medical care. Respondent No.2 and 3 are jointly and severally liable for negligent of duties performed by respondent No.1.”

10. In my opinion, the entire issue has been validly put up and defended by the appellant/defendant in terms of its reply dated 24.1.2003 given to the legal notice of the respondent/plaintiff. Since this reply is exhaustive as regards the issue in the present case, the said reply is reproduced in its entirety as under:

Ex.P-2

“LOK NAYAK HOSPITAL: NEW DELHI
(ESTABLISHMENT-V)

F-13.../FWC/P.P.Unit/MC/2003/7651

dt. 24-1-03

To

The Pradeep Katara, Adv.
Delhi High Court, Ch.No.
D-506 & Seat No.85,
Karkardooma Court, Complex
Shahdra Delhi-32

Sub: Regarding your legal notice on behalf of your client Smt. Prema @
Prem Lata W/o Promod.

Sir,

With reference to your legal notice on the above cited subject, I am to put before you the fact of the matter:-

1. Your client had voluntarily accepted the procedure of M.T.P with lap. sterilization. While putting of the history of child birth before the doctor, your client had deposed of having three living children and now vide said notice, five children have been reported which is in contravention to earlier deposition.
2. Before the lap. sterilization was done, the consent of your client was obtained in the prescribed format having the clear-cut statement from her that she would attend the hospital for follow-up check up and failing which she will be responsible for the consequences. Besides, she had undertaken not to institute any litigation in case of failure of the sterilization operation.
3. Your client had reported only twice for follow up check up and that too within 15 days of sterilization which was against the advice given to her at the time of discharge. She was directed to report after four weeks and in case of missed period any time, she was to report immediately to manage unwanted pregnancy. Needless to say that your client failed to comply with the instructions. The submission by her that she continued the medicines for two months of sterilization is also contrary to the written instruction to her at the time of discharge. She was prescribed the medicines consisting of pain killers and antibiotics for three/five days only and tab. Farrous Sulphate and B-Complex were prescribed to her for a month only. It is not clear as to what medicine she took for two months.
4. The version of your client vide Para no.6 of your legal notice is again contrary to the advice given to her. She was clearly directed to report to this hospital at the time of missed period so that the failure of procedure could be managed by the M.T.P and re-sterilization. But she failed to adhere to the instructions having a clear indication that she was interested to continue her pregnancy. However since no document sustaining the version of attaining pregnancy have been

enclosed, the statement of continued pregnancy cannot be relied upon

In view of above observation, the hospital authorities cannot be held responsible for the failure of procedure of the sterilization operation and even couples are duty bound to check conceptions as per a ruling of Hon'ble Court of Law. Hon'ble Justice Sh. Naipal Singh, Addl. District Judge, Delhi, while rejecting a similar suit instituted vide No. S-86/95, vide his valued order dt. 9/9/2000 held that the plaintiff himself had not observed the precautions that were prescribed by the doctor concerned after sterilization operation.

The said petition was accordingly dismissed, obviously the sterilization operations are subject to the condition to take precautions and adhere to doctor's advice and the counselling sessions are done preceeding the operation. During that, the instructions are given to the person undergoing sterilization operation. The plea of your client of facing mental tension and agony due to sterilization operation could be relieved by M.T.P, had she followed the instructions & reported to hospital within 20 weeks of pregnancy.

In view of above stated position, the claim for compensation as sought by your notice holds no ground and can not be entertained.

Yours Faithfully,

(BASU KUMAR)
DIRECTOR (ADMN)"

11. In my opinion, the trial court has also erred inasmuch the operation of the respondent/plaintiff took place on 15.5.2001 and the respondent/plaintiff only claimed to have found out about her pregnancy on 23.10.2002. Once a person becomes pregnant then the menstrual cycle stops and this is known within one month or at best

within two months from the conception month. The respondent/plaintiff therefore would have known about the conception in June 2001/July 2001 and when she could well have the abortion done, however, the respondent/plaintiff waited much later till 21.10.2002 to get her check up done. Obviously therefore if the respondent/plaintiff did not want to bear a child she could have well got abortion done within time and which was not so got done by the respondent/plaintiff. On this ground also the suit of the respondent/plaintiff will have to fail.

12. Learned counsel for the respondent/plaintiff relied upon the judgment of the Supreme Court in the case of ***State of Haryana and Ors. Vs. Santra(Smt.), (2000) 5 SCC 182*** to argue that a Hospital is liable for negligence, however, there is no dispute to this proposition of law but the issue is whether in the facts of the present case the appellant/defendant/Hospital could be held liable and which cannot be on account of the fact that medically not only there is no 100% chance of success of sterilization/tubectomy operation, this aspect has to be taken with the fact that the respondent/plaintiff had signed the forms Ex. PW-1/D-1 and Ex. PW-1/D-2, and also that the

respondent/plaintiff could well have done abortion on time but she did not do so and consequently the trial court has wrongly held the appellant/defendant and its doctors guilty of negligence.

13. At this stage, I may note that the trial court has arrived at a completely perverse and illegal finding that the forms Ex. PW-1/D-1 and Ex. PW-1/D-2 do not bear the signatures of the respondent/plaintiff and her sister-in-law/Bhabhi/Ms. Suman and inasmuch simple denial by the respondent/plaintiff of her thumb impression on forms Ex. PW-1/D-1 and Ex. PW-1/D-2 and the signatures of her sister-in-law/Bhabhi/Ms. Suman is not enough because of various reasons. Firstly, signing of such forms is always and invariably got done by any private or public Hospital before a tubectomy/sterilization operation. Secondly, the documents Ex. PW-1/D-1 and Ex. PW-1/D-2 contain the thumb impressions of the respondent/plaintiff and whereas a signature can be forged but thumb impressions can never be forged. Thirdly, admittedly, the name of the sister-in-law/Bhabhi of the respondent/plaintiff is Ms. Suman and how would the appellant/defendant have known the name of the sister-in-law/Bhabhi of the respondent/plaintiff as Ms. Suman and who has

signed as her full name Suman on the two forms. Trial court therefore ought not to have believed the self serving denial of the respondent/plaintiff of her thumb impression and signatures of her sister-in-law/Bhabhi/Ms. Suman on the forms Ex. PW-1/D-1 and Ex. PW-1/D-2.

14. In my opinion, the trial court has also unnecessarily laid emphasis on the defendant no. 1/Dr. Deepa in the suit for not appearing and deposing and therefore adverse inference has been drawn against the appellant/defendant, inasmuch as in my opinion there was no need of the defendant no. 1/Dr. Deepa to appear and depose inasmuch there was no specific case of negligence against the defendant no. 1/Dr. Deepa except that the operation was unsuccessful. Once the forms Ex. PW-1/D-1 and Ex. PW-1/D-2 are proved it cannot be argued by the respondent/plaintiff that there was 100% assurance given of the operation of being successful and which medically also is never 100% success.

15. In view of the aforesaid discussion, this appeal is allowed. Impugned Judgment of the Trial Court dated 16.8.2005 is set aside and the suit of the respondent/plaintiff will stand dismissed. Parties

are left to bear their own costs. The Fixed Deposit Receipt (FDR) received by the respondent/plaintiff on account of the interim order passed by this Court on 11.5.2007 be returned by the respondent/plaintiff to the appellant/defendant or be deposited in this Court within a period of six weeks from today.

AUGUST 6, 2018
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VALMIKI J. MEHTA, J

