

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 28.01.2019****Judgment delivered on 13.02.2019****First Appeal No.32 of 2005**

1. State of Chhattisgarh through the Secretary, Public Health & Family Welfare Department, DKS Bhavan, Raipur (CG)
2. Collector, Korba District Korba (CG)
3. Block Medical Officer, Primary Health Center, Korba District Korba (CG)

---- Appellants**Versus**

Smt. Meena Bai, W/o. Shri Sheetal Singh, aged about 42 years,
R/o. Sitamani Korba, Distt. Korba (CG)

---Respondent

For Appellants/State	: Shri Ravish Verma and Shri Raghavendra Verma, Govt. Advocates.
For respondent	: Shri Parag Kotecha, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma**CAV Judgment**

1. This appeal is preferred against judgment and decree dated 28.02.2004 passed by Second Additional District Judge (FTC), Korba (CG) in a Civil Suit No.1B/2004 wherein the said Court decreed the suit filed by the respondent/plaintiff for compensation partially to the tune of Rs.78,000/- with interest.

2. The respondent/plaintiff preferred a suit for damages against the appellants/defendants to the tune of Rs.4,02,000/- on 23.7.1999. As per the respondent, the suit was to the effect that she got her Laparoscopic Tubectomy (Family Planning) operation conducted in the Primary Health Centre, Korba on 13.12.1991. It

was stated that in the year 1998, the respondent/plaintiff was astonished to learn that she had again conceived in spite of her earlier operation as mentioned above and subsequently delivered a child on 30.7.1998. It was stated that the failure of her family planning operation was on account of negligence of the concerned doctor who had operated her. The appellants/defendants contested the claim on various grounds. The respondent/plaintiff filed cross-objection/appeal under Order 41 Rule 22 of CPC for awarding the amount as per the claim in the suit filed before the trial Court.

3. Learned counsel for the appellants submits as under:

(i) There was absolutely no negligence in performing the operation but the trial Court has not appreciated the factum of negligence in its right perspective.

(ii) The trial Court failed to appreciate that operating doctor has specifically made a note that right fallopian tube of the respondent could not be properly blocked. Thus, she was supposed to take proper precaution .

(iii) The respondent was bound with her declaration and application which was signed by her after understanding the contents and later she could not be permitted to be wriggle out the same.

(iv) The respondent has been very well informed about the pros and cons including the failure rate of the Laparoscopic Tubectomy. Therefore, finding of the trial Court is liable to be set aside.

4. The first question for consideration before this Court is whether the doctor who conducted the operation of the respondent was negligent and there is failure of operation. In the matter of **State of Punjab vs. Shiv Ram & Ors.** reported in **AIR 2005 SC 3280** it is held by the Hon'ble Apex Court that compensation can be awarded only if failure of operation is attributable to negligence of the doctor. Failure due to natural causes do not provide ground for claim.

5. In the present case, as per the version of the Dr. PS Sisodia (DW-1), Dr. GL Wadhvani conducted the operation of the respondent on 13.12.1999 at Primary Health Centre, Korba. The said doctor has not been made party in the suit before the trial Court and he had no opportunity to explain about his conduct regarding the operation. The trial Court recorded a finding that it is not a case of negligence on the part of the doctor and it is also not a case of failure of operation. The trial Court recorded a finding that as per the document (Ex-D/1) right fallopian tube of the respondent was thick that is why fallopian tube could not be blocked properly. But this fact was not informed by the doctor to the respondent. In the present case, the doctor who conducted the operation has not been made party and has not been provided opportunity to explain his conduct regarding operation. As per the version of Dr. PS Sisodia (DW-1) in para 7 it was informed to the respondent that there is chances of conceiving even after operation and for that the Government is not responsible and the

respondent gave consent for the said terms and conditions before the operation.

6. From the evidence of both sides, it is established that at the time of the operation the doctor has informed him that due to thickness of fallopian tube the loop was not properly made and therefore, there is chances of conceiving and she had alternate to go for traditional operation (CTT) or for operation of her husband. After understanding the entire facts, she consented for operation. From the evidence of medical expert Dr. PS Sisodia, there is no negligence on the part of the doctor who conducted the operation. The operation was conducted in the year 1991 and the respondent conceived after six years of the operation which shows that it is not a case of failure of operation. The doctor who conducted the operation has not been made the party before the trial Court and he had no occasion to explain regarding his conduct during the operation, therefore, in absence of the operating doctor and without providing him opportunity of explaining it cannot be held that the said doctor was negligent during the operation.

7. The second question for consideration before this Court is whether the respondent is entitled for compensation for conceiving and giving birth of a child after operation. In the matter of State of Punjab (supra) it is held that in spite of 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. Once the woman misses the

menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. Section 3(2) , Explanation II of the Medical Termination of Pregnancy Act, 1971 provides that if the woman has suffered an unwanted pregnancy, it can be terminated and it is legal and permissible under the said Act. If they do not opt for termination, the child born to the respondent could not be said to be unwanted child. Claim in such cases cannot be sustained merely on account of child birth. In the present case the couple opts for bearing the child, it ceases to be an unwanted child and compensation for maintaining and upbringing of such a child cannot be claimed against the doctor or against the department as vicarious liability.

8. In the present case, the doctor who conducted the operation did not offer any guarantee, therefore, there is no contract on not conceiving the child, therefore, the Court would not imply of such contract because any such contract is absence. Therefore, this claim must fail. In view of this Court, the impugned judgment/ decree cannot be sustainable under the law and is liable to be set aside.

9. As a result, the appeal is allowed. Impugned judgment and decree passed by the trial Court as mentioned above is set aside. Cross-objection/appeal filed by the respondent is liable to be dismissed.

10. Accordingly, the appeal is liable to be allowed and the decree is passed in favour of the appellants and against the respondent as under:

- (1) The appeal is allowed.
- (2) Suit filed by the respondent is dismissed with cost.
- (3) The parties to bear cost of litigation of their own.
- (4) Pleader's fee, if certified be calculated as per certificate or as per schedule whichever is less.
- (5) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)

JUDGE