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

+ RFA 224/2007

OM WATI

..... Appellant

Through: None.

versus

THE COMMISSIONER OF M.C.D. & ORS.

..... Respondents

Through

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

ORDER

% **04.02.2019**

1. No one appears for the appellant. It is 1.00 P.M.
2. The impugned judgment dismisses the suit of the appellant/plaintiff. By the suit the appellant/plaintiff alleges negligence on the part of the respondents/defendants as it is stated that sterilization operation performed on the appellant/plaintiff was not successful.
3. Trial court has dismissed the suit by observing that when the pregnancy was first discovered i.e on 10.12.1995 the foetus was six weeks old and therefore the pregnancy could have been terminated. Trial court also notes that it is a well known fact that there is a failure of the tubectomy to the extent of 1.8% and therefore there does not arise any issue of negligence. The prescription slip from Arya Clinic dated 10.12.1995 proved

as Ex.PW2/A mentions the last menstruation period as 25.10.1995. Trial court also notes that appellant/plaintiff has wrongly alleged that she was advised against medical termination of the pregnancy on 10.12.1995 inasmuch as this is found out from the prescription slip Ex.PW2/A and in any case the pregnancy of six weeks can always be terminated without any risk to the individual concerned.

4. I have had an occasion to examine the similar issue in the recent judgment in the case of **Lok Nayak Hospital Vs. Prema 252 (2018) DLT 293** and that appeal being RFA No.56/2006 as also the suit claiming damages on similar grounds were dismissed. The relevant paras of this judgment in the case of **Lok Nayak Hospital (supra)** are paras 8 and 9 and these paras 8 and 9 read as under:-

“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 fallopian 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 liquitur. 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.”

5. In view of the aforesaid discussion, though there is no merit in the appeal, since no one appears for the appellant, this appeal is dismissed in default and for non-prosecution. Let no application for restoration/recall of this order be entertained unless costs of Rs.20,000/- are first deposited with the website www.bharatkeveer.gov.in.

VALMIKI J. MEHTA, J

FEBRUARY 04, 2019

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