



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH AT NAGPUR**

**SECOND APPEAL NO.20/2013**

1. Dr. Mrs. Atey, Daga Memorial Hospital,  
Gandhibag, Nagpur.
2. The Hospital Superintendent,  
Daga Memorial Hospital,  
Gandhibag, Nagpur.
3. The Secretary,  
Government of Maharashtra,  
Ministry of Public Health,  
Mantralaya, Mumbai – 32.
4. The Collector,  
Nagpur District, Nagpur. ....**APPELLANTS**

**...V E R S U S...**

Smt. Nalu Nagorao Gajbhiye,  
aged 30 years, Occ. Household,  
r/o Plot No. 237, Near Taj Dwarkhana,  
Dr. Mohadikar's Hospital, Yadaonagar,  
Ward No. 4, Nagpur – 17. ....**RESPONDENT**

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Ms D. I. Charlewar, A.G.P. for appellants.  
Mr. Z. Z. Haq, Advocate for respondent.  
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**CORAM:- ANIL L. PANSARE, J.**  
**DATE OF RESERVING THE JUDGMENT :-08.04.2024**  
**DATE OF PRONOUNCING THE JUDGMENT :-12.04.2024**

**JUDGMENT**

The appeal has been admitted on the following  
substantial question of law:

*“The finding of fact recorded by the Courts below is not based upon any evidence available on record.”*

2. The additional substantial question of law is formulated vide order dated 12.03.2024, which reads thus:

*“Whether the finding rendered by the trial court that the Respondent/Plaintiff was entitled to get compensation and damages of Rs.2,00,000/- suffers from perversity having been passed contrary to the principles of law enunciated by the Hon'ble Supreme Court in the case of State of Punjab Vis Shiv Ram & Ors. (2005) 7 SCC 1?”*

3. The first substantial question of law is formulated on the ground that except the plaintiff, no other witness was examined to establish the negligence at the hands of the appellant no.1 – Dr. Mrs. Atey (the original Defendant No.1)

4. The facts necessary to answer the questions of law are as under.

The respondent – plaintiff had filed a suit for damages against the appellants – defendant Nos. 1 to 3. According to the respondent, she got married in the year 1988. She had three children out of the wedlock. The third child was born on 18.07.1990 at Daga Government Hospital, Nagpur. At that time, the appellant No.1 has advised her to undergo Tubectomy surgery. Accordingly, the respondent was operated on 20.07.1990. The

appellant No.1 stated that the surgery was successful and she (respondent) would not conceive in future. However, in November, 1995, respondent conceived and became pregnant.

5. It is further the case of respondent that she had no other alternative but to continue with the pregnancy. She delivered a baby girl on 29.07.1996. She, therefore, has blamed the appellants for negligence. She then states that it is impossible for her to maintain the child because she will be now required to incur expenses for her education, medical treatment and other activities. Accordingly, she filed suit for damages for Rs.2,00,000/-.

6. The appellants filed written statement admitting therein that the Tubectomy surgery was performed but by consent of the respondent. The surgery was successful. The respondent was advised to seek quick, timely and appropriate medical advise, if she conceives in future. She, however, had not approached the appellants after becoming pregnant. Had she approached, necessary treatment could have been given. She approached the appellants in March, 1996. She was carrying 26 weeks of pregnancy and, therefore, it was risky to proceed with the medico termination of pregnancy.

7. According to the appellants, despite successful surgery, there is a possibility of failure, which ranges from 0.4% to 1.5%. Both the Courts below have rendered concurrent findings that the appellant no.1 was negligent in performing Tubectomy surgery. This finding is based on unchallenged testimony of the respondent. She has led evidence in tune with the averments made in the plaint.

8. The question, however, is whether the unchallenged testimony can be said to be evidence sufficient to prove negligence at the hands of the appellant no.1. The plaintiff deposed that the surgery was performed on 20.07.1990 under the scheme of the Government proclaimed by the appellant Nos. 2 and 3 (original defendant Nos. 2 and 3). The respondent further deposed that the appellant No.1 assured that she (respondent) would not conceive in future. She, however, in the month of November, 1995 conceived and became pregnant. She approached the hospital in July, 1996 and delivered the fourth baby.

9. This unchallenged testimony indicates that despite knowing the fact that she became pregnant, the respondent did not approach the appellants for further advise and treatment. She herself has decided to continue with the pregnancy. She has not

explained in her evidence as to why did she not opt for medico termination of pregnancy, if her claim that she is financially not sound to maintain the fourth child, is to be accepted. The damages are sought on the count that she is not financially sound to maintain her child. If the damages are to be granted on this count alone, the respondent was under obligation to prove that she had no other option but to continue with the pregnancy. This issue has been not touched by her, either in the pleadings or the evidence. A mere statement is made that she had no alternative but to continue with the pregnancy. She does not explain the circumstance under which she was forced to continue with the pregnancy. In absence thereof, the damages cannot be accorded on the ground that she is not financially sound to maintain fourth child.

10. Another important factor is whether the appellant no.1 was indeed negligent in performing the surgery. The learned Assistant Government Pleader has taken aid of judgment of the Supreme Court in the case of **State of Punjab .Vs. Shiv Ram and Ors., (2005) 7 SCC 1.** The Supreme Court held that the child birth, in spite of the sterilization operation, can occur due to the negligence of doctor in performance of the operation, or due to

certain natural causes such as spontaneous recanalisation. The Court continued to say that the doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several textbooks on medical negligence have recognized the percentage of failure of the sterilization operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery. The Court held that the pregnancy can be for reasons dehors any negligence of the surgeon. In the absence of proof of negligence, the surgeon cannot be held liable to pay compensation. Therefore, the question of the State being held vicariously liable also would not arise. On the point of negligence, the Supreme Court, after taking into consideration various judgments, has held in paragraph 25 as under:

*“25. 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.”*

11. Thus, the Supreme Court has held that ordinarily, a surgeon does not offer a guarantee of exclusion of pregnancy after surgery. The person like the respondent will have to allege and prove that the surgeon like appellant no.1 had assured 100% exclusion of pregnancy after the surgery and the respondent, only on the basis of such assurance, was persuaded to undergo surgery. In the present case, the evidence on the assurance of 100% exclusion of pregnancy and that being the only reason for the respondent to undergo surgery is absent.

12. The respondent deposed that the appellant no.1 advised her to perform Tubectomy. Such a surgery was performed in terms of ‘Family Planning Scheme’ of the Government. The respondent received a sum of Rs.130/- at the hands of the appellant no.2 in terms of the scheme of family planning floated by appellant no.3. The respondent then deposed that appellant no.1 had assured that she would not conceive in future but she does not depose that the assurance was 100% and further that it was the only reason why she was persuaded to undergo surgery.

Rather, the evidence indicates that she got persuaded because of the scheme of family planning by which an amount of Rs.130/- was paid to her.

13. Her evidence further show that she did not conceive the child immediately after surgery but took five years for the same. Had there been negligence at the hands of the appellant No.1, the consequence would have arisen immediately. The span between performance of surgery till the respondent became pregnant, which is about 5 years, is indicative of the fact that the respondent conceived and became pregnant not because of negligence but because of spontaneous recanalisation, a natural cause. In the circumstance, the evidence, even if accepted as it is, will not lead to a conclusion that the appellant no.1 was negligent in performing surgery.

14. In any case, the respondent having not satisfied as to what prevented her from approaching the appellant no.1 immediately after coming to know of her pregnancy for appropriate medical treatment, she is precluded from claiming damages on the ground of the expenses, which she is likely to incur in bringing up her fourth child because she could have avoided these expenses by approaching the appellant no.1 in time.

15. Learned counsel for the respondent contends that the appellant no.1, having not entered the witness box and having not presented himself for cross-examination, an adverse presumption will have to be drawn against her on the basis of the principles contained in illustration (g) of Section 114 of the Evidence Act, 1872. In support, he has placed reliance upon the judgment of the Supreme Court in the case of Iswar Bhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera and another, (1999) 3 SCC 457, wherein the Court held in paragraph 17 as under:

*“17. Admittedly Respondent No.1 had an account in the Central Bank of India Limited, Sambalpur Branch which his father, namely, respondent No.2, was authorised to operate. It is also an admitted fact that it was from this account that the amount was advanced to the appellant by respondent No.2. It has been given out in the statement of respondent No.2 that when the appellant had approached him for a loan of Rs.7,000/-, he had explicitly told him that he had no money to lend whereupon the appellant had himself suggested to advance the loan from the account of respondent No.1 and it was on his suggestion that the respondent No.2 issued the cheque to the appellant which the appellant, admittedly, encashed. This fact has not been controverted by the appellant who did not enter the witness box to make a statement on oath denying the statement of defendant (respondent) No.2 that it was at his instance that respondent No.2 had advanced the amount of Rs. 7,000/- to the appellant by issuing a cheque on the account of defendant (respondent) No.1. Having not entered into the witness box and having not presented*

*himself for cross-examination, an adverse presumption has to be drawn against him on the basis of principles contained in illustration (g) of Section 114 of the Evidence Act.”*

16. As could be seen, the facts were such that the amount of loan was given from the account of respondent no.1, upon the suggestion made by the appellant himself. It was in this background, the Supreme Court held that adverse inference will have to be drawn.

17. Thus, it depends on facts of each case as to the effect of party not entering the witness box. It is not always necessary that adverse inference will follow only for the reason that the party has not entered the witness box. The basic rule is that the plaintiff has to prove his case on his own footing. In the present case, the plaintiff's case even if accepted on its face value, does not really prove negligence at the hands of the appellant no.1 and, therefore, appellant no.1 could not be said to be negligent in performing surgery.

18. In the peculiar facts and circumstances of the case, the respondent, by examining an expert witness, must have shown that the appellants did something or failed to do something while performing surgery, which no medical professional in her ordinary

sense and prudence would have done or failed to do. The evidence of an expert was of utmost importance because the negligence attributed in the present case was not obvious or was not such that inference of negligence could be drawn on the sole testimony of the respondent like in the case of *V. Kishan Rao .Vs. Nikhil Super Speciality Hospital and another, (2010) 5 SCC 513*, cited by the learned counsel for the respondent, where the facts were such that a patient, who was suffering from intermittent fever and chills, was wrongly treated for Typhoid instead of Malaria for four days, which resulted in her death. This treatment was found to be an apparent case of medical negligence and, therefore, the Supreme Court held that it was not necessary to obtain expert's opinion to award compensation by the District Forum. The Supreme Court noted that the patient was removed in a critical condition on the fifth day to another hospital and in the investigation conducted by the said hospital, it was found that the test for Typhoid was negative whereas test for Malaria parasite was positive. This was sufficient to conclude that it was a case of wrong treatment.

Thus, the record of medical hospital available on record was self sufficient to conclude that the case was of medical negligence. Such evidence is not presented in the present case.

19. Both the Courts below have thus rendered a finding without examining whether the ingredients of negligence have been established against the appellant no.1. Both the Courts below have not considered the law laid down by the Supreme Court in *Shiv Ram's* case supra. In fact, the said judgment was not cited before the Courts below. Had the same been pointed out to the Courts below, probably a different finding would have been rendered.

20. In the circumstances, it cannot be said that the finding of fact recorded by the Courts below is based on the evidence. Rather, the finding rendered by the Courts below suffer from perversity, having been rendered in ignorance of the principles of law enunciated in the case of *Shiv Ram* supra. Both the substantial questions of law are answered accordingly. Consequently, the appellants have made out the case in their favour.

### **ORDER**

- (i) The appeal is allowed.
- (ii) The judgment and order dated 18.08.2012 in Regular Civil Appeal No.207/2010 passed by District Judge-3, Nagpur and the judgment and decree dated 04.04.2006, passed by 3<sup>rd</sup> Jt. Civil Judge Senior Division, Nagpur in Special Civil Suit No.288/1997 are quashed and set aside.

(iii) Special Civil Suit No.288/1997 filed by the respondent is dismissed.

(iv) The amount deposited in this Court shall be remitted back to the appellants.

**(Anil L. Pansare, J.)**

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