(2014) 10 MAD CK 0242

Madras High Court

Case No: Second Appeal No. 683 of 2006

Sumathi		APPELLANT
	Vs	
Suganthi		RESPONDENT

Date of Decision: Oct. 30, 2014

Citation: (2015) 1 LW 146 : (2014) 8 MLJ 728

Hon'ble Judges: R. Mahadevan, J

Bench: Single Bench

Judgement

R. Mahadevan, J.
Plaintiff, who failed before both the courts below is the appellant in the second appeal.

2. The plaintiff filed the abovesaid suit as indigent person for the relief of direction to the defendants to pay a sum of Rs. 1,00,000/- to the plaintiff as damages for the negligence and carelessness in performing the sterilization operation done by the first defendant to the plaintiff. The case of the plaintiff is as follows:-

The plaintiff, being mother of two children, had underwent sterilization operation on 10.3.1990 which was done by the first defendant, the then Medical Officer in the Government Hospital, Tiruchengode. But, thereafter, to her surprise, she became pregnant and on 22.11.1991, she gave birth to a male child in Government Hospital, Tiruchengode. According to the plaintiff, the pregnancy was due to surgical failure due to deliberate negligency and wanton carelessness on the part of the first defendant and hence, she claimed a total sum of Rs. 1,00,000/- as damages.

3. The suit was contested by the first defendant by filing written statement, which was accepted by defendants 2 to 4, contending as follows:-

The plaintiff has not taken due care after the sterilization surgery. She had never approached the first defendant after the surgery as per the advice given to her. The pregnancy has not caused due to surgical failure or neither there was any

negligence or carelessness on the part of the first defendant. In the method of sterilization done to the plaintiff, there is a likelihood of the knot that would be made on the fallopian tube getting eased by lapse of time as recognized by medical world. Had there been any negligence in conducting the surgery, the plaintiff could have pregnant within two to three months from the date of surgery, whereas the pregnancy took place after 18 months. Soon after the symptoms of pregnancy was found, she could have very well avoided such pregnancy, but, she has not done so and hence, the carelessness on the part of the plaintiff in not following the medical advice is the cause for the pregnancy. The plaintiff has not revealed the details of the new born baby and he was also not impleaded as party to the suit and hence, the suit is liable to be dismissed for non-joinder of necessary party. The plaintiff could have taken steps to join the fallopian tube to get impregnated at her own volition and hence, the suit is liable to be dismissed.

4. Before the Trial Court, the plaintiff examined herself as PW1 and marked 8 documents as Exs.A1 to A8. On the side of the defendants, the first defendant was examined as DW1 and 2 documents were marked as Exs.B1 and B2. On analysis of the oral and documentary evidence, the Trial Court dismissed the suit. On appeal, the appellate court concurred with the finding of the Trial Court. Aggrieved against the same, the present second appeal has been filed.

5. The second appeal has been admitted identifying the following question to be the substantial question of law involved in the second appeal:

i) Whether the shifting of the burden of proof on the plaintiff that there is medical negligence on the part of the Doctor who performed the surgery, can be legally sustained and if not, does not vitiate the judgments in challenge?

6. The arguments advanced by Mr. N.Manokaran, learned counsel for the appellant and by Ms.M.Jayasree, learned Government Advocate on behalf of respondents 2 and 3 are heard in detail. The materials available on record are also perused.

7. The suit is one for the relief of damages for the alleged medical negligence on the part of the first defendant, a Doctor in the Government Hospital, Tiruchengode while conducting sterilization on the plaintiff. It is not in dispute that the plaintiff, having blessed with two children, had underwent sterilization surgery with the intention of avoiding further pregnancy due to her family circumstances and her status. The plaintiff is from a remote village. It is contended that she belongs to a poor family and her husband is a driver by profession. The plaintiff is said to have given birth to all the three children only in Government Hospital instead of approaching private hospitals which strengthens her contention that she is from weaker section of the society. The trend in the village, one can see, is that people will not come on their own volition to undergo a sterilization even after giving birth to a number of children. They deem it as a sin and pregnancy should not be avoided as it is blessed by Almighty. Only on wide publicity by the Government and the

education offered to the folk people, nowadays, they come forward to venture it. It is an appreciable maturity level in the society from that of fearing even for a vaccination. Birth control has the topmost priority in our nation for its move in the path of development. Therefore, people who wants to join in such a move should be encouraged. Such being the situation, a lady with a poor family status is burdened with one more child even after the sterilization.

8. It is relevant to see that in Keith Allenby v. H.((2013) 2 SCC 1), it has been held as under:-

"53. If, however, the purpose of the medical treatment is to prevent pregnancy from occurring and by reason of medical error that purpose is not achieved, it does not seem to us that, just because the pregnancy then occurs as a biological process, there should be no cover for the consequences. The development of the foetus following impregnation occurs because of the medical error, just as in the case of the undetected tumour. It causes significant physical changes to the woman''s anatomy, which of course occur naturally but still cause discomfort and, at least ultimately, pain and suffering. If a disease or infection consequential on medical misadventure can be classified by the statute as a personal injury, it does not involve any greater stretching of language to similarly include a pregnancy which has the same cause. We should add that it can make no difference that the direct cause of the pregnancy is an act of sexual intercourse which occurs separately from the negligently performed operation. The pregnancy is still caused by the surgeon''s negligence, and would not have happened without that negligence. It is the same in a case of negligent treatment by a health professional falling under s 32(6), where the transmission of the infection occurs separately from the failure to properly treat the patient who passes on the infection, and is directly caused by the proximity of the patient and the person to whom the infection is passed. Another example would be where a medical practitioner negligently carries out a vaccination procedure sought by a patient who later catches from a third person the very disease against which he or she wished to be protected.
. ...

60. The next question, and it is a key question in the case, is whether the resulting pregnancy amounts to personal injury under and for the purposes of the legislation. That expression is defined to mean physical injuries ... including, for example, a strain or a sprain. The question whether a woman who becomes pregnant as a result of a failed sterilisation operation thereby suffers physical injuries is the same question as that which arises if a pregnancy is the result of rape. The answer must logically be the same in respect of both causes. The fact that one results from medical misadventure and the other from accident cannot make any difference.

61. I am unable to accept that the changes which occur to a woman''s body as a result of pregnancy do not come within the compass of the expression physical injuries in the context of the legislation in issue. Clearly the bodily changes are of a physical kind. The only issue is whether they represent an injury or injuries for the purposes of the Act. I consider they do. In both cases (rape and failed sterilisation) the bodily changes which ensue qualify as personal injury. They are apt to cause a substantial degree of physical discomfort and, quite often, substantial pain and suffering. The changes produce bodily sensations which are of much greater consequence and duration than the examples given of a strain or a sprain.

62. I am not persuaded to a different view by the argument that pregnancy is a natural process and is necessary for the survival of the human species. A woman is entitled to choose whether or not to become pregnant. If she does not wish to do so, the consequences of her becoming pregnant are not to be discounted because pregnancy per se is a natural process. A woman who takes steps to avoid a natural consequence of sexual intercourse ought to be regarded as suffering physical injury when those natural consequences follow as a result of medical misadventure. In the same way, a woman who is raped, and becomes pregnant as a result, thereby suffers physical injury caused by the accident of sexual assault. This reasoning does not lead to all unwanted pregnancies being covered by the Act. In order to attract cover the pregnancy must be caused either, as here, by medical misadventure, or by rape.

. ..

80. Medical misadventure arises out of medical error or medical mishap. 17 Medical mishap (an adverse consequence of treatment 18) is not in issue here. Rather, it is said that the failed sterilisation resulted from medical error. Medical error does not exist solely because desired results are not achieved, but must amount to the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances.19 Whether the failure in the sterilisation undertaken was because the appellant did not observe the standard of care and skill reasonably to be expected is not conceded or established. It is however assumed for the purposes of the strike out determination that the pregnancy was the result of such medical error. "

9. In the case of Mrs. Vijaya v. The Commissioner, Corporation Of Chennai And 2 Others (2004-3-LW 201) this court has held as under:-

"7. The decision reported in the case of State of Haryana and Others Vs. Smt. Santra, , is more appropriate in the sense that it relates to a case of birth of a child in spite of tubectomy operation. The Supreme Court held that there was negligence on the part of the Doctors and ultimately, the State Government was responsible for the negligence. The award of compensation by the Court below was upheld by the Supreme Court. Ultimately, it was observed:-

" 34. From the above, it would be seen that the Courts in the different countries are not unanimous in allowing the claim for damages for rearing the unwanted child born out of a failed sterilisation operation. In some cases, the Courts refused to allow this claim on the ground of public policy, while in many others, the claim was offset against the benefits derived from having a child and the pleasure in rearing that child. In many other cases, if the sterilisation was undergone on account of social and economic reasons, particularly in a situation where the claimant had already had many children, the Court allowed the claim for rearing the child."

. ...

" 37. Ours is a developing country where the majority of the people live below the poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The principles on the basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages cannot be strictly applied to Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class, who earn their livelihood on a daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence."

. ...

" 42. Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up family planning as an important programme for the implementation of which it has created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation."

8. Applying the ratio of the above said decision, it has to be seen whether the petitioner is entitled for any compensation. The main objection raised by the learned counsel for the respondents is to the effect that there is no material on record to establish negligence on the part of the Doctors and in normal course, there can be failure of such operation. It is, of course true that the petitioner has not produced any positive material to show negligence at the time of operation. However, in such case, where the failure rate is negligible, the initial presumption

would be regarding the negligence in the operation. Thus, the doctrine of Res ipsa loquitur would be applicable to such cases. In other words, where it is found that in spite of undergoing sterilising operation, there is conception and birth of child, the burden would be shifted to the concerned Doctor, to prove that there was no negligence and the fact that "there was conception in spite of tubectomy operation" would speak for itself. In the present case, except a vague denial about the allegations and shifting the blame to the petitioner, no material has been produced on behalf of the respondents to prove that due care had been taken at the time of operation."

10. Let us assume, for a moment, that a surgery for avoiding pregnancy was done on the husband and the wife got pregnant. Then, the situation may be entirely different considering the view that may be taken in the society. Therefore, the medical negligence in sterilization, unlike in treatments for some other ailments, may not take away the life, but, it has its own consequences. Therefore, such medical negligence cannot be allowed to go scot-free. The courts below have rejected the case of the plaintiff that her pregnancy was only due to medical negligence on the part of the first defendant mainly on the ground that the plaintiff failed to prove the medical negligence. The courts below have, unreasonably expected the plaintiff, a poor folk lady, to prove the medical negligence. In Smt. Savita Garg Vs. The Director, National Heart Institute, , a Division Bench of the Hon''ble Supreme Court has held that once a claim petition is filed and the complainant has successfully discharged the initial buden that the hospital/clinic/doctor was negligent, and that as a result of such negligence the patient died, then in that case the burden lies on the hospital and the doctor concerned who treated the patient to show that there was no negligence involved in the treatment.

11. In a similar case in Dr. Alice George and The Rural Unit for Health and Social Affairs Vs. Lakshmi, , the plaintiff therein underwent the family planning operation in the year 1987, but, gave birth to another child in the year 1990 and claimed damages. The defence of the Medical Officer therein was that even after the sterilization operation, there was approximately 0.5% of pregnancy. The courts below awarded damages and the second appeal preferred by the Medical Officer was dismissed by this court by holding that it is for the medical person to prove that the operation was done carefully and without any negligence whatsoever.

12. The learned counsel for respondents 2 and 3, by pointing out the decision of a Full Bench of the Honourable Supreme Court in State of Punjab Vs. Shiv Ram and Others, , submitted that the Honourable Supreme Court, while allowing an appeal filed by the State against the decree for damages passed by the courts below in a case of alleged medical negligence due to failure of sterilization operation, has clarified the position with regard to claims regarding failure of sterilization and following the decision of the Honourable Apex Court, the claim of the plaintiff has to

be rejected.

13. Of course, the Full Bench of the Honourable Apex Court has held in the above cited decision that the cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of childbirth; that failure due to natural causes would not provide any ground for claim; that it is for the woman who has conceived the child to go or not to go for medical termination of pregnancy and having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child and compensation for maintenance and upbringing of such a child cannot be claimed.

14. It is also relevant to note that in the above decision, the Full Bench had discussed the post female sterilization pregnancy with the aid of articles from the medical journals and listed out the causes for such failure and pointed out the finding of US study that 1 of every 3 pregnancies after sterilization was ectopic. The Full Bench has observed as under:-

"Pregnancy after female sterilization is rare but why does it happen at all? The most common reason is that the woman was already pregnant at the time of sterilization. Pregnancy also can occur if the provider confused another structure in the body with the fallopian tubes and blocked or cut the wrong place. In other case pregnancy results because clips on the tubes come open, because the ends of the tubes grow back together, or because abnormal openings develop in the tube, allowing sperm and egg to meet."

15. In the above case, the childbirth was after seven years from the date of sterilization operation conducted on the victim lady. But, in the present case, the pregnancy itself took within a year after sterilization operation and the plaintiff gave birth to a child after 19-1/2 months. The rate of risk of post sterilization pregnancy in "pomeroy method" is said to be 2 out of 1000. Even in the above decision, the biological reason for automatic reversal of the sterilization is considered as the last and least cause.

16. In the case on hand, the contention of the first defendant before the Trial Court is that had the plaintiff was cautious, she could not have become pregnant. It is also admitted by her in cross-examination that she had not given the warnings and precautions to the plaintiff in writing. Therefore, this court is of the view that the burden heavily lies on the Medical Officer to prove that there was no negligence in performing the surgery. It is too much on the part of the Medical Officer to doubt the genuineness of the plaintiff in contending in the written statement that the plaintiff might have joined the fallopian tube with the intention of having one more child. Such a contention made by the first defendant-Medical Officer when the plaintiff had approached for damages alleging medical negligence on the part of the first defendant itself shows her idea of escapism and lethargic approach. It is

beyond imagination that the plaintiff could have ventured to join the fallopian tube by undergoing another process of surgery to get pregnant for the purpose of claiming some damages that too by fighting against the medical world for years together.

17. In view of the above discussion, this court is of the view that the courts below have committed error in shifting the burden of proof on the plaintiff, a folk lady, which certainly vitiates the judgments in challenge and the substantial question of law is answered accordingly. The judgment and decree of both the courts below are liable to be set aside.

18. In the result, the second appeal is allowed setting aside the judgment and decree of the courts below and the suit is decreed directing the third defendant to pay a sum of Rs. 1,00,000/- with interest at 6% per annum from the date of plaint till the date of payment towards damages. It is open to the third defendant to conduct a discreet enquiry and recover the amount so paid, from the first defendant, if so advised. No order as to costs.