

**HIGH COURT OF MADHYA PRADESH: BENCH AT
INDORE**
SINGLE BENCH: HON'BLE SHRI JUSTICE VIVEK RUSIA

FIRST APPEAL No.576/2001

STATE OF M.P & ANOTHER
Vs.
SMT.REKHA W/O NEMICHAND CHOWKSEY

Shri Vikas Yadav, learned Govt. Advocate for the
appellant/State.
None for the respondent.

J U D G M E N T
(Delivered on 26.09.2019)

Appellants/defendants have filed the present appeal being aggrieved by the judgment and decree dated 10.09.2001 passed by District Judge, Shajapur in Civil Suit No.3-B/2001 whereby a decree of Rs.1,64,000/- has been granted in favour of the respondent/plaintiff.

Facts of the case in short are as under:

2. Plaintiff filed a suit for damages of Rs.5 lakhs. According to the plaintiff she is a resident of Gram Maksi, district Shajapur. She was married to Nemichand Chouksey in the year 1990 and thereafter gave birth to two daughters and one son aged 7 years, 4 years & 2 years respectively. Thereafter she decided to undergo sterilization operation. The State Govt. through Health Department organized a camp for conducting the sterilization operation in the Primary Health Centre, Maksi. The respondent got operated

on 12.12.1998 by defendant No.2. According to the plaintiff the operation was not successful and immediately after the operation she became ill, suffered weakness, blood pressure etc. and on 26.01.2000 she gave birth to a male child. She has undergone mental as well as physical agony. She was assured that after the T.T operation she would not be pregnant. She pleaded that the defendant No.2 did not operate her properly and because of which she has suffered mental and physical agony. She further pleaded that now she is required to spend lot of money for education of the fourth child. Accordingly, she claimed Rs.4 lakhs and Rs.1 lakh for mental and physical agony. She gave a notice under section 80 on 18.02.2000 and when compensation was not paid to her she filed a civil suit on 08.05.2000 before the Additional District Judge, Shajapur.

3. After the notice, defendants filed written statement by submitting that the plaintiff was operated in the camp on 12.12.1998 but denied the allegation that the operation was not successful. They further pleaded that the plaintiff was informed that there is no 100% success rate of this operation and after the operation there is a possibility of pregnancy at the rate of 8%. It is further submitted that the plaintiff did not follow treatment as she had an occasion to go for abortion but continued with the pregnancy up to nine months and after giving birth to the child she is claiming compensation.

4. On the basis of pleadings, trial Court framed 5 issues for adjudication. Plaintiff examined herself as PW/1, Nemichand as PW/2 and Nand Kishore as PW/3. The plaintiff got exhibited notice dated 18.02.2000 as Ex.P/1, acknowledgment as Ex.P/2 & P/3, certificate of operation dated 12.12.1998 as Ex.P/4 and birth certificate as Ex.P/5. In the cross examination of the plaintiff, defendant has tendered the form and consent letter signed by the plaintiff and the Court has marked it as Ex.D/1.

5. After appreciating the evidence came on record vide judgment and decree dated 10.09.2011 learned District judge has decreed the suit in favour of the plaintiff by directing the defendants to pay Rs.1,64,000/- as compensation to the plaintiff along with interest at the rate of 12%.

6. Being aggrieved by the aforesaid judgment, defendants preferred this appeal. This Court while admitting the appeal has declined to grant stay of execution of the impugned judgment and decree.

7. Learned counsel for the appellants submits that the plaintiff has admitted her signature in the consent form in which it is clearly mentioned that there is no guarantee of 100% success of the operation and in case of failure of the operation, the hospital or the surgeon cannot be held responsible. The sterilization operation has been done by the State Govt. free of cost in order to control population of the country. There was no compulsion for undergoing the operation but it was in the interest of the nation. At the time

of operation it has been made clear that this is an effort to prevent pregnancy and there is a possibility of failure of the operation. Learned District Judge has wrongly granted compensation on exterior consideration. He has unnecessarily observed that in the mass level operation there is a possibility of failure. There was no follow-up check up in the camp and it was done only to gain cheap publicity. Learned trial Court has also awarded compensation on the higher side by applying the principle of multiplier.

8. It is further submitted that the plaintiff herself continued with the pregnancy up to nine months. If she was not willing for fourth child she could have gone for abortion. In support of his contention, he has placed reliance over the judgment passed by the Apex Court in the case of **State of Punjab vs. Shiv Ram and others (2005) 7 SCC 1**. It is further submitted that as per the policy of the Central as well as State Govt. in case of failure of operation the victim is only entitled for Rs.30,000/- as compensation as held by this Court in the case of **Smt.Prabha Bansal vs. State of M.P & others in W.P.No.3109/2017 decided on 27.02.2019**, therefore, the impugned judgment be set aside.

9. Despite notice, no one is appearing on behalf of the respondent to argue in support of the judgment and decree.

10. It is not in dispute that after having three children the plaintiff decided to undergo sterilization operation to prevent further pregnancy. She was operated by defendant No.2 on 12.12.1998 in a *Shivir* held in the Primary Health Centre,

Maksi. Before the operation, she signed the consent letter Ex.D/C in which it is specifically mentioned that there is a slight possibility of failure of operation and in case of failure, neither she nor her relatives would held the Surgeon responsible for the failure of operation. The relevant part of the consent letter is reproduced below:

मेरे द्वारा नसबन्दी ऑपरेशन करने का निर्णय स्वयं स्वतंत्र रूप से बिना किसी बाहरी दबाव, प्रलोभन अथवा बल-प्रयोग के लिया गया है। मुझे ज्ञात है कि मेरे लिये गर्भ निरोधक की अन्य प्रद्वत्ति उपलब्ध है। मैं जानता/जानती हूँ कि सभी व्यावहारिक प्रयोजनों के लिये यह ऑपरेशन स्थायी है और अधिक बच्चे नहीं हो सकते है। यह भी जानता/जानती हूँ कि ऑपरेशन के असफल होने की कुछ संभावनाये हैं जिसके लिये शासकीय चिकित्सालय/ऑपरेशन करने वाले सर्जन को मेरे द्वारा मेरे संबंधियों द्वारा अथवा अन्य व्यक्ति जो कोई भी हो द्वारा उत्तरदायी नहीं ठहराया जावेगा। मेरे पति/पत्नि का पूर्व में नसबन्दी ऑपरेशन नहीं हुआ है। मुझे यह भी जानकारी है कि जो ऑपरेशन में करने जा रहा/रही हूँ उसमें जोखिम का तत्व है। ऑपरेशन की पात्रता में माप दण्ड मुझे स्पष्ट किये गये है और मैं प्रतिज्ञा पूर्वक कहता/करती हूँ कि इन माप दण्डों के अनुसार मुझे ऑपरेशन कराने का पात्रता है। किसी भी प्रकार के निश्चेता (एनेस्थिसिया) के अर्न्तगत जो सर्जन मेरे लिये उचित समझे ऑपरेशन कराने तथा संबंधित डॉक्टर्स द्वारा उपयुक्त समझी जाने वाली अन्य औषधियां के क्रियान्वयन (Administration) के लिये मैं सहमत हूँ।

11. The plaintiff in her cross examination admitted her signature in Ex.D/1.

12. In the plaint she has not given the date when she came to know about the pregnancy after the operation. She has only stated that after the operation she became weak and thereafter she delivered the child on 26.01.2000. From the

date of operation till the delivery she has not filed any documentary evidence to show that she became ill due to the operation. Till the delivery she must have taken treatment from the doctor but the documents have not been exhibited in the suit. She has not examined any doctor to establish that abortion was not possible or not advised looking to the health condition of the mother or child.

13. It appears from the evidence came on record that the plaintiff herself continued with the pregnancy and delivered the child and thereafter she filed the suit for compensation.

14. The Apex Court in the case of Shiv Ram (supra) has held that the claim of tort in case of medical negligence can be sustained only if there was negligence on the part of the Surgeon who has performed the surgery. Merely because a woman has undergone sterilization operation and became pregnant and thereafter delivered a child the operating Surgeon or his employer cannot be held liable on account of unwanted pregnancy or unwanted child. Paragraphs 25, 26, 28 & 30 of the said judgment are reproduced below:

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.

26. *The cause of failure of sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by x-ray examination, or by pathological examination of the materials removed at a subsequent operation of re-sterilisation. The discrepancy between operation notes and the result of x-ray films in respect of the number of rings or clips or nylon sutures used for occlusion of the tubes, will lead to logical inference of negligence on the part of the gynaecologist in case of failure of sterilisation operation. (See: Law of Medical Negligence and Compensation by R.K. Bag, Second Edition, p.139).*

28. *The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the 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. A reference to the provisions of the Medical Termination of Pregnancy Act, 1971 is apposite. Section 3 thereof permits termination of pregnancy by a registered medical practitioner, notwithstanding anything contained in the Indian Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation II appended to sub-section (2) of Section 3 provides:*

"Explanation II. --Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman."

30. *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 child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical*

termination of pregnancy. 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. Compensation for maintenance and upbringing of such a child cannot be claimed.

15. The relevant part of the order dated 27.02.2019 passed in W.P.No.3109/2017 is reproduced below:

Learned counsel appearing for the petitioner referring to the order dated 5.7.2017 passed in W.P.No.3634/2016 in the matter of Smt. Komal Bai Vs. State of M.P. and others and also placing reliance upon the Family Planning Indemnity Scheme, has submitted that the petitioner is entitled to receive the compensation of Rs.30,000/-. Learned counsel for State has not disputed the fact that in terms of the order in the case of Smt. Komal Bai, the petitioner is entitled to a sum of Rs.30,000/-. This Court in the matter of Smt. Komal Bai has held as under :-

“Heard learned counsel for the parties at length and perused the record.

In the present case, the undisputed facts reveal that the petitioner has undergone Sterilization Operation on 24/08/2011. The undisputed facts also reveal that the petitioner has later on delivered a child through Cesarean Operation. No document has been filed in respect of postoperative care / advise given to the petitioner by the Doctor at the time of operation.

*Government of India in order to ensure proper implementation of Family Planning Scheme has issued a manual for Family Planning Operations and has framed a scheme known as Family Planning Indemnity Scheme. As per the scheme and keeping in view the directions of the Hon'ble Supreme Court in the case of **Ramakant Rai & Anr. Vs. Union of India & Ors.** passed in **Writ Petition (Civil) No.209/2003**, the Union of India has laid down the norms and in case of death a sum of Rs.1 Lac has to be given and a sum of Rs.30,000/- in case of incapacity and Rs.20,000/- in case of post-operative complications. Relevant extract of the scheme in paragraphs No.1.1.9 reads as under:-*

“1.1 Directives of Hon'ble Supreme Court:

9. *The Union of India shall also lay down the norms of compensation which should be followed uniformly by all the states. For the time being until the Union the Union Government formulates the norms of compensation, the States shall follow the practice of the State of Andhra Pradesh and shall pay Rs.1 Lakh in case of death of the patient sterilized, Rs 30,000/- in case of incapacity and in the case of post-operative complications, the actual cost of treatment being limited to the sum of Rs.20,000/-.”*

The scheme is operational from 01/10/2013. In light of the scheme as the factum of operation and delivery of a child has not been denied, there is no documents on record to establish that the petitioner was directed to take postoperative care, this Court is of the opinion that the petitioner is entitled for a sum of Rs.30,000/- as per the Indemnity Scheme.

Learned Government Advocate has drawn the attention of this Court towards Annex.-R/1 which is a literature relating to failure of female sterilization and his contention is that there is no such method which provides for 100% guarantee in case of sterilization operations.

*This Court has carefully gone through the aforesaid document, however, the aforesaid document will not supersede the Indemnity Scheme framed by the Government of India. Learned counsel for the State Government has also placed reliance upon a judgment of the Hon'ble Supreme Court in the case of **State of Punjab Vs. Shiv Ram (Supra)** and his contention is that unless and until it is established that there was negligence on the part of the Surgeon, no compensation can be awarded.*

*This Court has once again carefully gone through the aforesaid judgment and is of the opinion that the judgment is of the year 2005, thereafter, the Government of India in the year 2013 has framed a scheme based upon the subsequent judgment delivered in the case of **State of Punjab Vs. Shiv Ram (Supra)** dated 01/03/2005 and therefore, in the considered opinion of this Court, the judgment relied upon is again of no help to the State Government.*

Resultantly, the writ petition stands allowed with a direction to the Chief Medical and Health Officer, Shajapur to pay a sum of Rs.30,000/- to the petitioner within a period of 60 days from the date of receipt of certified copy of this order. In case, the amount is not paid within 30 days to the petitioner, the same shall carry interest @ 12.5% per annum from 24/08/2011 till the amount is actually paid to the petitioner.”

Having regard to the aforesaid and considering the undisputed stand of the State before this Court, the present writ petition is disposed of by directing the respondent No.2 to pay a sum of Rs.30,000/- to the petitioner within 60 days from the date of receipt of certified copy of this order. In case the amount is not paid within 60 days to the petitioner, the same shall carry interest @ 12.5% per annum w.e.f. 09/05/2017 i.e. the date of filing of the writ petition till the payment is made.

16. Plaintiff has claimed the compensation only because it was an unwanted pregnancy and unwanted child but she has failed to prove the negligence on the part of the doctor as well as his employer. Learned District Judge has presumed the negligence merely on the ground that the operation was held in a *Shivir* of mass level operations. The operation was held as per the programme of the State Govt. through the Health Department. The motive behind the operation cannot be said to be of ulterior motive. The State Govt. has organized the camp in order to facilitate more females from remote areas of the State to participate in the *Shivir*. The operation was conducted free of cost, therefore, it cannot be presumed that since it was mass level operation negligence must have been caused. The plaintiff has not examined any

doctor to prove the negligence on the part of the defendant No.2, therefore, the judgment cannot be sustained and the same is liable to be dismissed.

17. Learned Govt. Advocate fairly submits that as per the policy of the State Govt. and the judgment passed by this Court in W.P.No.3109/2017 the plaintiff is only entitled for Rs.30,000/- as compensation because of the failure of the sterilization operation.

18 In view of the above, the appeal is partly allowed and the impugned judgment is modified to the extent that the plaintiff is entitled for only a sum of Rs.30,000/- as compensation. The plaintiff is directed to refund the remaining amount to the State without interest, if the same is realized. The State can initiate proceedings for recovery of the principal amount excluding the interest part from the plaintiff.

The appeal is partly allowed.

(VIVEK RUSIA)
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