AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

FA No. 71 of 2006

1. State Of Chhattisgarh, Through the Collector, Raipur
2. Chief Medical Officer, Raipur, Distt. Raipur
3. Block Development Officer, Primary Health Centre, Chhura, Tehsil Gariaband, District Raipur(Original Defendants)

---- Appellants

Versus

1. Smt. Triveni Bai, aged 28 years, W/o Shri Lachchan Yadav, Profession – Housewife, R/o Village Chhura, Tehsil Gariaband, Distt. Raipur(Original Plaintiff)
2. Dr. S. N. Tiwari, C/o Chief Medical Officer, Raipur.(Original Defendant)

---- Respondents

For Appellant/s : Mr. Avinash K. Mishra, Govt. Advocate
For Respondent No.2 : Mr. Vivek Tripathi, Advocate

Hon'ble Mr. Justice P. Sam Koshy
Order on Board

22/08/2022

1. The instant is a defendant's first appeal by the State Government challenging the impugned judgment and decree dated 30.12.2005 passed by the 10th Additional District Judge(FTC), Raipur in Civil Suit No. 1B/2005.

2. Vide the impugned judgment and decree the Court below has ordered for payment of Rs. 51,000 towards compensation to the plaintiff on account of the failure of LTT Operation conducted upon the plaintiff Smt. Triveni Bai. The payment of compensation stands fastened upon the State Government i.e. defendant no.1.

3. Brief facts of the case is that at the Primary Health Centre, Chhura Tahsil Gariyaband District Raipur(as it then was) a family planning camp was organized on 9.12.1998 wherein a large number of women belonging to the said locality had undergone the Laparoscopic Tubectomy (Family Planning)

Operation in short 'LTT Operation'. The said operation is a surgical sterilization procedure adopted on the willing ladies in order to ensure that they do not have any further child. On the said date i.e. on 9.12.1998 around 77 women had undergone the said family planning operation. One such person was the plaintiff Smt. Triveni Bai w/o Lachchan Yadav.

4. However, in the case of plaintiff the said operation conducted on 9.12.1998 resulted in a failure in as much as immediately about a year's time the plaintiff again got conceived and gave birth to her 5th child on 4.9.2000. The operation was conducted by the respondent defendant no.4 in the suit before the trial Court Dr. S. N. Tiwari i.e. respondent no.2 in the instant appeal.

5. Much after the child was born, the plaintiff issued a notice under Section 80 in July, 2001. Thereafter, the suit was filed in the year 2005 claiming for damages of an amount of Rs. 1,51,000. The suit was registered as Civil Suit No. 1B/2005. Three witnesses were examined on behalf of the plaintiff side, the plaintiff, her husband and another local villager Vinod Kumar PW-3. On behalf of the respondent State two witnesses were examined DW-1 Dr. G. L. Tandon, the then Block Medical Officer, PHC Chhura and DW-2 namely Smt. Padmini, ANM who was the person present at the time of the camp held on 9.12.1998 and who was posted at the same PHC at the relevant point of time.

6. After conclusion of the pleadings and evidence, the trial Court taking into consideration the submissions made by the parties allowed the suit and held that since admittedly the plaintiff had undergone the LTT Operation on 9.12.1998 and the said operation resulted in failure in as much as immediately the plaintiff having got conceived and thereafter delivered her 5th Child on 4.9.2000. Hence the plaintiff became entitled for the claim of damages/compensation for the said failure and awarded an amount of Rs. 51,000 in this regard. The liability of payment of compensation was fastened upon the State Government. It is this judgment and decree dated 30.12.2005 which is under challenge before this Court.

7. Contention of the learned counsel for the appellant/State is that from the evidence of DW-1 and DW-2 it would be emphatically clear that there was no negligence whatsoever on the part of the Doctor conducting the LTT Operation, nor was there any case of the complications whatsoever which the plaintiff had suffered as a result of the said operation. It is further contention of the learned counsel for the appellant/State that witnesses DW-1 Dr. G.L. Tandon himself had deposed that in some cases there is a chance of failure of the LTT operation as is established from the medical jurisprudence itself. The experts and researchers have accepted the fact that under certain circumstances there is a possibility of failure of the said operation. It was the further stand of the State counsel that witnesses examined on behalf of State Government clearly established the fact that before conducting the operation written consent was obtained from the plaintiff herself which has been marked as Exhibit D-1 which she has voluntarily given without any coercion on the part of the State whatsoever. That having given the written consent at one point of time, the plaintiff cannot be permitted to turn around and raise a claim for damages at a later stage, particularly, when under the medical jurisprudence itself in certain exceptional cases there can be failure of the said operation.

8. It is further contention of the learned counsel for the appellant that the plaintiff have not given any cogent strong medical evidence to show that there was any failure, lapse or negligence on the part of the doctors or supporting staff in the course of conducting of the aforesaid operation upon the plaintiff. In the absence of which the evidence of DW-1 cannot be ignored and in the absence of any rebuttal to the said medical evidence, the finding arrived at by the Court below is not proper, legal and same should be interfered with.

9. Appellant/State counsel at this juncture further pointed out that there is inordinate delay on the part of the plaintiff in between issuance of Section 80 notice and in filing of suit i.e. a gap of more than four years. Further, it was contended that except for a birth certificate of the child born on 4.9.2000 the

plaintiff has not shown any medical evidence of her having conceived and undergone the delivery on 4.9.2000.

10. Counsel appearing for the respondent no.2 also has adopted the argument lead by appellant-State and have further relied upon the recent decision of this Court in the case of State of C.G. & Others Vs. Meena Bai reported in 2019 (4) CGBCLJ 386 (CG) in FA No. 32/2005 decided on 13.02.2019 wherein under similar if not identical set of facts, the appeal of the State Government was allowed and judgment and decree of the Court below was set aside.

11. None appears for the claimants in spite of repeat calls being made. The appeal is of the year 2006. While taking cognizance of the said appeal, this Court on 12.06.2006 had directed the appellant State to deposit the decreetal amount before the trial Court within a period of one month from 12.06.2006. Further from the available documents with the Second Appeal it is reflected that pursuant to the order dated 12.06.2006 the appellant State has deposited the decreetal amount of Rs. 51,000 vide Cheque No.153602 dated 29.06.2006.

12. In all probability the said amount by efflux of time since there was no interim protection in favour of the appellant, must have been by now disbursed to the plaintiff. Considering the fact that there is no representation on behalf of the respondent plaintiff i.e. respondent no.1 for a considerable period of time i.e. for more than two years now, this Court proceeds to decide the appeal taking into consideration its seniority in the absence of any representation on behalf of respondent plaintiff.

13. From the admitted factual matrix which has been narrated in the preceding paragraphs undoubtedly a camp for family planning operation was held at PHC Chhura District Gariyaband, Raipur(as it then was) on 9.12.1998. The plaintiff was one of the persons who had undergone operation on the said date. The plaintiff at the time of the operation already had four children. The other admitted facts is that the operation conducted upon the plaintiff, resulted in its failure as the plaintiff gave birth to 5th child on 4.9.2000.

14. But what needs appreciation at this juncture is the fact that there is no pleading, no evidence led by the plaintiff to show any lapse or negligence on the part of the Doctor conducting the operation or on the part of any other persons involved in the said operation.

15. As regards the appellant defendants are concerned they have examined DW-1 Dr. G.L. Tandon the then Block Medical Officer at PHC Chhura and which has in his deposition categorically stated that under certain circumstances the chance of failure of the LTT Operation is possible and that he has suggested that in the case of plaintiff the failure must have been because of some of those reasons.

16. What has further to be taken note of is the fact that the petitioner had voluntarily approached the Primary Health Centre, Chhura and had given her consent in writing before undertaking the operation on 9.12.1998. The evidence would further reveal that the entire scheme was part of the welfare measure floated by the State Government and it was free of cost without charging anything from the plaintiffs.

17. What is also necessary to be taken note of is the fact that immediately upon conceiving the 5th child(unwanted child) as a result of the alleged failure of the LTT operation, there was no intimation given by the plaintiff to the Government or to the concerned Doctor at PHC from where she had undergone LTT Operation. If the plaintiff was really not interested at having the 5th child or was serious about the family planning operation that she had undergone, the plaintiff ought to have approached the concerned Doctor at the PHC with a request for termination of her pregnancy in terms of the Medical Termination of Pregnancy Act, 1971.

18. Explanation (2) of sub-section 2 of Section 3 provides for termination of pregnancy where pregnancy occurs as a result of failure of device or methods used by any married women or husband for the purpose of limiting the number of children. On the part of the plaintiff there does not seem to be any such approach made at any point of time, much less there was no report of the

plaintiff upon getting conceived immediately approached the PHC where the Doctors could have advised the plaintiff about the options available to her. From the evidence of PW-3 Vinod Kumar, it is further established that even after having the 5th child on 4.9.2000 the plaintiff has further conceived and gave birth to another child i.e. 6th child at a later stage which further gives an indication of the fact that plaintiffs were not quite serious about the issue of failure of LTT Operation or else she would have taken appropriate remedial measures that were medically available at that point of time.

19. The Hon'ble Supreme Court of India in the **State of Punjab Vs. Shiv Ram and Others, (2005) 7 SCC 1** has in similar factual backdrop have in paragraph 25, 28, 29, 30 & 31 have held 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.
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> 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."
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> 29. And that provides, under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

> 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.
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> 31. For the foregoing reasons, we are of the opinion that the judgments and the decrees passed by the High Court and courts below cannot be sustained. The trial court has proceeded to pass a decree of damages in favour of the plaintiffs-respondents solely on the ground that in spite of the plaintiff-respondent No.2 having undergone a sterilization operation, she became pregnant. No finding has been arrived at that will hold the operating surgeon or its employer __ the State, liable for damages either in contract or in tort. The error committed by the trial court, though pointed out to the first appellate court and the High Court, has been overlooked. The appeal has, therefore, to be allowed and the judgment and decree under appeal have to be set aside."

20. It would be relevant also at this juncture to take note of Section 3 of the Medical Termination of Pregnancy Act particularly Explanation (2) provided under sub-section 2 of Section 3 where under such circumstances the termination of pregnancy by a registered medical practitioner was permissible which again reproduced hereinunder :-

> "Explanation 2.- Where any pregnancy occurs as of 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."

21. Relying upon the aforesaid judgment and aforesaid provisions of Act of 1971, this Court in the case of State of C.G. & Others Vs. Smt. Meena Bai (Supra) has in its judgment dated 13.02.2019 in an almost similar set of facts have allowed the appeal of the State Government setting aside the judgment and decree/decision passed by the Trial Court.

22. For all the aforesaid reasons and discussions made in the preceding paragraphs in the instant case also considering the fact that the entire operation firstly was voluntarily undertaken by the plaintiff, secondly she having given consent in writing in this case and thirdly there is no evidence so far as any

negligence or lapse on the part of the appellants side or for that matter on the Doctor who had conducted the operation, the judgment and decree of the payment of compensation as damages by the Court below does not seem to be proper, legal and justified.

23. The first appeal in the given circumstances deserves to be and is accordingly allowed. The judgment and decree passed by the Court below therefore is set aside/quashed. The plaintiff would not be entitled for any compensation/damages.

24. Let a decree in this regard be drawn by the Registry.

Sd/-
(P. Sam Koshy)
Judge

Rohit