offence is three years and fine. The appellant has already undergone imprisonment for two years, five months and eight days. As such, he is sentenced to the already undergone imprisonment. However, he is also sentenced to pay a fine Rs. 10,000 and in default of the same, to further undergo rigorous imprisonment for six months. He shall deposit this amount of fine within two months from today, in the trial Court failing which, he will undergo rigorous imprisonment for one year. In the event of failure to deposit this fine, the learned Chief Judicial Magistrate, Barnala shall take necessary steps to send the appellant to the prison for serving the imprisonment in default of payment of fine. The Registry is directed to transmit a copy of this judgment to learned Chief Judicial Magistrate, Barnala for necessary action.

(22) Disposed of accordingly.

R.N.R.

Before Rakesh Kumar Jain, J.

STATE OF HARYANA AND OTHERS,—*Appellants*

versus

SMT. AMRAWATI,—*Respondent*

R.S.A. 3088 of 2003

23rd January, 2008

Code of Civil Procedure, 1908—Medical Termination of Pregnancy Act, 1971—Failure of sterilization operation after five years—Birth of a male child—Claim for compensation—Both Courts below failing to record finding of negligence on part of Doctor at time of operation—Medical science also recognizing failure rate of 0.3% to 0.7% of sterilization operation-In absence of finding of negligence appellants cannot be held liable for compensation—Appeal allowed, judgments and decrees of both Courts below set aside.

Held, that the trial Court has committed an error in discarding the statement of Dr. G.S. Buttar as self-serving statement although while

appearing as PW1 plaintiff Amrawati has stated in her examination-in-chief that the doctor had thoroughly checked her and then operated upon. It is a matter of chance that after five years of operation, she had conceived and delivered a child. Both the Courts below have not recorded a positive finding of negligence on the part of Doctor at the time of operation. In the absence of finding of negligence on the basis of evidence and authoritative text books on gynaecology which recognized a failure rate of 0.3% to 0.7% depending on the technique chosen out of accepted ones, the negligence cannot be attributed to the appellants. The surgery was performed by a technique known and recognized by medical science. It is a pure and simple case of sterilization operation having failed though duly performed.

(Paras 11 & 12)

Ms. Kirti Singh, Assistant Advocate General, Haryana *for the appellant.*

None *for the respondent.*

RAKESH KUMAR JAIN, J.

(1) State of Haryana and others are in second appeal against the judgment and decree passed by the Courts below whereby suit of the plaintiff for compensation has been decreed.

(2) The plaintiff filed a suit for compensation on account of medical negligence of defendant No. 3 as she gave birth to an unwanted child on account of failure of sterilization operation. It is averred in the plaint that the plaintiff had underwent tubectomy operation on 23rd March, 1992 at Civil Hospital, Panipat. Defendant No. 3 negligently conducted operation upon the plaintiff which led to the birth of a male child for which compensation of Rs. 3 lacs was claimed. The suit was contested by defendants No. 1, 2 and 3 through separate written statements. The operation was admitted however, negligence was denied. It was rather contended in para 12 of the written statement filed by defendant No. 3 that the plaintiff had given in writing before the operation that in case of failure of operation neither she nor her relatives will sue the Doctor, Paramedical Staff or the Government. It was also pleaded that no family planning method is permanent as per medical science

and chances of reunion and failure of every method is reported in various medical books. In the written statement filed by defendants No. 1 and 2, it was pleaded that the plaintiff had herself given her consent for the operation and defendant No. 3, who is a well-qualified Surgeon, had already performed thousands of such operations. The said defendants also denied the negligence as alleged by the plaintiff. In the replication filed by the plaintiff to the written statement of defendant No. 3, para No.12 has been vaguely replied and it has not been specifically denied that she had not given in writing that in case of failure of operation she or her relatives will not sue the Doctors etc.

(3) On the pleadings of the parties, the following issues were framed by the trial Court :

(1) Whether the plaintiff deserves for compensation to the tune of Rs. 3 lacs as alleged ? OPP

(2) Whether the suit is not maintainable in the present form ? OPD

(3) Whether the suit is time barred ? OPD

(4) Whether the plaintiff has no *locus standi* to file this suit ? OPD

(5) Whether the suit is bad for want of notice under Section 80 CPC ? OPD

(6) Relief.

(4) Both plaintiff Amrawati and defendant No. 3 Dr. G.S. Buttar appeared as PW1 and DW1 respectively, besides leading documentary evidence.

(5) The trial Court relying upon a decision of Hon'ble the Apex Court in the case of **State of Haryana and others** *versus* **Smt. Santra (1),** held that the plaintiff is entitled to damages to the tune of Rs. 1,00,000 and decreed the suit as such *vide* its judgement and decree dated 2nd March, 2002.

(6) State of Haryana and others filed first appeal wherein it was argued by the Government Pleader that there is no surety of the operation

(1) AIR 2000 S.C. 1888

being fool proof and the plaintiff had given an undertaking that she will not sue the Doctors etc., therefore they cannot be made liable for the compensation. The first Appellate Court in its judgment dated 10th April, 2003 recorded that so far as the facts are concerned, those are not in dispute but the point to be determined is as to whether Rs. 1 lac has been rightly awarded as damages. The first Appellate Court found that the compensation is just and as such the appeal was dismissed on 10th April, 2003. Hence the present second appeal by the State of Haryana and others.

(7) The appeal was admitted on 10th July, 2003 and as per the office report, notice was also served upon the respondent but despite service, no-body has put in appearance on behalf of the respondent.

(8) I have heard Ms. Kirti Singh, learned Asstt. Advocate General, Haryana appearing for the appellants. She has formulated the following questions of law :

(1) Whether the judgment in **Santra's case** *(supra)* is applicable to the facts and circumstances of the present case as in **Santra's case** *(supra)* there was an admission on the part of doctor of his negligence.

(2) Whether the operation of tubectomy is having 100% success rate whereas per the opinion of medical experts there are chances of failure of operation from 0.4% to 0.6%.

(9) Counsel for the appellants has relied upon a recent decision of Hon'ble the Apex Court reported in **State of Punjab** *versus* **Shiv Ram and others (2),** and contended that merely because a woman having undergone sterilization operation became pregnant thereafter and delivered a child, the operating Surgeon or his employer cannot be held liable on account of the unwanted pregnancy or unwanted child. It is further contended that the claim can be sustained only if there was negligence on the part of Surgeon in performing the surgery and that the judgment relied upon by the Court below in **Santra's case** *(supra)* is not applicable.

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(2) (2005) 7 S.C.C. 1

(10) I have gone through the aforesaid judgment cited by the counsel for the appellants. The Judgment in **Santra's case** *(supra)* relied upon by the trial Court while awarding damages, has also been discussed. It has been found in that case that the lady had offered herself for complete sterilization and not for partial operation, therefore, both her fallopian tubes should have been operated upon. It has been found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation is successful and she was assured that she would not conceive a child in future. It was in these circumstances, that a case of medical negligence was found and decree for compensation in tort was held justified.

(11) In the present case, while appearing as DW1, defendant No. 3 Dr. G.S. Buttar has categorically stated that he had operated upon both the fallopian tubes and had conducted operation with due diligence after taking into consideration all the prescribed norms. In my view, the trial court has committed an error in discarding the statement of DW1 as self-serving statement although while appearing as PW1 plaintiff Amrawati has stated in her examination-in-chief that the doctor-defendant No. 3 had thoroughly checked her and then operated upon. It is a matter of chance that after five years of operation, she had conceived and delivered a child. Both the Courts below have not recorded a positive finding of negligence on the part of Doctor at the time of operation. In the absence of the finding of negligence on the basis of evidence and the authoritative text books on gynaecology which recognised a failure rate of 0.3% to 0.7% depending on the technique chosen out of accepted ones, the negligence cannot be attributed to the appellants. In **Shiv Ram's case** *(supra)* , Hon'ble Apex Court has held that :

> "Merely because a woman having undergone a sterilisation 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 in such cases can be sustained only if there was negligence on the part of the surgeon in performing the surgery and not on account of childbirth. The proof of negligence shall have to satisfy Bolam's test, (1957) 2 all ER 118, 121 D-F, set out in

Jacob Mathew case, (2005) 6 SCC1, at p. 19, para 19. Failure due to natural causes would not provide any ground for a 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 inspite of having undergone the sterilisation 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. Once the woman misses the menstrual cycle it is expected of the couple to visit the doctor and seek medical advice. Section 3(2) read with Explanation II thereto, of the Medical Termination of Pregnancy Act, 1971 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.

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 it was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. Ordinarily a surgeon does not offer such guarantee. Where a doctor contracted to carry on a particular operation on a patient and a particular result was expected, the court would imply into the contract between the doctor and the patient a term that the operation would be carried out with reasonable care and skill, but would be slow to imply a term or unqualified collateral warranty that the expected result would actually be achieved, since it was probable that no responsible medical man would intend to give such a warranty.

There are several alternative methods of female sterilizaiton operations which are recognised by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is foolproof and no prevalent method of sterilisation guarantees 100% success. The causes for failure can well be

attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative textbooks on gynaecology and empirical researches which have been carried out recognise the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognised and accepted ones. The technique which may be foolproof is the removal of the uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be prformed for purposes other than merely family planning.

The cause of failure of the 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 resterilisation. 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 gynecologist in case of failure of sterilisation operation."

(12) In my considered view, the surgery was performed by a technique known and recognised by medical science. It is a pure and simple case of sterilisation operation having failed though fully performed.

(13) For the foregoing reasons, I am of the opinion that the decree passed by both the courts below cannot be sustained. The trial Court has proceeded to pass a decree for damages in favour of respondent Amrawati solely on the ground that in spite of plaintiff having undergone sterilisation operation, she became pregnant, without recording a finding of negligence to hold the operating surgeon liable. The error committed by the trial Court though was pointed out to the first Appellate Court but the same was over looked. The appeal is therefore, allowed and judgments and decrees of both the Courts below are set aside without any order as to costs.

R.N.R.