IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 28TH DAY OF NOVEMBER 2023 / 7TH AGRAHAYANA, 1945

RFA NO. 9 OF 2003-A

(AGAINST THE JUDGMENT AND DECREE DATED 8.4.1999 IN O.S.NO.1373/1994 ON THE FILE OF THE SUB COURT, TRISSUR)

APPELLANT/PLAINTIFF:

SINEBHA, AGED 39,
W/O HOSSARMVEETIL HANEEFA, PILLAKKAD DESOM,
POOKKODE VILLAGE, CHAVAKKAD TALUK, TRISSUR DISTRICT.

BY ADVS.V.R.K.KAIMAL
N.M.MADHU

RESPONDENTS/DEFENDANTS:

1 THE DISTRICT COLLECTOR,
THRISSUR, REP.BY GOVT.OF KERALA.

2 DR.JOSE PARAKKAL
RAILWAY STATION ROAD,
(CHALAKUDY ROAD),IRINJALAKUDA,THRISSUR DISTRICT.

3 UNITED INDIA INSURANCE COMPANY
REPRESENTED BY BRANCH MANAGER,KUNNAMKULAM

BY ADVS.SRI.V.MANU-SR.GP
T.J.LAKSHMANAN IYER

THIS REGULAR FIRST APPEAL HAVING COME UP FOR FINAL HEARING ON 17.11.2023, THE COURT ON 28/11/2023 DELIVERED THE FOLLOWING:

"C.R."

C.S.SUDHA, J.

R.F.A.No.9 of 2003

Dated this the 28th day of November, 2023

J U D G M E N T

This appeal under Section 96 read with Order XLI Rule 1 C.P.C. has been filed by the plaintiff against the judgment and decree dated 08/04/1999 in O.S.No.1373/1994 on the file of the Subordinate Judges' Court, Thrissur. The respondents herein are the defendants in the suit. The parties and the documents in this appeal will be referred to as described in the suit.

2. According to the plaintiff in O.S.No.1373/1994, a suit for damages, she belongs to a very poor family. Her husband is a coolie. As they already had four children, they decided not to have any more children and hence the plaintiff and her husband consulted the 2nd defendant who was then working as a doctor in the Government Hospital, Kunnamkulam. The 2nd defendant advised the plaintiff to undergo Post Partum Sterilization (P.P.S.) surgery, which according to him was the best and safest method of avoiding

future pregnancies. The plaintiff and her husband were told that if the said surgery was conducted, there would be no chance of any future pregnancy. Accordingly, the plaintiff underwent P.P.S. surgery. After the surgery, believing the assurance given by the 2nd defendant at the time of the surgery that she would not conceive, the plaintiff and her husband continued their conjugal life. However, the plaintiff thereafter conceived and gave birth to a girl child. The pregnancy was never intended by the plaintiff and her husband. This happened only because the surgery conducted by the 2nd defendant was not successful and had been done in a careless and negligent manner. The 2nd defendant had not taken the precautions that ought to have been taken by a specialist in the matter. If necessary precautions had been taken and the surgery done in a proper manner, there would have been no occasion for the plaintiff to conceive again. The plaintiff claimed compensation to the tune of ₹50,000/- for mental agony, pain and suffering; ₹1,40,000/- towards expenses of delivery; fees paid to the doctors; money spent for purchasing medicines ; laboratory expenses ; expenses for feeding the child and other expenses including the marriage expenses to be met in future for the child. Thus, she claimed an amount of ₹2 lakhs as compensation from the defendants.

3. The 1st defendant filed written statement admitting that the

plaintiff on 06/10/1987 had undergone P.P.S. surgery at the Government Hospital, Kunnamkulam, which surgery was conducted by the 2nd defendant herein. The 2nd defendant is a qualified and experienced gynecologist who in the year 1987 achieved 100% target in tubectomy and I.U.D. within a period of five months. He performed around 2,502 sterilization surgeries during the period from 09/06/1986 to 29/05/1990. To date, the case of the plaintiff was the first failure that has been reported. The allegation that the surgery was conducted in a careless and negligent manner is incorrect and false. The 2nd defendant had performed the surgery with utmost care, caution, and devotion. There is a small percentage, that is, 0.5 to 1% failure of such a surgery even in developed countries. The sterilization surgery is not a foolproof method to avoid further pregnancy. Failure in sterilization surgery is quite rare but like in the case of other surgeries, the same is possible. The plaintiff had undergone the 2nd P.P.S. surgery on 27/03/1993 at the District hospital, Thrissur. After the surgery, the senior medical officer, P.P.Unit diagnosed that the plaintiff had P.P.S. failure due to Rt- Tube-Peritoneal Fistula. As there was no negligence or carelessness on the part of the 2nd defendant, the plaintiff is not entitled to the reliefs prayed for.

4. The 2nd defendant filed a separate written statement denying the

allegation of carelessness or negligence. The plaintiff had approached the 2nd defendant with a request for P.P.S. surgery. She had given a consent letter also before undergoing the surgery. The promoters of the family planning programme had disclosed all the particulars including the plus as well as the minus points to be considered before undergoing the surgery. The 2nd defendant before the surgery had disclosed to the plaintiff the chances of failure. She was also informed that in case of failure, the doctor or the hospital would not be liable. The allegation that the defendant had told the plaintiff that if P.P.S. surgery was done, there would be no chance of future pregnancy and that it was the safest method, is false and incorrect. There was no negligence or carelessness on the part of the 2nd defendant and hence the plaintiff is not entitled to the relief prayed for.

5. The 3rd defendant filed a separate written statement admitting that the 2nd defendant had taken an insurance policy. The liability of the 3rd defendant is only as per the terms and conditions of the policy.

6. On completion of pleadings, the parties went to trial. PW1 was examined and Exts.A1 to A6 series were marked on the side of the plaintiff. DW1 and DW2 were examined and Exts.B1 to B5 series were marked on the

side of the defendants. X1 and X2 series have also been marked. The trial court on an appreciation of the oral and documentary evidence and after hearing both sides, dismissed the suit finding no negligence or carelessness on the part of the 2nd defendant. Aggrieved, the plaintiff has come up in appeal.

7. The only point that arises for consideration is whether there is any infirmity in the findings and conclusion of the court below calling for an interference by this Court.

8. Heard both sides.

9. The fact that the plaintiff had undergone P.P.S. surgery at the Government Hospital, Kunnamkulam and that the surgery had been conducted by the 2nd defendant doctor are admitted. In this appeal, though notice has been served on the 2nd defendant, he has not entered appearance. According to the 3rd defendant insurer, their liability would arise only to the extent of the sum assured and that too only in the event of the 2nd defendant being held liable for the failure of the surgery. The learned counsel for the plaintiff/appellant argued that even if there was no negligence or carelessness on the part of the 2nd defendant in carrying out the surgery, the 1st defendant would still be vicariously liable for the act of the 2nd defendant, its employee,

based on the principle of *Res Ipsa Loquitur.* It was also submitted that it is no defence in law in a claim for damages to say that if the plaintiff did not desire to have the child, she could have undergone abortion, which would be justified under the Medical Termination of Pregnancy Act, 1971 (MTP Act). In support of the arguments, reference was made to the dictums in **A.H. Khodwa v. State of Maharashtra, AIR 1996 SC 2377**; **State of Haryana v. Santra, 2000 KHC 750: AIR 2000 SC 1888; Gourikutty v. Raghavan, 2001 KHC 718** and **State of Kerala v. Santha, 2015(1) KHC 216**.

9.1. *Per contra,* it was submitted by the learned Government Pleader relying on the dictums in **Bolam v. Friern Hospital Management Committee, [1957] 1 WLR 582**; **State of Punjab v. Shiv Ram, AIR 2005 SC 3280; State of Haryana v. Raj Rani, AIR 2005 SC 3279; Kusum Sharma v. Batra Hospital and Medical Research Centre, AIR 2010 SC 1050** and **State of Kerala v. P.G. Kumari Amma, 2011(1) KHC 102,** that unless and until it is proved by the plaintiff that the failure of the surgery was due to the carelessness or negligence of the 2nd defendant, she cannot succeed. The evidence on record does not establish any case of rashness or negligence on the part of the 2nd defendant. On the other hand, the plaintiff conceived again not due to the failure of the surgery but due to natural causes, which can

happen in very rare cases. The formation of Rt-Tube-Peritoneal Fistula after the P.P.S. surgery was the reason why the plaintiff conceived again and not due to any failure or negligence on the part of the 2nd defendant.

10. **A.H. Khodwa** (*Supra*) was a case in which Chandrikabai, the wife of the appellant, was admitted to the Government hospital where she delivered a child. Two days thereafter she had a sterilization operation. The operation not known to be serious in nature, was performed under local anaesthesia. Complications arose thereafter which resulted in a second operation being performed on her. She did not survive for long and died shortly after the surgery. The cause of death was stated to be peritonitis. It was found that when Chandrikabai underwent the sterilization operation, due to the negligence of the doctor, a mop (towel) had been left inside her peritoneal cavity. It was revealed in evidence that formation of pus was due to the mop being left in the abdomen, and that it was the pus formation that caused all the subsequent difficulties. There was no escape from the conclusion that the negligence in leaving the mop in Chandrikabai's abdomen during the first operation led, ultimately, to her death. But for the fact that a mop had been left inside the body, the second operation would not have taken place. It was the leaving of the mop inside the abdomen of Chandrikabai which led to the

development of peritonitis leading to her death. It was held that negligence is writ large and that it was a case in which the principle of *res ipsa loquitor* was clearly applicable. Under these circumstances, and in the absence of any valid explanation by the respondents satisfying the court that there was no negligence on their part, it was held that Chandrikabai died due to negligence of respondent nos. 2 and 3/doctors. It was also held that the State would be variously liable for the damages payable on account of negligence of its doctors or other employees.

11. **Santra** *(Supra)* was also a case filed claiming damages for a failed sterilization surgery. Santra, the plaintiff therein, underwent the sterilization surgery and she was issued a certificate that her surgery was successful. She was assured that she would not conceive a child in future. However, she conceived and ultimately gave birth to a female child. The explanation offered by the officers of the State, the defendants in the suit, was that at the time of the sterilization surgery, only the right Fallopian tube was operated upon, and the left Fallopian tube was left untouched. This explanation was rejected by the trial court and the appellate court, and it was held that Santra had gone to the hospital for complete and total sterilization and not for partial surgery. The claim for damages was decreed and the same was confirmed by

the appellate courts too. This was challenged by the State.

11.1. The Apex court noticed that the public policy professed by the Government is to control the population and hence various programmes have been launched to implement the State sponsored family planning programmes and policies. The Government at the Centre as also at the State level is aware that India is the 2nd most populous country in the world and in order that it enters an era of prosperity, progress, and complete self-dependence, it is necessary that the growth of population is arrested. It is with this end in view that the family planning programme has been launched by the Government which has not only endeavored to bring about an awakening about the utility of family planning among the masses but has also attempted to motivate people to take recourse to family planning through any of the known devices or sterilization surgery. The programme is being implemented through its own agency by adopting various measures, including the popularization of contraceptives and surgery for sterilizing the male or female. The implementation of the programme is thus directly in the hands of the government officers, including Medical Officers involved in the family planning programmes. The Medical Officers entrusted with the implementation of the family planning programme cannot, by their negligent

acts in not performing the complete sterilization surgery, sabotage a scheme of national importance. The people of the country who cooperate by offering themselves voluntarily for sterilization reasonably expect that after undergoing the surgery they would be able to avoid further pregnancy and consequent birth of an additional child. In a country where the population is increasing by every second and the Government had taken up family planning as an important programme for implementation of which it had created mass awakening for the use of various devices including sterilization surgery, the doctor as also the State must be held responsible in damages if the sterilization surgery 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 sterilization.

11.2. 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 daily by taking up the job of an ordinary labourer, cannot be denied the claim for damages on account of medical negligence. As Santra had offered herself for complete sterilization, both the Fallopian tubes should have

been operated upon. However, the doctor who performed the surgery had acted in a most negligent manner as the possibility of conception by Santra had not been completely ruled out as her left Fallopian tube was untouched and hence, she conceived and gave birth to an unwanted child. Holding so, it was held that Santra, a poor lady who had seven children was already under considerable monetary burden. The unwanted child born to her had created additional burden on her on account of the negligence of the doctor who performed the sterilization surgery upon her and therefore she was held entitled to claim damages from the State to enable her to bring up the child at least till the child attained puberty.

12. **Gourikutty** *(Supra)* was a case in which one of the plaintiffs in the suit underwent tubectomy surgery, which was conducted by a doctor of a government hospital. The plaintiff was administered anesthesia for the surgery. Thereafter she never regained consciousness. According to the plaintiffs, this was due to the negligence of the doctors who had administered anesthesia and performed the surgery. Hence, compensation was claimed. The defendants contended that there was no negligence or carelessness on the part of the defendants in conducting the surgery. During the time of the surgery, some unfortunate and unforeseen complications arose, which were

beyond all human and medical control resulting in continued unconsciousness. On examination by the Medical Board, it was found that the plaintiff, following the P.P.S. Surgery, had a cardiac arrest. It was found that the same was an unforeseen accident which unfortunately happened on the operating table by which the patient sustained some irreparable brain damage because of brain anoxia. The trial court based on the principle of *res ipsa loquitur* allowed the claim for compensation rejecting the contention of the State that it was not vicariously liable.

12.1. In appeal, a Division Bench of this Court held that the principle of *res ipsa loquitur* is in essence an evidential principle, which, in certain instances, allowed the court to draw an inference of negligence. The burden of proof remains with the plaintiff, but the defendant must adduce evidence to rebut the inference of negligence, to avoid a finding of liability. The maxim applies where an accident occurs in circumstances in which accidents do not normally happen unless there has been negligence by someone. The fact of the accident itself may give rise to an inference of negligence by the defendant which, in the absence of evidence in rebuttal, would be sufficient to impose liability. The principle of *res ipsa loquitur* is simply a submission that the fact establishes a prima facie case against the defendant. The value of this

principle is that it enables a plaintiff who has no knowledge, or insufficient knowledge, about how the accident occurred to rely on the accident itself and the surrounding circumstances as evidence of negligence and prevents a defendant who does know what happened from avoiding responsibility simply by choosing not to give any evidence. It was also noticed in the said case that if proper care had been taken, damage to the brain of the plaintiff could have been avoided. However, the defendants in the said case had failed to prove that proper care had been taken. Hence the view taken by the trial court that there was negligence on the part of the defendants was upheld. Relying on the dictums in **Santra** (*Supra*); **N.Nagendra Rao & Co. v. State of A.P., AIR 1994 SC 2663**; **Common Cause, A Regd. Society v. Union of India, (1999) 6 SCC 667** and **Achutrao Haribhau Khodwa v. State of Maharashtra, 1996 KHC 193 : AIR 1996 SC 2377,** it has been held that the contention of the State that it cannot be vicariously held liable for the negligence of its officers in performing the sterilization surgery is liable to be rejected.

13. In **Santha** (*Supra*) a Division Bench of this Court in a suit for damages against the government and doctors for failed sterilisation surgery, held that the State including the doctors has a burden to prove by cogent evidence that there was no breach of duty and that they had taken all due care

and caution, in the absence of which, the doctrine of *res ipsa loquitur* applies and the court would be justified in granting a decree awarding damages.

14. Now coming to the decisions relied on by the 1st defendant/State. In **Bolam** (*Supra*) the plaintiff, John Hector Bolam, sued the defendants, the Friern Hospital Management Committee, claiming damages for negligence on the part of the defendants, their servants or agents, in electro-convulsive therapy (E.C.T.) treatment administered to him, when, during the treatment, he sustained fractures of the pelvis on each side caused by the head of the femur being driven through the cup of the pelvis. The plaintiff, suffering from depression was treated for his condition by E.C.T. E.C.T. treatment is carried out by placing electrodes on each side of the head and allowing an electric current to pass through the brain. One of the results of passing the electric current through the brain is to precipitate violent convulsive movements in the form of a fit in the patient, and muscular contractions and spasms. If a relaxant drug is administered to the patient prior to the treatment, the muscular reactions could be reduced to be barely discernible. But the plaintiff was given the treatment without any prior administration of such drug and without applying any form of manual restraint. It was during the convulsive muscular movements in the course of his treatment that he sustained the injuries. The

treatment was given to the plaintiff whilst he was lying on a couch, and the precautions were to support his chin, to hold his shoulders and to place a gag in his mouth, while nurses were present on either side of the couch to prevent him from falling off. The plaintiff alleged, inter alia, that the defendants were negligent as they had failed to administer to him before the current was passed through his brain a suitable relaxant and/or anaesthetic drug or drugs to prevent or control the violence of the convulsion; failed to supply sufficient nurses to control his convulsive movements whilst undergoing the fit; permitted the treatment to be given without either the previous administration of a relaxant drug or the provision of manual control of his convulsive movements; and failed to warn him of the risks which he was running when he consented to the treatment, in particular, failed to warn him that they proposed to carry out the treatment without relaxant drugs being previously administered and without manual control being available. The defendants denied any liability.

14.1. It was held that damages could be awarded only if it was proved that the defendants had been guilty of negligence. In an ordinary case which does not involve any special skill, negligence in law means, failure to do some act which a reasonable man in the circumstances would do, or the doing of

some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there would a cause of action. The test whether the act or failure is negligent, in an ordinary case, would be to judge it by the action of the man in the street or the ordinary man. But in a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of an ordinary man, because he does not have that special skill. The test then would be the standard of an ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men of the time. There may be one or more perfectly proper standards; and if he confirms with one of those proper standards, then he is not negligent. A mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. What is to be looked into is whether the defendants in acting the way they did, were acting in accordance with a practice of competent respected professional opinion. If it is satisfied that they were acting in accordance with

a practice of a competent body of professional opinion, then it would be wrong to hold that there is negligence. In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and a man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care. The question therefore would be whether the defendants in following the practice that they had followed was doing something which no competent medical practitioner using due care would have done or whether they were acting in accordance with the perfectly well recognised school of thought.

14.2. Evidence came on record that the injury which produced disastrous results in the plaintiff was one of extreme rarity. Evidence was also brought in to show that there was a firm body of opinion which was opposed to the use of relaxant drugs as a matter of routine. Though the defendants also admitted to providing manual control, expressed their view, borne out by their experience, that less restraint there was, less would be the risk of fractures. In the light of the evidence on record, and applying the aforesaid test relating to

negligence, it was held that the plaintiff was not entitled to damages, as there was no negligence on the part of the defendants/doctors.

15. A three judge Bench of the Apex Court in **Shiv Ram** (*Supra*) dealt with a similar suit for damages for failed sterilization surgery. The suit was decreed by the trial court which was confirmed by the appellate court. The Supreme Court applying the Bolam's test held that negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The essential components of negligence are – (i) duty; (ii) breach; and (iii) resulting damage. A simple lack of care, an error of judgment or an accident is not proof of negligence on the part of a medical professional. So long as the doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which had been followed. A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or he did not

exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession.

15.1. The Apex court noticed that the plaintiffs had not alleged that the surgeon who had performed the sterilization surgery was not competent to perform the surgery and yet had ventured into doing it. It was neither the case of the plaintiffs, nor had any finding been arrived at by any of the courts that the surgeon had been negligent in performing the surgery. It was also not a case where the surgeon who performed the surgery had committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognized by medical science. It was a pure and simple case of sterilization surgery having failed, though duly performed. After referring to various medical texts on the topic, the Apex court held that there are several alternative methods of female sterilization surgery which are recognized by medical science of today. Some of them are more popular because they are less complicated, requiring minimal body invasion and least confinement in the hospital. However, none of the methods are foolproof and no prevalent method of sterilization 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 gynecology and empirical research carried out recognize a failure at 0.3% to 7% depending on the technique chosen out of the several recognized and accepted ones. The technique which may be foolproof is removal of uterus itself but the same is not considered advisable. It may be resorted to only when such a procedure is considered necessary to be performed for purposes other than mere family planning. Therefore, the Apex court concluded that merely because a woman having undergone a sterilization surgery 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. 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 based on such assurance that the plaintiff was persuaded to undergo surgery. The Apex court, relying on the various judgments referred to in the decision, opined that ordinarily a surgeon does not offer such a guarantee.

15.2. The Apex court also distinguished the dictum in **Santra** (*Supra*). In **Santra** the finding of fact arrived at was that the lady had offered herself for complete sterilization and not for partial surgery and, therefore, both her Fallopian tubes ought to have been operated upon. However, only the right Fallopian tube had been operated upon and the left Fallopian tube, left untouched. Despite that she was issued a certificate that the surgery was successful, and she was assured she would not conceive a child in future. It was in the said circumstance that a case of medical negligence and a decree for compensation in tort was held to be justified. The court went on to hold that the methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. Despite the surgery 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 her menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. Further, Section 3 of the Medical Termination of Pregnancy Act, 1971, 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 says that where any pregnancy occurs because of failure of any device or method used by a 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. That provides under law, valid and legal ground for termination of pregnancy. If the woman had suffered an unwanted pregnancy, it can be terminated, which is legal and permissible.

15.3. The cause of action for claiming compensation in cases of failed sterilization surgery arises on account of negligence of the surgeon and not on account of childbirth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived a child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception despite having undergone sterilization surgery, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and bringing up the child cannot then be claimed. Hence it was held that the judgment and decree passed by the trial court and the appellate courts could not be sustained as the courts had proceeded to pass a decree for damages solely on the ground that despite the plaintiff having undergone a sterilization surgery, she had become pregnant. No finding had been arrived at

that would hold the operating surgeon or his employer-State, liable for damages either in contract or in tort. Holding so, the decree of damages awarded in favour of the plaintiff was reversed and the appeal allowed.

16. **Raj Rani** (*Supra*) was a similar case of failed sterilization operation. Suit was filed against the doctor who had performed the surgery, claiming compensation based on the cause of action of 'unwanted pregnancy' and 'unwanted child', attributable to the failure of the surgery. The Apex court noticed that 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 out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed by a proficient doctor successfully by adopting a technique recognized by medical science. Thus, the pregnancy can be for reasons *de hors* any negligence of the surgeon. In the absence of proof of negligence, relying on the dictum in **Shiv Ram** (*Supra)*, it has been held that the surgeon cannot be held liable to pay compensation. Then the question of the State being held vicariously liable also would not arise. Holding so, the claim for damages was rejected.

17. In **Kusum Sharma** (*Supra*) also the aforesaid principles based on which a surgeon can be held liable for negligence have been reiterated.

18. **P.G. Kumari Amma** (*Supra*) is yet another case claiming damages of failed sterilization resulting in an undesired and uninvited pregnancy. According to one of the witnesses of the plaintiff, a retired Professor of Gynaecology, Department at Medical College Hospital, Kottayam, who had examined the plaintiff, one among the several methods of sterilization is applying ring on the Fallopian tube. According to her, failure of sterilization could be due to many reasons. She would say that a ring is to apply to both the tubes, i.e., Fallopian tube at the left and right, the operation is over, and the sterilization is complete. She also gave a reason for the failure in the case of ring application. As per her testimony, the ring was found on the right side of Mesosalpinx, that is, a membrane covering the Fallopian tube extending down towards the uterus. This indicated that the Fallopian tube was free. According to her, this could have been the reason for pregnancy, even though the sterilization operation was conducted. The defendants did not adduce any evidence. There was no attempt at all from the side of the State to show that there was no negligence on the part of the Surgeon who had conducted the sterilization operation. This does not mean that the burden is on

the State initially to show that there was no negligence. But the testimony of the aforesaid witness which showed that the ring on the right side was on the Mesosalpinx and not on the Fallopian tube, which she attributed to the possible cause of pregnancy, could not be ignored. When there is evidence to show that such a possibility arose due to negligence on the part of the medical practitioner who had carried out the sterilization operation, it was incumbent on the part of the State to show that it was not so. It was for them to show by giving evidence that there was no want of care on their part while conducting the operation and the subsequent pregnancy was due to reasons beyond their control and due to natural and other causes. There was no such evidence in the case. Hence, it was held that the plaintiff had discharged the initial burden. Thereafter it was for the defendant to adduce rebuttal evidence. There was none. The trial Court had elaborately considered the issue and concluded that the subsequent pregnancy of the plaintiff was due to the negligence on the part of the medical practitioner, who had conducted the sterilization operation. The finding was based on materials on record and the evidence adduced in the case, which this court found neither to be perverse nor unwarranted, calling for an interference in appeal. The claim for damages was thus upheld.

19. The decisions relied on by the plaintiff are not applicable to the

facts of the present case because in all those cases there was evidence of negligence coupled with the failure of the officers of the State to prove that proper care and caution had in fact been taken. In the case on hand, the initial burden of the plaintiff to prima facie show negligence or carelessness on the part of the second defendant doctor, in performing the surgery has not been discharged. It is only then, the onus shift to the defendants to rebut the same and establish no rashness or negligence on their part. The plaintiff herein also has no case that the 2nd defendant who conducted the surgery was not possessed of the requisite skill or was not competent to perform the surgery and yet had ventured into doing it. The only case pleaded and established by the plaintiff is that though she had undergone P.P.S. surgery, she conceived, which fact speaks for itself that the surgery was a failure, as proper care and caution had not been taken by the second defendant in performing the surgery. This according to the settled position of law, as can be discerned from the aforesaid judgments, is not sufficient for the plaintiff to succeed.

20. This court, in **P.G. Kumari Amma** (*Supra*), refers to a book on Legal Aspects of Pregnancy, Delivery and Abortion by Sri. J. V. N. Jaiswal, in which different techniques of female sterilization are adverted to. They are (i) Radiotherapy. (ii) Removal of the ovaries, (iii) Removal of the Uterus and (iv)

Resection of Fallopian tubes. According to the author, one of the simplest operations on the Fallopian tubes, the best, is the Pomeroy procedure in which a loop of tube is excised, and the cut ends secured with a ligature. He also refers to the possible reasons as to how a female, who had undergone sterilization operation, could later conceive. No sterilization operation, according to him, can guarantee 100% success. A woman conceiving even after the surgery, may be due to re - canalisation or due to re - conception. This possibility has been taken note of by the trial court in paragraph 35 of the impugned judgment. According to the defendants, re-canalisation or re-conception is a natural process, and it does not occur in all cases. In exceptional cases there is such a possibility, and, in such cases, there is the chance of the woman conceiving even after the P.P.S. surgery. This is spoken to by DW1 and DW2. Admittedly the plaintiff underwent the P.P.S. surgery on 06/10/1987. She thereafter delivered her 5th child on 24/03/1993. Pursuant to the P.P.S. surgery, the plaintiff appears to have conceived sometime in May 1992, which is nearly 5 years after the surgery. Had the surgery actually been a failure as alleged by the plaintiff, the chances or possibility of the plaintiff conceiving would have been much earlier as was in the case of **T.G.Kumari Amma** (*Supra*), who conceived within a few months of the surgery. The time

gap between the surgery and the plaintiff conceiving also probabilises the contention of the defendants that it was due to the natural cause referred to hereinabove that the plaintiff happened to conceive and deliver her 5th child and not due to any negligence or carelessness of the 2nd defendant in carrying out the surgery.

21. In the facts and circumstances of the case and in the light of the precedents referred to, it can only be held that, as no negligence or carelessness on the part of the 2nd defendant has been established, the claim for damages cannot succeed. That being the position there can be no vicarious liability of the 1st defendant, employer. I find no infirmity in the findings of the trial court calling for an interference by this Court.

In the result, the appeal is dismissed.

Interlocutory applications, if any pending, shall stand closed.

Sd/-

C.S. SUDHA
JUDGE

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