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Court : Tamil Nadu State Consumer Disputes Redressal Commission SCDRC
Chennai

Decided On : Jan-28-2011

Judge : Honourable Thiru Justice M. Thanikachalam President, Thiru J. Jayaram,
M.a., M.L., Judicial Member & Thiru S. Sambandam, Member II

Appeal No. : F.A.NO.588/2007 (Against order in CC.NO.275/2000 on the file of
the DCDRF, Coimbatore)

Appellant : A. Kamadhenu

Respondent : Dr. Girija Rajkumar, M.B.B.S., Dgo R.G. Nursing Home

Judgement :

The appellant as complainants filed a complaint before the District Forum against the opposite party praying for the direction to the opposite party to pay Rs.4,00,000/-, as compensation alongwith cost. The District Forum dismissed the complaint. Against the said order, this appeal is preferred praying to set aside the order of the District Forum dt.22.2.2007 in OP.No.275/2000.

This petition coming before us for hearing finally on 11.1.2011. Upon hearing the arguments of the counsels on both sides, perusing the documents, lower court records, and the order passed by the District Forum, this commission made the following order:

M. THANIKACHALAM J, PRESIDENT

1. The complainant is the appellant.

2. Brief facts leading to the complaint:

The complainant was admitted in the opposite party hospital, for second delivery, gave birth to a child on 10.11.93, on which date itself, she had undergone sterilisation, for which a certificate was also issued by the opposite party.

3. The complainant had undergone sterilisation only on the assurance, given by the opposite party, that after sterilisation, she will not be conceived, on which basis, she had also obtained leave, but unfortunately in the year 1998, the complainant conceived once again, to her shock, and examination at Perunthurai Medical College, confirmed the pregnancy, and she gave birth to a male baby on 12.12.1998. Because of the negligence committed, followed by deficiency of service, the complainant was conceived, thereby she gave birth to an unwanted child, which she wanted to avoid. Now the complainant find it very difficult to maintain the three children, thereby causing mental agony also, for which the complainant is entitled to a sum of Rs.4 lakhs, claiming said amount, notice was issued, and there was no response, resulting consumer complaint.

4. The opposite party/ respondent, admitting the sterilisation operation, conducted by her to the complainant, in her hospital, at the time of second delivery, opposed the complaint, on the grounds, that the claim is barred by limitation, that she has not committed any negligent, or deficiency in service, while performing family planning operation, that if the complainant had conceived, she ought to have come to the opposite party immediately, which she failed, that if at all due to natural process, such as spontaneous recanalisation, or fistula formation, the complainant should have conceived, for that the opposite party cannot be held responsible, that too, even as per the consent given by the complainant, no assurance was given by the opposite party, or taken by the complainant, thereby praying for the dismissal of the complaint, denying further averments also.

5. The District Forum, mainly considering the effect of the consent letter, given by the complainant, at the time of sterilisation, viz. Ex.B1, as well considering the natural failure, even in case of family planning, came to the conclusion, in the

absence of proof of negligent operation, as if the opposite party has not committed any negligence, for the conception, the opposite party cannot be held responsible. In this view, the petition came to be dismissed on 22.2.2000, which is under challenge, on various grounds.

6. The learned counsel for the appellant, urged before us, that because of the assurance given by the opposite party, that the complainant will not be conceived, after sterilisation, she had undergone the operation, which proved to be a failure, which should have been taken as negligent act, not properly considered by the District Forum. It is the further submission of the learned counsel for the appellant, that because of the improper or careless sterilisation alone, the complainant had conceived, resulting unwanted pregnancy, followed by 3rd child, for this also, the opposite party should be held responsible, but the same was not properly considered by the District Forum.

7. The respondent/ opposite party, opposing the above arguments, would contend, that the claim itself is barred by limitation, that after 5 years or so, the complainant had conceived, that should have occurred due to natural process, not due to any negligent act, which was properly considered by the District Forum, that too, when there was no guarantee, on the part of the opposite party, thereby praying to confirm the order of the District Forum, which is having much legal flavour, supported by judicial precedent also.

8. The complainant, when delivered second child, in the hospital of the opposite party, on 10.11.93, with consent, had undergone sterilisation, not in dispute. After 5 years or so (roughly), she conceived, probably in the early period of 98, not immediately, within the reasonable time, thereby the purpose of sterlistion not served, permanently. Immediately, when the complainant came to know about the conception, which she should have had knowledge, after the stoppage of menstruation, has not approached the opposite party, informing the failure, whereas, she had been to Perundurai Medical College Hospital and waiting for the delivery, she delivered a male child also on 12.12.98. So far as the above facts are concerned, we find no loggerhead between the parties.

9. It is the specific case of the complainant, that an assurance was given by the opposite party, that after sterilisation, there will not be any conception, which alone impelled her to go for sterilisation, which proved to be false. Therefore, according to the complainant, the opposite party had committed negligent act, probably while performing operation. On the other hand, it is the specific case of the opposite party, based upon medical literature, that the failure would have occurred, due to spontaneous recanalisation, or fistula formation, which is perhaps the most common cause for failures; imperfect occlusion of the tube is a technical loophole which may result in an unwanted pregnancy. The medical text also informs us, that there may be failure, even in the case of sterilisation, resulting in conception, and in this view, it should be taken as an admitted complication, or there may be a possibility of conception, despite sterilisation also. Therefore, mere fact, after the sterilisation, the complainant conceived, will not take us automatically, that she had not performed surgery, properly or acted diligently. In this view, it is for the complainant to make out a case, that the opposite party had committed negligent act, at the time of sterilisation, that alone was cause for the 3rd conception, and subsequent delivery, failure should lead, as per the medical text, that it should have been happened, due to natural phenomenon, and in that case, we cannot affix the seal of negligent act, or deficiency, upon a doctor, who performed her duty, as per the protocol.

10. The complainant, though accused the opposite party, in a single line, as if she had committed negligent act, or deficiency, in support of the same, we find no materials. No expert opinion was adduced in this case, to prove, due to improper sterilisation, this should have happened, whereas we are having literature, that this kind of failure would occur, due to natural phenomenon, or spontaneous recanalisation or fistula formation. No attempt was made, to explain, on behalf of the complainant, that there was no spontaneous recanalisation, or fistula formation, so as to say the failure had occurred. Therefore, as rightly held by the District Forum, we cannot find fault, with the opposite party, for the third conception, if really, the complainant had felt the opposite party had committed negligent act, resulting in conception/pregnancy, immediately she should have rushed to the opposite party. If she had permanent intention to avoid further child. In that case, there would have been possibility for termination of pregnancy also,

which was not admitted.

11. In this context, we have to see, what is the dictum of the Supreme Court in this kind of cases, since even there is a possibility, to say that, the very fact after permanent sterilisation, since the complainant conceived, extending the principle of *res ipsa loquitur*. This can be adopted in this case, if there cannot be any failure after 100% sterilisation, or if the opposite party had assured 100% absence of conception after sterilisation. In Ex.B1, though it is said, after sterilisation, there may not any possibility of conception, it is also further stated, there is a possibility of failure also, and this was informed to the complainant also, and the relevant portion in the consent letter reads It is not the case of the complainant, as seen from the affidavit, as well as in the complaint, she was not informed properly, and accepting the recitals in the consent letter, she had signed, had undergone sterilisation, and therefore question of giving assurance, for non-failure, does not arise for consideration at all. The District Forum, has correctly assessed this document, and dismissed this complaint.

12. The Apex court of the land, had an occasion to consider the sterilisation operation, and its failure, in *State of Punjab Vs. Shiv Ram and others*, reported in (2005) 7 Supreme Court Cases 1, where it is elaborately considered, taking the medical literature also, including resection of fallopian tube, probably that is the method adopted here, that is the Pomeroy procedure. The Apex Court, considering the text book of gynecology, as well as the statistics available therein, has quoted Spontaneous recanalisation or fistula formation is perhaps the most common cause of failure. Though these are generally non-negligent causes of failure, it is very difficult to convince the patient if they are not informed beforehand about the possibility. It is not the case, that the opposite party was not qualified, or inexperienced, so as to say, that she should have committed error, in the process. The Apex Court, considering the medical literature, has come to the conclusion that Surgeon cannot be held liable in contract unless plaintiff alleges and proves that surgeon had assured 100 percent success of surgery and it was only on basis thereof that plaintiff had agreed to undergo surgery. In our case also, as held, placing reliance upon Ex.B1, no 100% assurance was given, and failure also was informed. It is the further observation of the Apex Court 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 a couple to visit the doctor and seek medical advice. Sec.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. This dictum is followed by many State Commissions also, as pointed out by the learned counsel for the opposite party. To deviate from the above ruling, and to confirm or conclude that the opposite party should have committed negligent act, we find no material, that too, in the absence of the complainant, approaching the doctor, who performed the sterilisation, immediately after the stoppage of menstruation period.

13. The submission of the learned counsel for the opposite party, that the claim is barred by limitation, though not considered by the District Forum, appears to be acceptable in this case. The complainant gave birth to the unwanted child on 12.12.98, and that date cannot be the cause of action, because, the complainant came to know, about her pregnancy, even prior to that, which date wantonly not given in the complaint. From the date of stoppage of the menstruation, normally conceivment could be confirmed within 3 months, at the maximum. If we calculate, the period from the date of delivery, in reverse, we can easily say, atleast in the month of March or April 1998 itself, the complainant should have come to know, about the unwanted pregnancy, that date should be the date of cause of action, regarding the negligent act, if any committed by the opposite party, from which date, the complainant should have filed the complaint, within two years. The complaint was filed only on 29.9.2000. If we calculate from April 1998, being the known date of pregnancy, the complainant ought to have filed the case, on or before April 2000. Since, admittedly the complaint came to be filed, only in the month of September 2000, there is nothing wrong in concluding, the claim is barred by limitation. In this view also, the dismissal order of the District Forum,

requires to be confirmed. For the reasons stated above, the appeal fails.

14. In the result, the appeal is dismissed, conforming the order of the District Forum in O.P.No.275/2000 dt.27.2.2007. There will be no order as to cost in this appeal.

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