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Court : Delhi

Decided On : Mar-07-2005

Reported in : 118(2005)DLT484; 2005(81)DRJ445

Judge : Manmohan Sarin, J.

Appeal No. : W.P.(C). Nos. 8202-03/2003

Appellant : Laxmi Devi and anr.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Amiet Andley and ; Arun K. Sharma, Advs.

Advocate for Pet/Ap. : R.C. Kainthola, Adv

Disposition : Petition allowed

Judgement :

Manmohan Sarin, J.

1. Petitioners by this writ petition seek award of compensation of Rs. 3,50,000/- against respondents 1 & 2 for a failed sterilization operation and birth of an unwanted child.

2. Petitioner No. 1 is the wife and petitioner No. 2 is her husband. Petitioners married under Hindu rites in February,1992. Petitioner No. 1 between 1992 till

1998, gave birth to two sons and one daughter. Petitioner No. 2 is a night watchman in a locality and collects contributory small monthly amounts from residents of the locality. The income is irregular and uncertain.

3. Petitioners facing financial difficulties with meagre income and three children, decided not to have any more children. Petitioners opted for sterilization of petitioner No. 1. A tubectomy operation was performed on petitioner No. 1 by the doctor of respondent No. 2 in respondent No. 2 hospital on 7.3.2000. A certificate to this effect was also issued.

4. Petitioners claim to have been assured by respondents that operation was successful and they need not now worry about pregnancy or unwanted children.

5. It is petitioners' case that in the month of July,2002, she came to know that she had conceived. She contacted doctors of respondent No. 2, who confirmed the pregnancy after conducting tests. Petitioner No. 1 was advised that three months having already elapsed, Medical Termination of Pregnancy (MTP) was not advisable and was fraught with risk. Petitioner sent a representation in September, 2002, for grant of compensation, which did not bring forth any result except an acknowledgement and advice to contact the Welfare Department. In due course, a male child was born to the petitioner on 28.11.2002.

6. Taking the normal gestation period or pregnancy term, since the child was born on 28.11.2002, conception should have been in the month of late February,2002 or March, 2002. The petitioners as per their own admission contacted respondent No. 2 only in the month of July,2002, by which time over 4-5 months had already elapsed and medical termination of pregnancy was not free from risk.

7. The question to be considered by the Court is the effect of contributory negligence on the part of petitioners to their claim. Undoubtedly, petitioner No. 1 did not on missing mensuration or immediately thereafter approach the Respondent authorities for termination of unwanted pregnancy, which may have resulted from the failure of the sterilization operation.

8. Reference may usefully be made to the judgment of a learned Single Judge of this Court in *Smt. Shoba v. Govt. NCT of Delhi and Anr.* reported at 2003 4 AD (Del) 492. The judgment deals with two cases for grant of compensation due to unwanted conception and birth of children, following failure of sterilization operations. The judgment lucidly enunciates the legal principles to be followed in grant of compensation as also the essential components of the tort of negligence and notices the relevant case law. The Court in para 14 observed as under:-

'14. However, in the instant case, the petitioner was not suffering from any disease for treatment of which she had gone to hospital authorities. She is a normal healthy person. She had approached the hospital authorities as she wanted to prevent birth of unwanted child. There was no question of error of judgment in performing the operation properly it could have been simply a case of success. If in spite of this operation, she conceived and has given birth to a child, it is clearly a case of something amiss while performing an operation and one can hopefully deduce that standard of reasonable care expected of the doctor was not taken.'

9. In the first case dealt with in the judgment, the Court awarded damages of Rs. 3,25,000/- holding that there was no negligence on the part of the petitioner therein and there was no delay in approaching the hospital authorities. However, in the case of second writ petition, namely, WP(C). No. 7515/2000, the Court concluded that the petitioner was guilty of contributory negligence in not approaching the Hospital Authorities on coming to know of her pregnancy. The Court concluded on facts that petitioner must have got pregnant sometime in April and as on 24.5.1999, when her pregnancy was confirmed she would be 6-7 weeks pregnant, having regard to the child being born on 8.1.2000. Her pregnancy could have been safely terminated in May, 1999. She did not choose to do so. She went to the Government dispensary thereafter only on 23.8.1999, when she was at advance stage of pregnancy. It appeared that the couple had accepted the position regarding pregnancy. Petition was filed to simply claim compensation of Rs. 10 lacs. The Court held that petitioner could have prevented the birth of child in respect of failure of tubectomy operation and awarded Rs. 10,000/- as token damages.

10. On the basis of the above ruling, Mr. Amiet Andley on behalf of the respondent submits that there was no reason to depart from the figure of Rs. 10,000/-, as fixed in the judgment of Smt. Shobha v. Govt. Of NCT of Delhi and Anr. (Supra) as token damages in case of contributory negligence. In my view, in the present case, there are distinguishing features from that of WP(C). No. 7515/2000. In the said case (WP(C). No. 7515/2000), husband and wife were both Government employees, which would imply certain degree of education and a higher degree of awareness of facts of life. In the present case, petitioner Nos. 1 and 2 are poor people. Petitioner No. 2 is a part-time Chowkidar, engaged by the residents, who pay him individually some token amount and he barely collects about Rs. 1500/- from different residents. Both are stated to be illiterate. The contributory negligence of petitioners in not approaching the doctors on time, has to be considered and determined, keeping in mind their background, general awareness and living conditions. While it is true that petitioner No. 1 had also been a mother three times and the factum of having gone through the pregnancy three times and a missing menstruation period could have alerted her. However, at the same time, she would have the expectation and belief of being safe from pregnancy as a result of operation and thus ignore missing periods. Besides, delay and irregular menstruation following sterilization/tubectomy operation are also not unknown. Keeping in mind the lack of educational background, economic conditions and the lack of awareness, the factum of failure of sterilization operation cannot be ignored. Petitioners could have been allured into the belief of being total safe from unwanted pregnancy.

In the light of the foregoing discussion, I am of the view that ends of justice would be sub-served by awarding total damages of Rs. 30,000/- to the petitioners. Out of the said sum, Rs. 25,000/- be kept in an FDR in a nationalised Bank till the minor child Mahesh attains majority. The interest to be available on 6 monthly basis for up-keep of the child, while the remaining sum of Rs. 5,000/- be paid to the petitioners.

Writ petition is allowed in the above terms.