***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 3rd February, 2015**

\+ **LPA 55/2015**

KAMLA DEVI .... Appellant

Through: Mr. Mukesh M. Goel, Adv.

Versus

UNION OF INDIA & ORS. ..... Respondents

Through: Ms. Purnima Maheshwari, Adv. for R-2 to 4.

CORAM:-
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra court appeal impugns the order dated 20th November, 2014 of this Court of dismissal of W.P.(C) No.5605/2012 filed by the appellant (*inter alia* claiming compensation for the death of her son) on the ground of the same entailing disputed questions of fact and, giving liberty to the appellant to take appropriate proceedings in accordance with law.

2. We have perused the appeal paper book and have heard the counsel for the appellant.

3. The counsel for the appellant has argued that merely because some facts were disputed, was no ground for the learned Single Judge to dismiss

the writ petition and the learned Single Judge ought to have at least directed a Medical Board to be constituted to unearth the reason for the death of the 16 years old son of the appellant.

4. The cause pleaded by the appellant for claiming compensation was, (i) that her said son, since the year 2003, from time to time suffered from severe headache and was under treatment of the respondent No.6 All India Institute of Medical Sciences (AIIMS); (ii) however the angiography needed to be done was done after a long delay of four years, only on 19th April, 2008; (iii) that he was thereafter advised to undergo interventional procedure at a cost of Rs.1,10,000/- towards consumables; (iv) that though the appellant applied for financial assistance but the same was sanctioned after a delay of nearly one year; (v) however thereafter also the interventional procedure was not done owing to lack of bed; (vi) that in the evening of 3rd February, 2012 the said son of the appellant again complained of severe headache, the appellant took him to respondent no.4 Lal Bahadur Shastri Hospital which, owing to lack of facilities therein, advised the appellant to go to a private hospital; (vii) that after much persuasion, the appellant was provided an ambulance to take her son to AIIMS; (viii) that AIIMS however refused to admit on the ground of non-availability of bed; (ix) that the appellant thus took her son to

respondent no.5 Safdarjung Hospital where he was admitted but died early next morning.

5. The writ petition was entertained.

6. Safdarjung Hospital in its counter affidavit pleaded that the son of the appellant was in a serious condition at the time when the said Hospital was approached; that he was suffering from Intracranial Bleed; that in fact he had come to the Safdarjung Hospital on Ambu bag assisted ventilation; that he was given adequate treatment and the prognosis was also explained to the relatives.

7. AIIMS in its counter affidavit pleaded, (a) that MRI of the son of the appellant was done at Maulana Azad Medical College where he was under treatment on 19th August, 2003 and whereafter he was referred to Lok Nayak Jai Prakash Hospital and thereafter to AIIMS; (b) that owing to lack of beds, further investigation could not immediately be carried out on 25th August, 2003; (c) that the appellant or his son did not approach AIIMS till 19th April, 2008 when the treatment of the child was started and on 28th April, 2008 angiography was done; (d) that an interventional procedure was advised and the cost of consumables wherein was Rs.1,10,000/-; a sum of Rs.1 lakh was

got arranged by AIIMS out of the rotating / periodic National Illness Assistance Fund; (e) however the appellant or her son thereafter again for about one year did not approach; (f) that in the meanwhile, the sum of Rs.1 lakh was transferred to the account of the son of the appellant in AIIMS on 12th August, 2009; (g) that the appellant or her son thereafter approached AIIMS only in January, 2010 when treatment was provided; (h) that thereafter the child was brought on 3rd February, 2012 only in the emergency ward where he could not be admitted due to non-availability of bed; (i) that the present is not a case of medical negligence.

8. In the aforesaid state of pleadings, we do not find any error in the reasoning of the learned Single Judge that the matter indeed involved disputed questions of fact which could not have been adjudicated in writ jurisdiction and are best left to be adjudicated in appropriate jurisdiction where proper enquiry with respect thereto can be made. Whether, as a matter of fact, there was negligence on the part of the respondents or not cannot be determined in writ proceedings under Article 226 of the Constitution. These are matters of evidence which, in fact, can be resolved only on the basis of material which is produced in the course of the trial of a suit. Where a claim intrinsically depends upon proof of an act of medical

negligence, such a claim cannot be determined in exercise of a writ jurisdiction. Negligence when alleged against any person is a question of fact which can be decided by oral and documentary evidence and the Court under writ jurisdiction cannot decide such questions of fact. Lord Denning in ***Hucks Vs. Cole*** (1968) 118 N.L.J. 469 observed that a charge of professional negligence against a medical man is serious and has far more serious consequences affecting his professional status and reputation and thus stands on a different footing to a charge of negligence against the driver of a motorcar.

9. Supreme Court in ***Tamil Nadu Electricity Board Vs. Sumathi*** (2000) 4 SCC 543 held that in matter of tortuous liability, the negligence of instrumentality or servant of State involving disputed questions fact coupled with unequivocal denial of liability, the remedy under Article 226 may not be proper unless there is negligence on the face of it. In the present case, though the son of the appellant was refused admission to AIIMS on the ground of non availability of bed but was admitted to Safdarjung Hospital across the road from AIIMS, from where he was admitted and treated though unfortunately unsuccessfully. Thus it cannot be said that there was negligence on the face in refusing treatment. Certainly more than one

Government Hospital situated in close vicinity can plan and manage the admission amongst themselves and merely because one refuses admission for lack of bed, would not be negligence on the face when the other admits the patient. The question whether admission if provided in AIIMS could have saved the son of the appellant is a question of fact which will have to be proved. This Court cannot make a roving inquiry in the absence of any definite material regarding negligence.

10. It is for such reasons only that the Supreme Court in ***Martin F. D'souza Vs. Mohd. Ishfaq*** (2009) 3 SCC 1 held that in a case of medical negligence, ordinarily the consumer forum or the criminal court should first refer the matter to a competent doctor or a committee of doctors and only when there is *prima facie* case of medical negligence, notice to the doctor or the hospital concerned should be issued. Mention in this context may also be made of ***Neelu Sarin Vs. UOI*** (1991) Supp. 1 SCC 300 where the Supreme Court turned down a petition under Article 32 of the Constitution claiming compensation on the ground of doctor's alleged negligence for the reason that the basic facts constituting negligence were disputed and it necessitated an investigation into the disputed questions of fact and the said exercise could not be undertaken in a writ petition.

11. It cannot be lost sight of that this Court has to do justice to both the parties. Entertaining writ petitions against the State and its instrumentalities in matters of compensation for negligence even where the same entail disputed questions of fact would create a mistaken impression of doctors and hospitals as easy targets for the dissatisfied patients and against which the Supreme Court sounded caution in ***Indian Medical Association Vs. V.P. Shantha*** (1995) 6 SCC 651.

12. In the aforesaid facts, we are also unable to appreciate the contention of the appellant regarding constitution of a Medical Board.

13. Though the counsel for the appellant also argued that at least compensation for refusal of admission by AIIMS, under whose treatment the son of the appellant was, ought to have been granted but in the light of the defence of AIIMS that it was the appellant herself who had delayed the treatment of her son inspite of having been rendered advise with respect thereto long ago, we are of the opinion that the said aspect also needs to be adjudicated in an appropriate fact finding fora. We cannot also lose sight of the fact that treatments, for which a bed is required, cannot be meted out, if all the beds in the hospital are occupied. We are a country with vast population and scarce medical resources. The Courts would not be right in,

as a matter of routine, commencing investigations into the conduct of Doctors, particularly of public hospitals, most of whom, despite various constraints, are rendering yeoman service to sea of humanity approaching such hospitals. Our Courts (see ***Jacob Mathew Vs. State of Punjab*** (2005) 6 SCC 1) have adopted the test of standard of care required of professional men generally and medical practitioners in particular, as laid down in ***Bolam Vs. Friern Hospital Management Committee*** (1957) 2 All ER 118 and held that the standard of care is judged in the light of knowledge available at the time of the incident and not at the date of trial and that when charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used. It was further held that many incidents involve a contribution from more than one person and the tendency is to blame the last identifiable element in the chain of causation, the person holding the "smoking gun". From the pleadings, we do not find any case to commence any such investigation into the conduct of any Doctor, at least in this jurisdiction. In ***Dr. C.P. Sreekumar Vs. S. Ramanujan*** (2009) 7 SCC 130 it was held that too much suspicion about the negligence of attending Doctors and frequent interference by Courts would

be a very dangerous proposition as it would prevent Doctors from taking decisions which could result in complications and in this situation the patient would be the ultimate sufferer. A doctor has to take snap decisions and if the medical profession is hemmed by threat of civil and criminal action, the consequence will be loss to the patients. The Supreme Court thus cautioned Courts that setting in motion law against medical profession should be done cautiously and on the basis of reasonably sure grounds.

14. We therefore concur with the view of the learned Single Judge. However we find that the limitation available to the appellant for approaching alternate fora may have already expired and / or may be soon expiring. The liberty given by the learned Single Judge to the appellant to approach the appropriate fora would thus be meaningless. Since the appellant had filed the writ petition, from which this appeal arises, soon after the cause of action had accrued and since the writ petition was entertained and remained pending, we are of the view that a case for allowing such appropriate proceedings, if instituted by the appellant, to be adjudicated on merits and being not defeated by the law of limitation, is made out. Accordingly, while dismissing the appeal, it is clarified that if appropriate proceedings, liberty wherefor has been given by the learned Single Judge to

the appellant, are instituted within three months from today, the same shall be entertained and decided on merits and be not knocked out as barred by time.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

FEBRUARY 03, 2015
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