

**HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU**  
**CIVIL MISCELLANEOUS APPEAL No.801 of 2007**

**JUDGEMENT :**

The C.M.A. is filed by the petitioner / workman against the orders dated 21.07.2005 passed in W.C. No. 6 of 2004 on the file of the Workmen's Compensation Act and Assistant Commissioner of Labour, Kakinada.

2. The case of the applicant, before the lower court is that he is employed in the factory of the 1<sup>st</sup> respondent on daily wages, and was working with Opposite Party No.2. He states that on 08.07.2002, when he was working near a Boiler Tank, he fell down and sustained serious injuries. Initially, the Medical Officer of the 1<sup>st</sup> Opposite Party rendered first aid and then sent him to a hospital for further treatment. Claiming that the injury occurred out of and in the course of employment with OP2, the case was filed in the Lower Court, claiming compensation of Rs. 2,00,000/- from Opposite Party No.1 and 2.

3. The Opposite Party No.1 (OP-1) filed a counter, denying the entire case and stating that the petitioner was not employed by them. They alleged that the 2<sup>nd</sup> opposite party is a contractor and that he was given some works, but there was no work order or work awarded to the 2<sup>nd</sup> opposite party on 08.07.2002. They state that they had given a work order only on 02.10.2002, based on a tender dated 02.08.2002.

4. The Opposite Party No.2 (OP-2) filed a counter, stating that there is no employer and employee relationship between the petitioner and him. The OP-2 is only a contractor with OP-1 and not an employee. He also states that the work order in question, for painting of the boiler was given

on 02.10.2002 and that on the date of the alleged accident the petitioner was not employed by him at all. Both the opposite parties, therefore, assert and state that on the date of the accident there was no contract in favour of the OP-2 and that the petitioner was not employed on that date. They both deny the accident also.

5. Based on these pleadings, the parties went to Trial. Before the Commissioner, the applicant examined himself as AW-1 and also examined AW.2 and 3. For the opposite parties; RW.1 and RW.2 were examined. For the applicant Ex.A1 to A14 were marked. For the respondents Ex.R.1 was marked. Based on the evidence introduced and the arguments advanced, the lower Court came to a conclusion that the petitioner did not sustain any injuries, "arising out of and in the course of employment." Therefore, the petition was dismissed. It is this order of dismissal that is now questioned in the appeal.

6. This Court has heard Sri J.Bhaskar Rao for the petitioner / appellant, Sri V.Hari Haran for the respondent No.1 and Sri A.Sudhakar Rao for the respondent No.2.

7. The learned counsel for the appellant strongly argued that the lower court failed to consider the oral and documentary evidence introduced and wrongly came to the conclusion that the applicant was not an employee. The learned counsel argued that the fact that the immediate first aid was rendered by the resident Doctor of OP-1 was overlooked by the Commissioner. He also argued that the oral evidence of AW.2 and 3 is also overlooked by the Commissioner. He argues that once an employee states that he was working under OP-2, a duty was cast upon the opposite parties, who are statutorily bound to maintain registers etc. to produce the same and rebut the petitioner's case. Neither

OP-1 nor OP-2 have produced any registers to discredit the case of the appellant. He therefore, argued that the order of the lower court should be reversed and compensation should be paid as prayed for.

8. In reply thereto, the counsel for the OP-1 argued that OP-2 is only a contractor, who is engaged on a “need” basis. Whenever there is a need and if he is the successful tenderer, a work is awarded to him. In the present case, the work was only awarded in October 2002 and therefore, according to them, the petitioner was not employee of OP-2 on 08.07.2002 (date of accident).

9. The counsel for OP-2 also argued that there was no work order on 08.07.2002. He denied the accident that occurred on 08.07.2002 and argued that the tender for that painting work was also floated in August, and that therefore he is not liable for the alleged accident that took place in July 2002. The work order to OP-2 was issued only on 02.10.2002. It is also strongly stressed by both the learned counsel appearing for the respondents that no accident actually occurred on 08.07.2002. Therefore, they urge that the appeal should be dismissed and the order of the lower court should be confirmed.

10. This Court, on an examination of the facts, evidence and arguments, notices that the case in the lower court was preceded by exchange of lawyers notices which were marked as Ex.A.12, A.13 and A.14. In the lawyer notices itself OP-1 and 2 expressly denied the employment of the petitioner and also the accident. Against this back drop, the evidence introduced in the application has to be assessed particularly to prove the accident. He relies upon a medical slip dated 08.07.2002, supposedly issued by a Medical Officer of the OP-1. This is followed by another medical slip dated 11.07.2012, by which the Doctor

advised X-Ray and a subsequent advise dated 11.07.2002. These documents are marked as Exs.A.1 to A.3 respectively. These documents by themselves do not show that an accident occurred on 08.07.2002 and that the treatment referred to in these three documents is directly attributable to the said accident. In fact, this Court agrees with the submissions of the learned counsel for the respondent No.1 that the Ex.A.1 slip merely prescribes some tablets and does not specify any injury. Even Ex.A.2 dated 11.07.2002 does not talk about any accident that has occurred. In addition to this important factor, this Court also notices that the lower court rightly commented on the fact that the Doctor who gave these slips is not examined as a witness. This is an important factor, which was noticed by the lower court. This Court also agrees that the non-examination of this Doctor is fatal to the case of the petitioner. Another set of Doctors supposedly treated the petitioner, and gave the prescriptions etc., marked as Exs.A-4 to A-8 / and A-11. As rightly pointed out by the learned counsel for the respondents, these Doctors could have thrown some light on the cause of the accident and the treatment. They were also not examined as witnesses.

11. In addition to this, the court notices that AW.1 in his cross examination on 06.01.2005, clearly admits that he was working with OP-2 and was drawing his salary from OP-2 only. He also admits that he has no evidence to show that OP-2 was working as a contractor with OP-1. He also admits in his cross-examination that he did not give any written report to the factory management about the accident. He also admits that if the accident occurs in the factory, medical treatment will be given by the factory people (OP.1 ) only. In the next line, he admits that he got himself treated out side by private medical practitioners.

12. A.Ws.2 and 3 are workers, who were examined to prove that the accident took place on 08.07.2002. A.W.2 admits that A.W.1 is an employee of the contractor only. A.W.2 is not an eye witness and according to his deposition in Chief, he came to know about the accident and then he went to the dispensary, where he saw the Doctor examining the A.W.1. He admits that he came to know that an accident occurred. A.W.3 is another witness, whose oral testimony is to the effect that he was working in the factory and that he came to know about the accident by talking to others in the factory. This witness admits that he will not an eye witness to the accident.

13. Therefore, on the basis of the oral evidence introduced, it is clear that there is no eye witness to the accident, nor is there evidence to state that the applicant was working with the OP.2 on 08.07.2002. The evidence of A.W.1 that he did not give any report to the factory authorities about the accident also throws any amount of doubt on the alleged accident. The evidence of R.W.1 is introduced for OP-1 but nothing much was elicited about the accident that supposedly occurred on 08.07.2002. R.W.2 is the contractor / 2<sup>nd</sup> respondent. He gives evidence to the effect that A.W.1 was earlier engaged by him on works outside the factory, but he was never engaged for any work within the factory. He clearly asserts that no accident occurred in the boiler section on 08.07.2002. Even in his cross-examination, he asserts and stands by the fact that the applicant was not working for him on 08.07.2002. Ex.R.1 is the work order, which is issued in October, 2002. Therefore, OP-2's contention is that there was no work given to the applicant on 08.07.2002 as he himself was not a contractor till October 2002.

14. This Court on a review of the entire evidence, including the submissions made in the various aspects of the case, agrees with the contention of the Lower Court that

(a) There is no proof that the applicant was engaged with OP-2 as a painter/worker as on the date of accident (8.7.2002).

(b) There is no proof that the accident, in fact, occurred on 08.07.2002. Neither was any letter written nor written complaint given by A.W.1 about the alleged accident. In the normal course of human conduct would expect that the management of the factory would be informed of any accident that occurs in a factory premises.

(c) The medical evidence, namely the slips filed, do not show that an accident actually occurred on 08.07.2002. The most immediate document - Ex.A.1 does not refer to any accident;

(d) None of the Doctors concerned were examined to prove the contents of the documents like prescription, slips etc. The Non-examination of the Doctors in the opinion of this Court is fatal to the case of the applicant.

15. Therefore, the lower court was right in holding that the applicant failed to prove that he was employed by OP-2 on the date of the accident. The applicant also failed to prove that the accident did in fact occur on 08.07.2002.

16. The sine qua non for a claim under the provisions of the Workmen's Compensation Act is the existence of an employer – employee relationship and an accident arising out of and in the course of employment. Both are not proved in this case.

17. For all these reasons, the order of the lower court is confirmed and the appeal is dismissed as there are no merits in the same. In the circumstances no costs.

18. The Miscellaneous petitions pending, if any, shall stand closed.

**D.V.S.S.SOMAYAJULU,J**

Dated: 07.06.2018

JR



**HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU,J**

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Dated: .05.2018

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