

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE K.K. SASIDHARAN
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

W.A. No. 2308 of 2013
and M.P. Nos. 1, 2 and 3 of 2013
and W.P. No. 21868 of 2015
and M.P. No. 2 of 2015

W.A. No. 2308 of 2013:-

S. Hariharan ... Appellant/Third Party

-vs-

1. Tamil Nadu Arasu Paniyalar Sangam,
Rep. by its President,
No. 62, Big Street,
Thiruvallikeni,
Chennai - 600 009. ... Respondent/Petitioner
2. The Government of Tamil Nadu,
Rep. by its Secretary,
Health and Family Welfare Department,
Secretariat,
Fort St. George,
Chennai - 600 009.
3. The Secretary to the Government of Tamil Nadu,
Labour and Employment Department,
Secretariat,
Fort St. George,
Chennai - 600 009.
4. The Director of Medical Education,
Kilpauk,
Chennai - 600 009.
5. The Director of Public
Health and Preventive Medicine,
Chepauk,
Chennai - 600 005.

6. The Director of Medical and Rural Health Service,
DMS Compound,
Chennai - 600 006.
 7. The Special Commissioner and Commissioner,
Employment and Training Department,
Guindy,
Chennai - 600 032.
 8. The Managing Director,
Tamil Nadu Medical Service Corporation,
DMS Compound,
Chennai - 600 006.
 9. V. Ravichandiran
 10. S. Ponnurangam
 11. B. Venkatesan
 12. L. Vivekanandan
 13. G. Ravichandiran
 14. P. Sivaperuman
 15. V. Sankar
 16. V. Baskaran
 17. R. Muthukumaran
 18. S. Muthuraman
- ... Respondents/Respondents

(Respondents No. 9 to 18
are formal parties and
therefore notice may be
dispensed with)

PRAYER : Writ Appeal filed under Clause 15 of Letter Patent,
praying to set aside the order in W.P. No. 13001 of 2008 (which
is a common order in W.P. Nos. 13001 of 2008 & 3742 to 274 of
2009) dated 17.08.2011.

Prayer in 13001/2008: Petition under Article 226 of the
Constitution of India for Issue of Writ of Mandamus to direct
the respondent to absorb the services of the outsourced
employees with time scale of pay and all other attendant
benefits.

For Appellant : Mr. Vijendran

For Respondents : Mrs. A. Sri Jayanthi,
Special Government Pleader
(for R2 to R8)

No appearance (for R1)

Given up (R9 to R18)

W.P. No. 21868 of 2015:-

1. S. Hariharan

2. M. Sivakumar ... Petitioners

-vs-

1. The Government of Tamil Nadu,
Rep. by its Secretary,
Health and Family Welfare Department,
Secretariat,
Fort St. George,
Chennai - 600 009.
2. The Director of Public Health and Preventive Medicine,
Chepauk,
Chennai - 600 005.
3. The Managing Director,
Tamil Nadu Medical Service Corporation,
DMS Compound,
Chennai - 600 006.
4. The Deputy Director of Health Service,
Nagapattinam District.
5. The Block Medical Officer,
Block Government Primary Health Centre,
Thirupoondi,
Nagapattinam District.

... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records from the Respondents pertaining to the impugned oral termination dated 28.12.2012 and its consequential reliving order through Na. Ka. No. 490/2012/A1 dated 11.02.2013 issued by the Fifth Respondent and quash the same and consequently direct the Respondents to reinstate the

Petitioners with continuity of service, back wages and all other attendant benefits.

For Petitioner : Mr. P. Vijendran

For Respondents: Mrs. A. Sri Jayanthi,
Special Government Pleader

COMMON JUDGMENT

(Judgment of the Court was delivered by P.D. AUDIKESAVALU, J.)

Since the issue involved in the Writ Appeal and the Writ Petition are one and the same, they are taken up together for disposal.

2. The Government of Tamil Nadu in the year 2001, for the purpose of curtailing the cost and adopting austerity measures, had imposed a total ban on recruitment in all departments including those relating to essential services such as, Education, Police and Health. As many posts in those Departments were vacant, there was imminent need for removal of the ban. Instead of lifting the ban on recruitment and filling up the vacancies through regular recruitment, the Health and Family Welfare Department was permitted to appoint persons on contract basis through outsourcing with private agencies by G.O. (D) No. 15, Health and Family Welfare Department, dated 22.03.2005 issued by the Government of Tamil Nadu. In pursuance of the same, vacancies in the cadres of paramedical and supporting staff of the Health Department were filled up by private agencies, which covered the posts of Driver, Hospital Worker, House Keeping Staff, Lab Technician Grade-II, ECG Technician, Dark Room Assistant, Data Entry Operator, Dialysis Technical, Lab Technician Grade-II (Nilgiris), Lab Technician Grade-II (Chennai), Mammography Technician and Staff Nurse (Dialysis). The wages in respect of the outsourced personnel was also fixed by the Government.

3. An Association of Government employees, viz., Tamil Nadu Arasu Paniyalar Sangam had filed W.P. No. 13001 of 2008 before this Court, seeking directions to absorb the services of the outsourced employees with time scale of pay and all other attendant benefits. It was contended that in respect of the outsourced staff of the Health Department, they were under the direct control of that Department except for payment of their remuneration. It was complained that the private agencies through which the salaries were paid did not disburse the same and they took away major portion of the salary, which were collected from the Department. Later those private agencies had abandoned their responsibility and vanished from the scene and

the employees, who were appointed through them had in the meanwhile got trained with sufficient experience and they took up the matter with the State Government for abolition of the practice of employing persons through outsourcing. It was further stated that they were issued with service certificates and assured preference in appointment at the time of recruitment through employment exchange, but the Commissioner for Employment and Training had not registered their names to be sponsored as a priority category. At a particular stage, the Government had decided to revoke the outsourcing of employees and decided to fill up the vacancies through recruitment of candidates on time scale of pay. It was in such circumstances that the aforesaid Writ Petition had been filed seeking aforesaid relief. The said Writ Petition was resolutely defended by the Government of Tamil Nadu by emphasizing that at the time of entering into agreement with private agencies, it was specifically agreed that they would be service providers, who would have to distribute the wages to the employees concerned, and the appointment of the staff were to be only by the private agencies and the Department would neither have any role nor be responsible for the same. It was also stated that since some of the private agencies had absconded, the payment to the outsourced personnel were made to them alone directly, while it was continued to pay the other employees only through the private agencies concerned. The absorption of the outsourced personnel was objected on the specific plea that they have been engaged only through private agencies and not through employment exchange and their services were not hired as per the service rules or following the rules of reservation, which had to be done in the case of regular employment. It was further explained that the service certificates cannot amount to guarantee absorption in any post in the Government. The Learned Judge, who heard the Writ Petition, following the dictum of the Hon'ble Supreme Court of India in Secretary, State of Karnataka -vs- Umadevi [(2006) 4 SCC 1], by order dated 17.08.2011 dismissed that Writ Petition.

4. In the meanwhile, another Writ Petition in W.P. No. 9690 of 2010 was filed by S. Hariharan and M. Sivakumar (Petitioners in W.P. No. 21868 of 2015) along with three others, whose services were engaged by the private agencies for the Health and Family Welfare Department of the Government of Tamil Nadu, seeking direction to absorb their services with time scale of pay and all other attendant benefits, and the same also dismissed following the aforesaid decision of the Hon'ble Supreme Court of India in Secretary, State of Karnataka -vs- Umadevi [(2006) 4 SCC 1], with an observation that it would not foreclose their right to make any representation to the competent authority and if such representation was made, appropriate orders may be passed on the basis of the orders issued from time to time by the Government.

5. That apart, the said S. Hariharan and M. Sivakumar along with two others have filed yet another Writ Petition bearing W.P. No. 14582 of 2012 before this Court seeking a direction to regularize their service in the concerned posts with appropriate time scale of pay with all other attendant benefits, which is now pending before this Court.

6. In the meanwhile, the Government of Tamil Nadu in G.O. (2D) No. 56, Health and Family Welfare (C2) Department dated 09.07.2012, after referring to the order dated 17.08.2011 passed in W.P. No. 13001 of 2008, has directed as follows:-

"5. The Government have examined the case of outsourced employees carefully and independently along with the orders passed by Hon'ble High Court in W.P. No. 13001 of 2008. In G.O. (Ms) No. 59, Health and Family Welfare (C2) Department, Dated 15.02.2008, orders were issued to terminate the services of outsourced employees. Due to stay order, the outsourced employees are still continuing in service. But, now there is no legal bar to terminate their service. The absorption of outsourced employees on regular basis will run contrary to recruitment rules and it will be in violation of Articles 14 and 16 of the Constitution of India. The outsourced employees were not appointed by Government but by outsourcing agencies and the Government is not aware of their qualification and no communal roaster was followed. The Government have, therefore, decided to instruct all the Head of the Departments under the control of Health and Family Welfare Department to implement the orders issued in G.O. (Ms) No. 59, Health and Family Welfare (C2) Department, Dated 15.02.2008 and to terminate all the outsourced employees in a phased manner by a maximum spread over period for one year and also to fill up the posts now occupied by the outsourced employees through Medical Services Recruitment Board or by any other approved means of filling up of the posts and order accordingly."

It is seen from the order Na. Ka. No. 490/2012/A1 dated 11.02.2013 of the the Block Medical Officer, Government Health Primary Centre, Thirupoondi, Nagapattinam District that pursuant to the aforesaid direction of the Government of Tamil Nadu, the Petitioners, who were outsourced employees engaged through the private agencies, were relieved on 31.12.2012 from discharging any work.

7. At that stage, the First Petitioner in W.P. No. 21868 of

2015, viz., S. Hariharan had then with the leave of this Court granted by order dated 01.02.2013 in M.P. No. 1 of 2013, has filed the intra-Court Appeal in W.A. 2308 of 2013 against the order dated 17.08.2011 in W.P. No. 13001 of 2008.

8. Further, in W.P. No. 21868 of 2015, the Petitioners, viz., S. Hariharan and M. Sivakumar, have contended that they were orally terminated on 28.12.2012 and a consequential relieving order Na. Ka. No. 490/2012/A1 dated 11.02.2013 has been issued by the Block Medical Officer, Government Health Primary Centre, Thirupoondi, Nagapattinam District and they have challenged the same and sought for consequential direction to reinstate them with continuity of service, back-wages and all other attendant benefits.

9. We have heard Mr. Vijendran, Learned Counsel appearing for the Appellant in W.A. No. 2308 of 2013 and Petitioners in W.P. No. 21868 of 2015, Mrs. A. Sri Jayanthi, Learned Counsel appearing on behalf of the Second to Eighth Respondents in W.A. No. 2308 of 2013 and Respondents in W.P. No. 21868 of 2015 and perused the materials placed on record, apart from the pleadings of the parties.

10. The Constitution Bench of Five Judges of the Hon'ble Supreme Court of India in the authoritative pronouncement in Secretary, State of Karnataka -vs- Umadevi [(2006) 4 SCC 1] has exhaustively dealt with the issue of regularisation in public services and the legal principles laid down therein can be succinctly culled out as follows :-

- (i) The words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. When rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. This distinction, therefore, has to be kept in mind and it has to be proceeded on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with

regularization.

- (ii) When appointments were made in contravention of mandatory provisions of the Act and statutory rules framed there under and by ignoring essential qualifications, the appointments would be illegal and cannot be regularized by the State. The State could not invoke its power under Article 162 of the Constitution to regularize such appointments. Regularization is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed there under. Regularization furthermore cannot give permanence to an employee whose services are ad hoc in nature. The fact that some persons had been working for a long time would not mean that they had acquired a right for regularization.
- (iii) The concept of 'equal pay for equal work' is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity.
- (iv) When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate

expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

- (v) Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. They cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules.
- (vi) It has been clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what has been held therein, will stand denuded of their status as precedents.

On a consideration of the case of the Petitioners in the light of the aforesaid dictum laid down by the highest Court of the land, it would be evident that the engagement of the Petitioners through private agencies and that too, without extending invitation to all qualified persons to apply for the posts at the relevant point of time, was not in consonance with the mandate of Articles 14 and 16 of the Constitution of India and as such, the Petitioners cannot claim any right for absorption

or permanent continuance and if such benefit is extended to them, it would squarely amount to a blatant violation of the constitutional scheme, which cannot be countenanced. Inasmuch as the services of the Petitioners in the Health and Family Welfare Department have been disengaged with effect from 31.12.2012 for valid reasons pursuant to G.O. (2D) No. 56, Health and Family Welfare (C2) Department dated 09.07.2012 issued by the Government of Tamil Nadu taking note of illegal manner in which they had been hired through private agencies, there does not appear to be any justification to grant the reliefs claimed by the Petitioners in W.P. No. 21868 of 2015. In view of the same reasons, we also do not find any infirmity in the order dated 17.08.2011 passed in W.P. No. 13001 of 2011 dismissing that Writ Petition requiring interference in W.A. No. 2308 of 2013.

11. At the same time, it is made clear that the dismissal of the Writ Petition as well as the Writ Appeal would not preclude the right of the Petitioners, if they are otherwise eligible to apply for any future vacancy, if any recruitment to the posts in Health and Family Welfare Department, is notified. In the event of the merit of the Petitioners in such recruitment is found to be equal to other successful competing candidates found suitable for such employment, the Petitioners shall be entitled to preference in such appointment. Having regard to the fact that there had been a ban on recruitment during the period when the services of the Petitioners as outsourced employees through private agencies were engaged, they shall also be entitled to the benefit of relaxation of age to the extent of the period they had worked in that Department.

12. In the upshot, W.A. No. 2308 of 2013 and W.P. No. 21868 of 2015 are dismissed with aforesaid observations. No costs. Consequently, the connected Miscellaneous Petitions are closed.

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Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

vjt

To

1. Secretary to the Government of Tamil Nadu,
Health and Family Welfare Department,
Secretariat,
Fort St. George,
Chennai - 600 009.

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Labour and Employment Department,
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Block Government Primary Health Centre,
Thirupoondi, Nagapattinam District.

सत्यमेव जयते

W.A. No. 2308 of 2013
and W.P. No. 21868 of 2015

RSV (CO)
GN (06/03/2019)

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