

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.8.2011

CORAM:

THE HONOURABLE MR.JUSTICE K.CHANDRU

W.P.Nos.13001 of 2008

and 3742 to 3748 of 2009

W.P.No.13001 of 2008:

Tamilnadu Arasu Paniyalar Sangam

rep. by its President

62, Big Street, Thiruvallikkeni

Chennai 600 005.

.. Petitioner

Vs.

1. The Government of Tamilnadu

rep. by its Secretary

Health and Family Welfare Department

Fort St.George, Chennai 600 009.

2. The Secretary to Government

of Tamilnadu, Labour and Employment

Department, Fort St.George

Chennai 600 009.

3. The Director of Medical Education

Kilpauk, Chennai 600 010.

4. The Director of Public Health and

Preventive Medicine, Chepauk

Chennai 600 005.

5. The Director of Medical and Rural

Health Services, DMS Compound

Chennai 600 006.

6. The Special Commissioner and

Commissioner, Employment and

Training Department, Guindy

Chennai 600 032.

7. The Managing Director

Tamilnadu Medical Service Corporation

DMS Compound, Chennai 600 006.

8.V.Ravichandran

9.S.Ponnurangam

10.B.Venkatesan

11.L.Vivekanandan

12.G.Ravichandran

13.P.Sivaperuman

14.V.Sankar

15.V.Bhaskaran

16.R.Muthukumaran

17.S.Muthuraman

.. Respondents

(Respondents 8 to 17 impleaded

as per order dated 3.4.2009 in

M.P.Nos.1 and 2 of 2009 in

W.P.No.13001 of 2008)

W.P.Nos.3742 to 3748 of 2009:

L.Vivekanandan

.. Petitioner in

WP:3742/2009

G.Ravichandran

.. Petitioner in

WP:3743/2009

P.Sivaperuman

.. Petitioner in

WP:3744/2009

V.Sankar

.. Petitioner in

WP:3745/2009

U.Bhaskaran

.. Petitioner in

WP:3746/2009

R.Muthukumaran

.. Petitioner in

WP:3747/2009

S.Muthuraman

.. Petitioner in

WP:3748/2009

Vs.

1. The Director of Public Health and
Preventive Medicine, Chepauk
Chennai 600 006.

2. The Deputy Director of Public
Health Service, Nagapattinam.

.. Respondents

PRAYER in W.P.No.13001 of 2008: Petition under Article 226 of the Constitution of India for issue of writ of Mandamus to direct the respondents to absorb the services of the outsourced employees with time scale of pay and all other attendant benefits.

PRAYER in W.P.Nos.3742 to 3748 of 2009: Petitions under Article 226 of the Constitution of India for issue of writ of Certiorarified Mandamus to call for the records of the second respondent in Pro.R.No.2699/2008/A1, dated 9.3.2009, quash the same and to issue direction to the respondents to reinstate the petitioners and to regularise their service with all consequential benefits.

For Petitioner : Mr.V.Ajoy Khose
in WP:13001/2008

For Petitioners : Mr.M.Ravi
in WP:3742 to 3748
of 2009

For Respondents : Mr.Mr.V.Subbiah
1 to 7 in WP:13001/08 Special Government Pleader
and respondents 1 and 2
in WP:3742 to 3748/09

ORDER

In the first writ petition (W.P.No.13001 of 2008), the petitioner is a government employees association, by name Tamilnadu Arasu Paniyalar Sangam, represented by its President. The prayer in the writ petition is for a direction to respondents 1 to 7 to absorb the services of the outsourced employees in time scales of pay and other attendant benefits.

1.2. When the writ petition came up on 27.5.2008, this Court, after noting that in similar circumstances the Madurai Bench had given a direction to maintain status-quo and also in view of the

fact that the members of the petitioner/association are liable to be terminated at any time, granted an order of status-quo. The writ petition was subsequently admitted on 15.7.2008. Pending the writ petition, interim injunction was granted until further orders and liberty was also given to the respondents to file a vacate stay petition. In the petition for grant of interim injunction restraining the respondents from making any fresh appointment, only notice was ordered and subsequently, on a vacate stay petition being filed, this Court rejected the vacate stay petition and the petition to restrain the respondents from making fresh appointment was also rejected. It was thereafter respondents 8 to 17 got themselves impleaded by filing a petitions in M.P.Nos.1 and 2 of 2009. On notice from this Court, the first respondent/ State has filed a counter affidavit dated 29.8.2008.

1.3. In the meanwhile, the matter was tagged along with W.A.No.426 of 2008 before a Division Bench, but however the Division Bench, by order dated 30.3.2010, directed the matter to be delisted from being heard along with the writ appeal and directed the matter to be dealt with by a Single Judge.

2.1. Even while the said writ petition was pending, the impleaded respondents, viz., L.Vivekanandan (11th respondent), G.Ravichandran (12th respondent), P.Sivaperuman (13th respondent), V.Sankar (14th respondent), V.Baskaran (15th respondent), R.Muthukumaran (16th respondent) and S.Muthuraman (17th respondent), filed W.P.Nos.3742 to 3748 of 2009. In that writ petitions, they have challenged the orders dated 9.3.2009 passed by the Deputy Director of Health Services, Nagapattinam, terminating the service of those petitioners. It was stated that though those petitioners were appointed on being sponsored through the employment exchange as Drivers under Rule 10(a)(i) of the General Rules for Tamil Nadu State and Subordinate Services and posted to the office of the Deputy Director and were working in the station, their services were terminated with effect from 9.3.2009, for want of vacancies and due to administrative reasons.

2.2. When those writ petitions came up on 4.7.2011, it was directed to be posted along with W.P.No.13001 of 2008. The writ petitions were admitted subsequently on 17.3.2009 and interim stay was granted of the termination until further orders. This Court passed the following order:

"15. In view of the above, the following order is passed in all the above miscellaneous petitions:

(a) There will be an interim stay of operation of the orders of termination dated 9.3.2009 passed by the Deputy Director of Health Services and Family Welfare, Nagappattinam against the petitioners in W.P.No.3742 to 3748 of 2009, until further orders.

(b) The interim injunction granted in M.P.N o.2 of 2008 in W.P.No.13001 of 2008 on 15.7.2008 is modified, to the effect that those appointed as Drivers in the Office of the Deputy Director of Health, Nagappattinam through outside agencies may be accommodated to the extent possible, in posts over and above the posts of Drivers occupied by the Employment Exchange sponsored candidates.

(c) It will be open to the respondents to come up with any application for modification, depending upon any contingency that may arise as a result of implementation of this order."

3. Thus, by the interim order, a peculiar situation was created, wherein in respect of the same post of driver, there were two sets of employees one who were recruited under Rule 10(a)(i) of the General Rules, sponsored by the employment exchange and who obtained a stay order against their termination, and the other who were initially appointed by outsourcing agencies and are continuing in the same post on the strength of the interim order. In view of the conflicting interest projected by the two sets of writ petitions, they were heard together and a common order is passed.

4.1. In the first writ petition (W.P.No.13001 of 2008), the petitioner/association claimed that the said association is a registered society under the Societies Registration Act and the Government in the name of curtailing the cost and adopting austerity measures has imposed a total ban of recruitment in all departments in the year 2001. Even the essential services departments such as Education, Police and Health Departments were not spared from the purview of the ban order and many posts were allowed to remain vacant. Therefore, the departments themselves made representation for removal of ban. Instead of lifting the ban on recruitment in respect of departments rendering essential service and ordering for filling up of vacancies through regular recruitment drive, the Government permitted those departments to make appointments on contract basis by outsourcing them with private agencies.

4.2. By G.O.(D) No.15, Health and Family Welfare Department, dated 22.3.2005, vacancies in the cadres of paramedical and supporting staff of Health Department were permitted to be filled up by outsourcing them with private agencies. The said government order covered 12 posts, including Driver, Hospital worker, House Keeping staff, Lab Technician Grade-II, ECG Technician, Dark Room Assistant, Data Entry Operation, Dialysis Technical, Lab Technician Grade-II (Nilgiris), Lab Technician Grade-II (Chennai), Mammography Technician, and Staff Nurse (Dialysis). The wages in respect of those outsourced staff were also fixed by the Government.

4.3. Previous to the said policy, outsourcing was done only in respect of Grade-D posts by G.O.Ms.No.49, Health and Family Welfare Department, dated 14.5.2002. Pursuant to the said policy, recruitment of drivers was made through one agency and recruitment for other posts was made by several other agencies. It is also claimed that all the persons who are appointed by the agency were qualified for appointment and they have also got their names registered in the employment exchange.

4.4. It is also stated that except the payment of their remuneration, the services of the employees were under the control of the Health Department. They normally sign the attendance register and allocation of work and control and supervision was done only by the department. But the agencies through which the amount of salary was paid, did not disburse the salary and took away major portion of the salary and in the end, the agencies have failed to pay any salary to the staff, though the amounts were collected from the department. Thus, the agencies have abandoned their responsibility and vanished from the place. The employees who were appointed have also got trained and got sufficient experience and therefore, the petitioner/ association took up the matter with the Chief Minister demanding abolition of the practice of employing persons by outsourcing.

4.5. It is stated that they were also issued with service certificates and were assured of preference in appointment at the time of recruitment through employment exchange, but the sixth respondent/Commissioner for Employment and Training did not register the names of their members to be sent as a priority category. The Government continued their services from 1.3.2008 to 31.5.2008 and in that order, it was stated that the Government had decided to revoke the outsourcing and posts are to be filled up with candidates with time scale of pay. The respective Medical Officers were directed to take steps.

4.6. It is also stated that the action of the respondents in not absorbing the services of the existing paramedical staff, support hospital staff, sanitary workers and drivers, having utilized their services for four years, was illegal, and their being paid consolidated pay is also totally arbitrary. After organizing several direct protests and token hunger fast, they have come forward to file the present writ petition seeking a direction to absorb their services in time scale of pay.

4.7. It is also stated that even after the outsourced agencies tenure came to an end, from time to time the State Government was issuing orders to extend the service of the personnel who were outsourced through agencies and the department also called for statistics of such of those outsourced persons who are engaged in various government hospitals.

5.1. In the counter affidavit filled, it was contended that the Government through a policy decision decided to fill up 12 categories of vacancies coming under Grades C and D by outsourcing them through various agencies. The selections were made by the agencies only and the Government has no connection whatsoever. The agencies selected those candidates, whether or not they have registered their names in the employment exchange, and no criteria for communal rotation was followed. Some of the candidates recruited by the agencies for the post of Lab Technician Grade II were from unrecognized institutions and all temporary appointments and appointments which did not fall under the purview of

the Tamil Nadu Public Service Commission have to be filled up only through employment exchange and therefore, the outsourced persons cannot be absorbed in the government service.

5.2. It is stated that at the time of entering into agreement with agencies, it has been specifically stated that the appointment will be made only by the agencies and the Directorate shall not be responsible. It is service provider who has to disburse the wages. The agreements between the Heads of Departments and the outsourcing agencies were not renewed after 2005 and one of the agencies by name Society for Education and Woman Development has absconded and their whereabouts are also not known. In that case, the Government permitted to disburse wages to the outsourced personnel from the Hospital Maintenance Fund and Patient Welfare Society. Payments to the outsourced personnel are still made only through agencies for all categories, including Driver. In respect of the outsourced personnel for whom the agencies are not available, the payments are made directly.

5.3. It is also stated that the members of the petitioner/association cannot claim perpetual right for their continuance. By G.O.Ms.No.59, Health and Family Welfare Department, dated 15.2.2008, the Government decided to revoke the policy of outsourcing and fill up the post of paramedical staff on regular time scale of pay. The Government also rejected the request of absorption of outsourced personnel, as they were engaged through private agencies and not through employment exchange and while recruiting them, the rules of reservation were not followed.

5.4. It is stated that the service certificates, which were directed to be issued to them, nowhere guaranteed any employment opportunity and the Government has decided to recruit candidates only through employment exchange, granting due adherence to seniority and communal rotation. Merely because the outsourced persons have served for four years, that does not guarantee any right for their being absorbed to government service. The arrangement of employing personnel through outsourcing agencies is only an interim measure and those employees cannot seek absorption.

6.1. The impleaded respondents 8 to 17 have stated that their names were registered in the employment exchange. They are qualified for the post of Driver and on their names being sponsored, they were called for an interview and they were appointed under Rule 10(a)(i) of the General Rules on a time scale of pay. They joined duty on 16.5.2008, except P.Sivaperuman who had joined on 17.5.2008. It is because of the pendency of this writ petition seeking absorption of the outsourced employees in which a status-quo order was granted, the services of respondents 8 to 17 are sought to be terminated on administrative grounds.

6.2. It is stated that at the time of filing of their petition for impleadment, they had put in more than four years of service and reference was also made to the judgment of the Constitution Bench of the Supreme Court in *State of Karnataka v. Uma Devi*(3), [2006] 4 SCC 1.

7. In the other batch of writ petitions (W.P.Nos.3742 to 3748 of 2009), the writ petitioners, who were directly recruited under Rule 10(a)(i) of the General Rules, contended that their termination without notice on administrative reasons was erroneous and though their appointment was made under Rule 10(a)(i) of the General Rules, since it was against the post which was available, it cannot be said that their services can be terminated at any time without notice. Hence, it was argued that their termination was illegal.

8. In the counter affidavit, it was contended that in view of the earlier writ petition and the status-quo order being continued, a peculiar situation has arisen where the department found that they cannot maintain two sets of drivers one employed through outsourcing agencies and other sponsored by employment exchange, and therefore, the termination of the direct recruits was sought to be made, as their appointment was purely temporary and liable to be terminated without any notice. Subsequently, the order was modified to accommodate the outsourced persons to the extent possible over and above the posts of drivers occupied by persons sponsored by employment exchange and liberty was given to the department to come up with a petition. It was stated that since the petitioners were employed on temporary basis, their services can be terminated at any time.

9.1. Mr.Ajay Khose, learned counsel for the petitioner/association contended that in a batch of writ petitions in W.P.No.20691 of 2008 and other cases (*K.Sivalingam and others v. The State of Tamil Nadu*, rep. by its Secretary, Health and Family Welfare Department and others), a learned Judge of this Court, by order dated 28.8.2008, in paragraph [4] had passed the following direction in respect of the outsourced drivers engaged by the Health Department:

"4. In view of the stand of the Government that the petitioners will be given preference in the regular selection, these writ petitions are disposed of giving direction to the fourth respondent to give preference to the petitioners based on their earlier engagement either as contract Drivers/ Sanitary Workers/Hospital Workers while appointing any fresh candidate. The fourth respondent is directed to consider the claim of the petitioners and if they are found qualified, they should be given priority taking note of their experience. The learned counsel for the petitioners submitted that there are vacancies now available. Hence, petitioners are directed to submit their application before the fourth respondent along with the experience certificate issued by the concerned medical officers to the fourth respondent, within a period of two weeks from the date of receipt of a copy of this order. The fourth respondent is directed to consider their claims even if their names are not sponsored by the employment exchange. It is made clear that since the petitioners are already engaged through outsourcing and performed the

duties either as Drivers/ Sanitary Workers/Hospital Workers, further sponsorship through employment exchange is not required to be made in so far as the petitioners are concerned."

Therefore, it was stated that the requirement to be sponsored through employment exchange is unnecessary in respect of those members.

9.2. He also referred to another order passed by this Court in a batch of writ petitions in W.P.No.25092 of 2008 and other cases, dated 20.10.2008 (V.Parameswaran and others v. The State of Tamil Nadu, rep. by its Secretary, Health and Family Welfare Department and others), wherein a direction was given regarding preference in regular selection based on their engagement as contract Drivers/Sanitary Workers/Hospital Workers while appointing fresh candidates. In paragraph [7], it was directed as follows:

"7. In view of the stand of the Government that the petitioners will be given preference in the regular selection, these writ petitions are disposed of giving direction to the fourth respondent to give preference to the petitioners based on their earlier engagement either as contract Drivers/Sanitary Workers/Hospital Workers while appointing any fresh candidate. The fourth respondent is directed to consider the claim of the petitioners and if they are found qualified, they should be given priority taking note of their experience. The learned Counsel for the petitioners submitted that there are vacancies now available. Hence, petitioners are directed to submit their application before the fourth respondent along with the experience certificate issued by the concerned medical officers to the fourth respondent, within a period of two weeks from the date of receipt of a copy of this order. The fourth respondent is directed to consider their claims even if their names are not sponsored by the employment exchange. It is made clear that since the petitioners are already engaged through outsourcing and performed the duties either as Drivers/Sanitary Workers/Hospital Workers, further sponsorship through employment exchange is not required to be made in so far as the petitioners are concerned. No costs."

That judgment was based upon an order passed by a Division Bench in R.Amirthavani and another v. The District Employment Exchange Officer and others, [2008] 5 MLJ 1252.

9.3. The learned counsel also referred to an order passed by me in W.P.No.30105 of 2008 and batch cases, dated 23.10.2009 (R.Parimala and others v. The State of Tamil Nadu, rep. by its Secretary, Health and Family Welfare Department and others), wherein after following the earlier order, a similar direction was given.

10. In none of these cases referred to by the learned counsel for the petitioner/association, the larger question as to whether the persons who are employed through outsourcing agencies without reference to the employment exchange and without following communal roster came to be considered, since such issues were never raised by the respondent/ Government. But, in the present case, directly

the issue has been raised by the respondent/State Government in the counter affidavit as well as in the vacate stay petition and another set of employees, who were directly appointed, on being sponsored by the employment exchange, also got themselves impleaded as parties as their employment is under direct threat. Therefore, the main issue regarding the maintainability of the writ petition will have to be gone into and only when that issue is resolved, the question of any direction to give preference can be considered.

11. The Supreme Court in *State of Karnataka v. Uma Devi*(3), [2006] 4 SCC 1 has clearly laid down that the appointment for all government employments will have to be made in terms of the recruitment rules and any other recruitment will be against Articles 14 and 16 of the Constitution of India. Though certain attempt was made to reinterpret the judgment in *Uma Devi*(3) case, supra, such an attempt was frowned by the Supreme Court in *Uttaranchal Jal Sansthan v. Laxmi Devi*, [2009] 7 SCC 205.

12. Even if ad hoc appointees, who are appointed directly, work for more than ten years under interim orders of the Court, the Court cannot show any misplaced sympathy of protecting such ad hoc employees only because they have worked for long time and the Supreme Court held that in such cases, the decision in *Uma Devi* (3) case, supra, is binding and has to be applied, vide judgment in *State of West Bengal v. Banibrata Ghosh*, [2009] 3 SCC 250.

13. The Supreme Court also took a similar view in *Raghavendra Rao v. State of Karnataka*, [2009] 3 SCC 250 and held that such candidate has no right to be absorbed or made permanent.

14. Similarly, in *Harminder Kaur v. Union of India*, [2009] 13 SCC 90, the Supreme Court held that the long service rendered by ad hoc employees cannot be a ground for regularisation and regularisation cannot be a mode of appointment. Even on the question of age relaxation of such appointees for being considered for future recruitment, the Supreme Court only gave a non binding direction to the respondents/State to consider such issues on their own.

15. The Supreme Court in *Pinaki Chatterjee v. Union of India*, [2009] 5 SCC 193 held that the recruitment cannot be made contrary to the statutory recruitment rules and in violation of Articles 14 and 16 of the Constitution of India.

16. Even in cases where an employee was appointed twenty times against short term vacancies, such a candidate cannot be regularised and the posts will have to be filled up by direct recruitment, as held in *Man Singh v. Commissioner, Garhwal Mandal, Pauri and others*, [2009] 11 SCC 448.

17. Even the clarification given in paragraph [53] of the *Uma Devi(3)* case, *supra*, that as a one time measure regularisation can be resorted to, came to be subsequently reinterpreted in *Satya Prakash v. State of Bihar*, [2010] 4 SCC 179. The Supreme Court held that in *Uma Devi(3)* case, *supra*, the Constitutional Bench has drawn a distinction between temporary employees, daily wagers, and those who were appointed irregularly, in the sense that there was non compliance with the procedure in selection process and they did not go through the selection process and in such cases, inspiration cannot be taken from paragraph [53] of the *Uma Devi(3)* case, *supra*.

18. The decisions referred to above are all cases where employees were directly recruited but de hors the recruitment rules. But, in the present case, the members of the petitioner/association were recruited not even by the Government but by outsourcing agencies and as rightly contended in the counter affidavit, the Government was not even aware of their qualifications and no communal roster was followed in respect of their recruitment.

19. Whether employees who are engaged through contractors [outsourcing agencies] can claim as a matter of right absorption against the principal employer came to be considered by the Supreme Court in its judgment in *Steel Authority of India Limited and others v. National Union Waterfront Workers and others*, [2001] 7 SCC 1. It was held by the Constitutional Bench of the Supreme Court that the High Court under Article 226 of the Constitution of India cannot grant such direction and directed the parties to move the appropriate Labour Court either for the abolition of the contract labour or for contending that the employment was sham and nominal and therefore, they can make a claim directly against the principal employer.

20. In any event, the contention raised by the petitioner/association cannot be considered in a writ petition of this nature and hence, W.P.No.13001 of 2008 stands dismissed and the interim order stands vacated.

21. In W.P.Nos.3742 to 3748 of 2009, the petitioners were directly recruited by sponsorship through employment exchange under Rule 10(a)(i) of the General Rules. The present impugned order came to be passed because the department was faced with a peculiar situation of employing two sets of drivers against the same post and because of the order of status-quo they were sought to be

terminated. Even though it is contended that their appointment was only under Rule 10(a)(i) of the General Rules and liable to be terminated at any time, in the present case their termination was occasioned only because of the pendency of W.P.No.13001 of 2008 and the petitioners also contended that while terminating from the service, they were not given any notice.

22. In normal circumstances, such a notice is required if there is any want of vacancy. But, in the present case, they were sought to be ousted only because this Court passed orders against the department. Hence, the impugned orders passed against the petitioners in W.P.Nos.3742 to 3748 of 2009 are set aside and liberty is given to the respondents to pass appropriate orders in case their services are not required for any reason other than the reason which prompted them from terminating the services which gave rise to the present batch of writ petitions.

In the result, W.P.No.13001 of 2008 is dismissed and W.P.Nos.3742 to 3748 of 2009 are allowed. No costs. Consequently, M.P.No.4 of 2009 is closed.

To:

1. The Secretary to Government of Tamilnadu

Health and Family Welfare Department

Fort St.George, Chennai 600 009.

2. The Secretary to Government

of Tamilnadu, Labour and Employment

Department, Fort St.George

Chennai 600 009.

3. The Director of Medical Education

Kilpauk, Chennai 600 010.

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Commissioner, Employment and
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DMS Compound, Chennai 600 006.

8. The Deputy Director of Public
Health Service,
Nagapattinam