

# **ARMED FORCES TRIBUNAL, REGIONAL BENCH, KOCHI**

T.A. No.229 of 2010  
(W.P.No.15381/07 (S) of Hon'ble High Court of Karnataka at Dharwad Bench)

MONDAY, THE 3RD DAY OF DECEMBER, 2012/12TH AGRAHAYANA, 1934

CORAM:

HON'BLE MR. JUSTICE SHRI KANT TRIPATHI, MEMBER (J)  
HON'BLE LT.GEN.THOMAS MATHEW, PVSM, AVSM, MEMBER (A)

## **APPLICANT:**

M.EVEN, S/O.LAZERS, AGED ABOUT 47 YEARS,  
SAFAIWALA (NO.10421167 H),  
115 INFANTRY (TA) MAHAR,  
FORT BELGAUM, DIST. BELGAUM.

BY ADV. SRI. RAMESH C.R.

***versus***

## **RESPONDENTS:**

1. ADDL. DIRECTOR GENERAL OF TERRITORIAL ARMY,  
GENERAL STAFF BRANCH,  
INTEGRATED HQ OF MINISTRY OF DEFENCE (ARMY),  
L – BLOCK, CHURCH ROAD, NEW DELHI – 01.
2. GROUP COMMANDER, TERRITORIAL ARMY GROUP HQ,  
SOUTHERN COMMAND, PUNE, MAHARASHTRA STATE.
3. COMMANDING OFFICER, 115 INFANTRY BATTALION (TA),  
MAHAR, FORT BELGAUM, DIST. BELGAUM.
4. SENIOR RECORDS OFFICER, FOR OIC RECORDS,  
RECORDS MAHAR REGIMENT, SAGAR - 900127

R1 TO R4 BY ADV. SRI. TOJAN J. VATHIKULAM, CENTRAL GOVT. COUNSEL

## **ORDER**

### **Shri Kant Tripathi, Member (J):**

The applicant, M.Even, had filed Writ Petition No.15381 of 2007  
in the Hon'ble High Court of Karnataka for a writ of mandamus

directing the respondents to add his past service as "Safaiwala" from 21.3.1979 to 21.3.1994 to his second spell of service as "Safaiwala" and sanction him pension with effect from the due date. A prayer for quashing the order dated 19.3.2007 (Annexure G) passed by the first respondent has also been made.

2. The aforesaid Writ Petition has been received in this Tribunal under Section 34 of the Armed Forces Tribunal Act and has been re-numbered as T.A.No.229 of 2010.

3. Most of the facts are not disputed. The applicant, M.Even, had two spells of service as "Safaiwala" in 115 Infantry Battalion, Territorial Army, Mahar Fort, Belgaum. He joined the first spell of service on 21<sup>st</sup> March 1979 and was discharged therefrom on 31.3.1994 on completion of terms of engagement (Annexure A – Discharge Certificate). During the initial engagement of 15 years, the applicant served 12 years of embodiment service (qualifying service) countable for pension. As the applicant's embodiment service was less than the requisite qualifying service of 15 years, he was not sanctioned pension for the first spell of service. After about one year, he was re-enrolled as "Safaiwala" in the same unit on 21.3.1995 for a term of engagement of 12 years. As the respondents had not counted his first spell of service at the beginning of

the second spell or during its continuance, the applicant submitted a representation in March 2006 praying for counting his first spell of service to the second spell and accordingly claimed promotion (vide Annexure B). One Major Mahendra Singh, acting for the Commanding Officer, informed the applicant on 6.4.2006 (vide Annexure C) that his first spell of service could not be counted for the purpose of promotion, and the same was relevant only for pension. Thereafter, the applicant preferred another representation dated 27.10.2006 (Annexure D) requesting the respondents to discharge him from service with pension by adding his first spell of qualifying service to the present service. On this request of the applicant, the respondents informed him that he was not entitled to any benefit of first spell of service on the ground that he had not disclosed the facts pertaining to his first spell while he joined the service on re-enrolment as required by Regulation 126, condition No.1, of the Pension Regulations for the Army, Part 1, 1961, hereinafter referred to as "Pension Regulations". Even column Nos.14 and 19 of the enrolment form regarding the former service were left blank. The applicant was further informed that he had already received Rs.12,285/- (Rupees Twelve Thousand Two Hundred and Eighty Five) as service gratuity for his first spell of service, which he did not refund as required by the condition No.3 of the aforesaid Regulation 126. In

view of these two reasons, the respondents declined to take into account the applicant's first spell of service and to sanction him pension as claimed by him. It is also significant to mention that applicant moved one more representation dated 22.11.2006 (Annexure F) with the allegations that his intention to rejoin the service was to earn pension and he was not aware of the details of columns 14 and 19 in the enrolment form which were left blank. He further informed that he wished to refund the service gratuity with prescribed rate of interest and requested the Senior Record Officer, Mahar Regiment, Pin Code – 900127, C/o.56 APO, to calculate the amount to be refunded and inform the date by which payment was to be made, but it was turned down by the respondents on the ground that it was not permissible to permit him to exercise option after a lapse of twelve years only on the ground of ignorance and oversight. It was also informed to the applicant that approval of the Government was necessary in such belated cases, and the Ministry of Defence, Government of India had already turned down similar cases. Therefore, the applicant's prayer was rejected vide endorsement/order dated 19.3.2007 (Annexure G), which has been impugned in the instant case.

4. It is also not in dispute that the applicant would be entitled to

pension if his both spells of service are counted together.

5. Counsel for the applicant submitted that applicant was not a well educated person, so he joined the post of Safaiwala (Sweeper) in the Territorial Army. When he joined the second spell of service, he was not aware that he had to refund the service gratuity received by him for the first spell of service and to exercise an option in writing to have the previous service counted with the second spell of service. He joined the second spell of service in the same post in the very same unit and he thought that his superiors as also others were aware of the facts pertaining to his first spell of service, so he believed that his first spell of service would automatically be counted for pension purposes. When the applicant noticed that no benefit of his first spell of service was being given to him for promotion, he made a representation for considering his previous service but he was told that his previous service could not be counted for want of exercise of option and refund of service gratuity within the prescribed time after re-enrolment. He came to know of the relevant rules and regulations only at that time, so, he immediately requested the authorities to calculate the amount with interest to be refunded and thereby he showed his willingness to do so, therefore, there was no fault on the part of the applicant and the

mistakes, if any, occurred only on account of ignorance and illiteracy, and were not in any way deliberate or wilful. The counsel for the applicant further submitted that applicant may be allowed to refund the amount of service gratuity with interest with regard to his first spell of service and the respondents may be directed to take into account his first spell of service with the second spell and grant him due pension in accordance with the rules.

6. Learned counsel for the respondents, on the other hand, submitted that ignorance of law was no excuse. Regulation 126 of the Pension Regulations was very clear, which requires not only for refund of the service gratuity but also a written option to be submitted within the stipulated time, but the applicant did not do so, therefore, he could not be permitted to avail the benefits of Regulation 126 after the expiry of the stipulated time.

7. Learned counsel for the respondents next submitted that the applicant deliberately concealed his first spell of service so as to avoid refund of service gratuity already received by him and this fact find support from the fact that during the first spell of service the applicant had disclosed his name as "EVEN" but at the time of re-enrolment, he

disclosed his name as "M.EVEN". More so, in the enrolment form, he left blank the columns 14 and 19 pertaining to the previous service.

8. In reply, learned counsel for the applicant submitted that the enrolment form was filled in by an official of the respondents, who merely obtained the applicant's signature, so he was not aware of the column wise contents and requirements of the enrolment form. He had not been required to say whether or not he had served anywhere before the re-enrolment, so, no such information was furnished at that point of time. Learned counsel further submitted that the name 'EVEN' shown in the discharge certificate with regard to the first spell of service was written by an official and not by the applicant. More so, the applicant while signing the Discharge Certificate mentioned his name as "M.Even" and as such there was no wrong disclosure of name during the first spell of the service. Even the name "M.EVEN" shown during the second spell of service has no material distinction or variation and is the same. The parentage and other details including address etc were the same. Therefore, on the basis of the minor variation in the name it could not be inferred that the concealment was deliberate. Learned counsel further submitted that the default, if any, on the part of the applicant in not disclosing his first spell of service was bonafide and therefore, it was liable to be condoned.

9. We have heard the learned counsel for the parties, perused the record, considered the rival submissions and the relevant provisions.

10. Regulation 126 of the Pension Regulations deals with the matter pertaining to counting of former service for pension and gratuity. Clause (a) thereof provides that combatants and enrolled non-combatants who had former service to their credit, may be allowed by the competent authority to reckon their former service towards pension and gratuity the extent specified in the table annexed to the said regulation, subject to the fulfilment of the conditions stated in column 5 thereof provided that, they were not dismissed from their former service. In column 5, there are three conditions which are to be fulfilled. The condition Nos.1 and 3 being relevant in the present matter, are reproduced as follows:

"Condition No.1. At the time of re-employment/ re-enrolment, the individual shall have declared his former service and cause of discharge there from and elected to count that service towards pension or gratuity and retirement/death gratuity. The election once made shall be final.

Condition No.2: .. .. .

Condition No.3. The individual shall have refunded pension any gratuity other than war gratuity, received in respect of his former service within a period of three years from the date of his re-employment/re-enrolment in not more than 36 monthly installments from his pay. The first installment shall be payable within three months from the date of re-employment/re-enrolment."



It is thus clear that, at the time of re-employment/re-enrolment, the individual must declare his former service and the reason of discharge therefrom and if he so desires, request for counting his former service towards pension or gratuity. The option so made is treated final. Therefore, according to the plain language of condition No.1 referred to in column 5 of the aforesaid table, the person concerned has to inform the authorities concerned regarding his previous service, reason of discharge and his option for counting the said service towards pension or gratuity etc., and in case he does not do so, ordinarily, he will not be permitted to agitate the said point at any subsequent stage. More so, he has to refund the gratuity etc within 03 years of his re-employment as per the aforesaid condition No.3. In a similar case, **Ex. Nb. Sub. Mahesh Anand vs Union Of India and Others, 2003 (1) SLJ 105**, a Division Bench of the Delhi High Court allowed the petitioner therein to have added his past service to the subsequent service for pension and gratuity purposes. The observations of the Division Bench of the Delhi High Court contained in para 8 and 9 of the judgment being relevant, are being reproduced as follows:

“8. There is no dispute that para 126 of the Pension Regulations provides that former service rendered by combatants and enrolled non-combatants may be allowed to be credited and reckoned towards pension

and gratuity by the competent authority - subject to fulfillment of conditions stated in column 5. Condition 1 in this column requires an individual to declare his former service and cause of discharge at the time of re-employment/re-enrollment and also to elect whether he wanted to count that service towards pension and/or retirement/death gratuity. It also says that the election made by him once shall be final. The relevant condition for facility reads thus:-

*"Condition 1 - At the time of re-employment/ re-enrolment, the individual shall have declared his former service and cause of discharge there from and elected to count that service towards pension or gratuity and retirement/death gratuity. The election once made shall be final."*

9. It goes without saying that the reckoning of the past service under para 126 falls within the discretion of the competent authority who may order to credit it to the individual's qualifying service subject to the conditions attached thereto. But the question that arises is whether non-fulfillment of such conditions in peculiar circumstances would disentitle an individual from pensionary benefits for good, more so when the individual either had no knowledge of this or had no hand in the alleged failure to satisfy the requirements. In our view, it would be too much to hold so by placing a rigid interpretation on the terms of condition (1) and overlooking the circumstances in which petitioner had failed to indicate his past service in the Enrollment Form."

11. What the Delhi High Court has held in the aforesaid case is that, the individual who claims addition of former service to his subsequent service

for the purposes of pension and gratuity, under Regulation 126 of the Pension Regulations, cannot be denied the said benefit only on the ground of non-fulfillment of any of the conditions stated in column 5 of the table annexed to Regulation 126, in a case where he had no knowledge of the requirements of the said Regulation or had some other good reason for not furnishing the required information in time. In our view, Regulation 126 seems to be a benevolent scheme which should be liberally construed and applied so as to extend the benefit as far as possible to every individual, who had some previous service to be counted to the subsequent service and this object can only be achieved if at the time of joining the subsequent service the individual is properly informed, explained and appraised of his right of addition of previous service in terms of Regulation 126 and this can be done at least by serving on him a written notice with regard to the requirement of the aforesaid regulation either at the time of joining the subsequent service or within a reasonable period thereafter. An illiterate, less educated and lay person and even sometimes, educated persons, may not be aware of the implications as also the requirements of the aforesaid Regulation 126. Therefore, in appropriate cases, where proper explanations are furnished with regard to non-compliance of the requirements of the said regulation in time, the authorities have to give due consideration to such

explanation before passing any order on his request for addition of previous service. The object behind the aforesaid regulation is not to adopt a rigid stand so as to deny genuine cases. More so, clause (c) of Regulation 126 specifically provides that, in individual cases, the competent authority may relax at its discretion condition Nos.2 and 3.

12. The applicant's case needs to be examined in the backdrop of the aforesaid principles. According to the discharge certificate as also the enrolment form furnished at the time of subsequent enrolment, the applicant is not a well educated person. He had studied upto sixth class only and it appears that due to the said qualification he joined the very inferior post of "safaiwala" at both the occasions. Therefore, he was to be informed at the time of his subsequent enrolment with regard to the requirements and implications of the aforesaid regulation. But, in this case, there does not appear to be any material to show that the applicant was informed that he had to furnish the details of his former service so as to get the benefit of addition of said service to the subsequent service for pension and other purposes. It may not be out of context to mention that, no doubt, in the enrolment form, there were two questions, question No.14 and 19, viz., *"14. Have you ever served in the regular forces, the Reserve or the Indian States Forces or the Nepal State Army? If so, state in which, the period of service and*

*the cause of discharge?” and “19. Have you ever previously applied for enrolment under the Act, and if so, with what result?”* But, the said two questions were not replied. It is not the case of anybody that the applicant while answering the said questions said “No” or “Yes”. The applicant has clarified in this regard that the enrolment form was filled in by an official of the Unit and he was merely required to sign the enrolment form. Whatever information was required to be furnished at that point of time had been furnished by the applicant and they all were disclosed in the enrolment form. But the official who filled in the enrolment form did not apprise the applicant about the aforesaid questions 14 and 19 nor he required to furnish answers thereof, therefore, they remained unanswered. It is also relevant to note that the applicant had given a representation in March 2006 much before his retirement from the second spell of the service for counting his previous service for granting him promotion. A copy of the said representation is on record as Annexure B. In that representation, the applicant stated that had joined as “safaiwala” on 21<sup>st</sup> March 1979 and after rendering 15 years of service was discharged on 21<sup>st</sup> March 1994 from the rank of Lance Naik. He further disclosed that since his embodiment service was only 12 years, he was not granted any pension. He further stated that on 21.3.1995 he again joined the same unit in the post of “Sepoy”.

At that time, several other persons who got enrolment second time had been provided the rank they had held previously during the first spell of service, but he was not given, however, he was assured that he would also be promoted within one year. It is also alleged by the applicant that he joined the service for the second time only to earn pension. In view of the above facts, there was no reason for the applicant to conceal his former service, especially when he was to get the benefit thereof for the purpose of pension and gratuity, if his former service had been counted. Therefore, the explanation of the applicant that he had no knowledge of the requirements of Regulation 126 of the Pension Regulations, nor he was informed of such requirement by the authorities, which resulted in his failure to furnish the option and refund the gratuity received, seems to be believable and is liable to be accepted. More so, the applicant had rendered 15 years service (12 year embodiment service) during the first spell and also few years service as informed by the counsel for the applicant, during the second spell, and his total service could be more than the requisite service for pension. But he is denied his total service of the first spell for pension purposes resulting in depriving him the pension and other benefits. Therefore, it will be a grave injustice if his explanations are not accepted and he is not granted due benefit of both the services for pension.

13. Counsel for the respondents gave much stress on the fact that the applicant failed to refund the gratuity amount of Rs.12,285/- (Rupees Twelve Thousand Two Hundred and Eighty Five) within the time fixed, therefore, he was not entitled to claim any benefit of his previous service. In this connection, it may be stated, at the cost of repetition that, clause (c) of the aforesaid Regulation 126 empowers the competent authority, in appropriate cases, to relax the requirement of condition No. 3 specified in column 5 of the table annexed to the said Regulation and this power of the competent authority is purely discretionary, which can be exercised in deserving cases, like the present one.

14. It is also relevant to state that the learned counsel for the applicant very clearly stated at the bar that the applicant would deposit the entire amount of gratuity with interest within the time to be fixed by the Tribunal and he had so expressed in his representation Annexure 'F' dated 23.11.2006. It is also significant to mention that the amount of gratuity paid to the individual for his former service is recoverable in terms of condition No.3 within a period of three years from the date of reemployment. Therefore, there does not appear to be any reason to claim any interest during the said period of three years. The question of payment of interest while refunding the gratuity will arise only after the

expiry of the said period of three years. In this case, the applicant was re-employed with effect from 21<sup>st</sup> March, 1995. Therefore, he has to pay interest on the gratuity which is to be computed with effect from 22.3.1998, i.e. the date falling immediately after the expiry of the aforesaid period of three years. So far the the question of rate of interest is concerned, it is appropriate to say that the rate of interest should be at the fixed deposit rate of the State Bank of India prevalent on 22.3.1998 for fixed deposits of 10 years or more. Therefore, the applicant's claim for addition of first spell of service to the second spell of service for pension and other purposes in terms of aforesaid Regulation 126 of the Pension Regulations is liable to be allowed subject to refund or adjustment from the arrears, of the gratuity amount of Rs.12,285/- with due interest by the applicant.

15. The Original Application is allowed. The respondents are directed to add the applicant's first spell of service as Service No.10419977 N, Lance Naik/Safaiwala, 115 Infantry Battalion, Territorial Army, Mahar, Fort, Belgaum to the second spell of his service as Service No.10421167 H in the said unit and to provide him the benefit of both the services together for pension, gratuity and other purposes in terms of Regulation 126 of the Pension Regulations for the Army, 1961.



The respondents are further directed to sanction and disburse pension, gratuity and other benefits to the applicant as per the rules from the due date after taking into account his both spell of service as early as possible preferably within four months from today and accordingly pay the arrears to the applicant within the said period. The amount of gratuity of Rs.12,285/- with interest to be refunded by the applicant in terms of this order is directed to be adjusted from the arrears of pension, gratuity and other benefits. In case, even after such adjustment, any amount remains unpaid, in that eventuality, the balance amount may be recovered from the applicant from his monthly pension, in easy instalments.

16. No order as to costs.

17. Issue free copy of this order to both side.

Sd/-  
LT. GEN. THOMAS MATHEW,  
MEMBER (A)

Sd/-  
JUSTICE SHRI KANT TRIPATHI,  
MEMBER (J)

DK.

(True copy)

Prl. Private Secretary