

AFR
Court No. 2

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

TRANSFERRED APPLICATION No 79 of 2013

Monday, this the 11th day of April 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Smt Siri Kumari Gurung D/o Late RFN Naina Singh Gurung
W/o Late Naik Patiram Gurung alias Krishna Bahadur, R/o
Ram Bazar (Laxmi Tol) House No 15, Ward No, 15, Pokhara,
Kaski, Nepal.

...Petitioner

Ld. Counsel for the: **Shri P.N. Chaturvedi, Advocate**
Petitione

Versus

1. Government of India, through the Secretary, Ministry of Defence, New Delhi.
2. The Controller General of Defence Account (Pension), New Delhi.
3. The Principal Controller of Defence Account (Pension) Draupadighat, Allahabad-211014 (U.P.).
4. Officer in Charge, Indian Embassy Nepal, Pension Paying Office, Pokhara, Nepal, Post Box No. 11.
5. Gorkha Record Officer, Kunraghat, Gorakhpur (UP).
6. The Director, Department of Pension and Pensioner's Welfare, Lok Nayak Bhawan, Room No, 320, 3rd Floor, New Delhi-110003.
7. Personnel Services/PS-4, AGs Branch, Army Headquarter D.H.Q. PO, New Delhi-110011.

.....Respondents

Ld. Counsel for the : **Shri Rajiv Pandey,**
Respondents **Central Govt Counsel assisted by**
Col Kamal Singh, OIC Legal Cell.

ORDER

1. Being aggrieved with the stoppage of family pension which the petitioner, a lady aged about 103 years was receiving on account of death of her father late RFN Naina Singh Gurung since First World War, the petitioner approached the High Court by preferring Writ Petition No 4618 of 2010 which has been transferred to this Tribunal in pursuance of provisions of Section 34 of the Armed Forces Tribunal Act, 2007 and has been renumbered as T.A. No. 79 of 2013.

2. We have heard Ld. Counsel for the parties and perused the records.

3. It is admitted fact on record that the petitioner's father was soldier who fought for the country in the First World War. He died during war on 08.03.1916 in Italy. At the time of death of petitioner's father, the petitioner was 05 years of age. Family pension was sanctioned to the petitioner for life with effect from 09.03.1916. Copy of the pension book filed with the T.A. on the face of record shows that it was sanctioned till life by the then competent authorities.

4. Time moves on and the petitioner on attaining youth married on 23.11.1930 with a soldier of the Indian Army i.e. Naik Patiram Gurung alias Krishna Bahadur of 2/6 Gorkha

Rifles, who after retirement was being paid regular pension by the respondents. Nk Patiram Gurung alias Krishna Bahadur died on 17.09.1964. After his death ordinary family pension on account of death of husband of the petitioner was also given to the petitioner. Subject to aforesaid backdrop the petitioner was getting two pensions; firstly the pension admissible to her for life on account of death of her father late RFN Naina Singh Gurung, and secondly on account of death of her husband Naik Patiram Gurung alias Krishna Bahadur.

5. It appears that sometime in the year 2007 the matter came to the knowledge of the Principal Controller of Defence Account (Pension) Allahabad, (for short PCDA) that the petitioner is getting two family pensions (supra). He wrote a letter dated 02.01.2008 with observation that family pension given to the petitioner on account of death of her father in the year 1916 be stopped and since it has been paid illegally, recovery may be made. According to letter dated 02.01.2008 the petitioner was held to be entitled for family pension till she attained majority or married with late Naik Patiram Gurung alias Krishna Bahadur. Another letter dated 13.02.2008 shows that petitioner was informed that she is entitled for family pension till date of her marriage i.e. 23.11.1930 and further amount paid as pension be recovered. In pursuance of aforesaid orders,

recovery proceedings were initiated and amount of rupees five lacs and odd was liable to be recovered from the petitioner.

6. Being aggrieved the petitioner preferred Writ Petition (supra) and order of recovery was stayed by the High Court. However in the meantime rupees one lac seventeen thousand had already been recovered from the petitioner. In pursuance of stay order passed by the High Court further recovery proceedings was stayed.

7. It is argued by Ld. Counsel for the respondents that the moment the petitioner married, she became disentitled to receive family pension which was being paid to her on account of death of her father. However Ld. Counsel for the applicant invited attention to the aforesaid two letters of PCDA as well as letter dated 28.06.1990. Interestingly, both the sides relied upon letter dated 28.06.1990. For convenience sake letter dated 28.06.1990 is reproduced as under:-

*“Tele:4-10900/242 Bhartiya Najduvagtas Nepal
Sainik Pension Sakha
Indian Embassy Nepal
Military Pension Branch
Kathmandu*

*No. 21 (90) Inst/Pen/IMPs-1/6368 28 Jun 90
The Officer-in-Charge
Indian Embassy Nepal
Pension Paying Offices
Pokhara and Dharan*

*AMA (W). IE Nepal
AMA (R) IE Nepal*

PENSION RULINGS

As per the directions of Military & Air Attache, the following aspects of pension rulings are being highlighted due to reasons mentioned in each aspect :-

(a) Several; aged pensioners have expressed their inability to draw pensions to the M&AA due to illness. It appeared as if they were not aware of the provisions of life certificates. The possibility drawing pension through representatives using life certificate is to be emphasised in morning briefings of pensioners. The necessity of pensioners having to come physically once a year to draw pensions is also to be emphasised.

(b) Children Allowance – As discussed in the officers conference the following points are clarified:-

- (i) Family pension for 1st world war cases was for life (wives, parents, children).*
- (ii) Family pension for 2nd world war cases was till marriage (for daughters).*
- (iii) Family pension for daughters was till age 16 years or marriage, whichever is later in 1950's (refer para 132(i) of PPI).*
- (iv) The age limit subsequently was raised to 18 years, then 21 years, 24 years and later 30 years (OM No. 1/2/86-P & PW dt 21.5.86) or marriage whichever is earlier.*
- (v) The age limit has now been placed at 25 years or marriage whichever is earlier, and the method of rationalisation has*

been mentioned in ROIE letter No. 2101/E/NE (C) of 18 Aug 89.

2. During the checking of Pension Check Register's by Board of offices as ordered in the officers conference, cases falling in the categories mentioned in Paras 1 (b), (uui), (iii) and (iv) are to be highlighted and checked. Details of such cases and their numbers may be included in the board proceedings.

*Sd/-
Captain
Asstt Military & Attache."*

8. A close reading of the aforesaid letters shows that family pension being paid to persons of First World War victims shall be for life whether it is wife, parents or children. However, family pension for Second World War victims shall be till marriage of daughter. The provisions contained in Clauses (i), (ii), (iii) and (iv) of Clause (b) of para-1 of letter dated 28.06.1990 seems to deal with different circumstances and are disjunctive. They should be read separately to find out the intents of the authority who issued the letter. Accordingly, we are of the view that in sub-clause (i) of Clause (b), family pension to the First World War victims paid for life shall continue for life whether it is wife, parents or children. Needless to say that the petitioner was about 5 years of age and pension was paid to her being dependent of her father Late RFN Naina Singh Gurung. Sub clause (i) does not lay down any condition which may entitle the respondents or the PCDA to stop pension or make recovery. Accordingly opinion formed by PCDA seems to be incorrect and against letter dated 28.06.1990.

9. Though one of the arguments of Ld. Counsel for the respondents is that it is simply a letter and does not confer any statutory right and pension is being paid in pursuance to statutory rules and regulations of the Indian Army, but facts of the present case stand on different footing. Pension book shows that pension sanctioned to the petitioner on 19.03.1916 was for life. No order or decision has been pointed out or placed before the Tribunal which may affect pension granted to the petitioner on 19.03.1916.

10. Article 372 of the Constitution of India provides that notwithstanding the repeal by this Constitution of enactment referred to in article 395 but subject to other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority. For convenience sake Article 372 of the Constitution is reproduced as under:-

372. Continuance in force of existing laws and their adaptation. (1) *Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.*

(2) *For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient and provide that the law shall, as*

from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

- (3) *Nothing in clause (2) shall be deemed –*
- (a) *to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or*
 - (b) *to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.*

Explanation I-The expression ‘law in force’ in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II-Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III-Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV-An Ordinance promulgated by the Governor of a province under section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the

Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.”

11. Keeping in view the fact that the petitioner was paid pension in pursuance to the then existing pension regulations for life, then the marriage or no marriage shall not make any difference or create hurdle in the payment of pension to the petitioner. Though the parties have not produced the Pension Regulation relating to pension of Armed Forces personnel we presume that decision to grant pension for life was under some regulation or statutory mandate of the Army. Such provision or law would be within the meaning of Article 13 of the Constitution of India. Hence unless and until legislature changes such law it shall deem to continue under the ethos of the Constitution of India.

12. It is well settled that pension is a property envisaged under Article 300 of the Constitution of India. A person cannot be deprived of the property or the pension as in the present case saves by authority of law. Though it may not be a fundamental right on account of Constitutional amendment, right to property includes with it right to use the property in accordance with law as it stand at a particular time vide (2007) 8 SCC 705 **Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke & Chemicals Ltd.** Accordingly the pension availed by the petitioner in her

childhood i.e. since the year 1916 that has been paid till 2007 could not have been stopped by the respondents with follow up recovery proceedings without providing reasonable opportunities of showing cause and hearing. The decision taken by PCDA seems to be ex parte decision and is against the canon of justice. Petitioner who has crossed a century of her life has been deprived of her property in the form of pension by the PCDA, Allahabad without following due course of law. Hence the decision of the PCDA suffers from the vice arbitrariness and hit by Article 14 of the Constitution of India. The Bombay High Court in the case of ***Amina (in re:)*** AIR 1992 Bom 214 held that the expression “all the laws in force” includes not only the enactments of the Indian Legislative but also the common law of the land which was being administered by the Courts in India. This includes not only the personal law, viz. the Hindu and Mohammedan laws, but also the rules of the English Common law, e.g., the law of torts as well as customary laws, the rules of interpretation of statutes.

13. Hon'ble Supreme Court in the case of ***Tej Singh vs. State of Maharashtra***, (1992) Supp 2 SCC 554 held that there is no bar to an executive act or a grant or a contract made by such Ruler (the absolute Ruler of an Indian State) being modified by an executive act of the appropriate successors Government. It means that it is open to modify an order,

circular, rule or regulation governing in the year 1916 but that can be done by keeping in view the procedure provided and not otherwise. Nothing has been brought on record that relevant rules and regulations governing payment of pension to the petitioner have been modified. Rather from the letter relied upon by both the sides dated 28.06.1990 protects the right of the petitioner for payment of pension for life.

14. The decision taken by the PCDA seems to suffer the vice of arbitrariness and non-application of mind. Because of incorrect and arbitrary decision, the applicant suffered mental pain and agony not only on account of stoppage of pension but also on account of recovery of rupees one lac seventeen thousand and odd paid to her by way of pension. Such act on the part of the PCDA seems to be not proper and against letter dated 28.06.1990. The PCDA seems to be responsible for causing mental pain and agony to the petitioner. In view of above, the petitioner is entitled for exemplary cost from the respondents.

15. Hon'ble Supreme Court in the case of ***Ramrameshwari Devi and others V. Nirmala Devi and others***, (2011) 8 SCC 249 has given emphasis to compensate the litigants who have been forced to enter litigation. This view has further been rendered by Hon'ble Supreme Court in the case reported in ***A. Shanmugam V. Ariya Kshetriya Rajakula Vamsathu***

Madalaya Nandhavana Paripalanai Sangam represented by its President and others, (2012) 6 SCC 430. In the case of ***A. Shanmugam*** (supra) Hon'ble the Supreme considered a catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. ***Indian Council for Enviro-Legal Action V. Union of India***, (2011) 8 SCC 161;
2. ***Ram Krishna Verma V. State of U.P.***, (1992) 2 SCC 620;
3. ***Kavita Trehan V. Balsara Hygiene Products Ltd.*** (1994) 5 SCC 380;
4. ***Marshall Sons & CO. (I) Ltd. V. Sahi Oretrans (P) Ltd.***, (1999) 2 SCC 325;
5. ***Padmawati V. Harijan Sewak Sangh***, (2008) 154 DLT 411;
6. ***South Eastern Coalfields Ltd. V. State of M.P.***, (2003) 8 SCC 648;
7. ***Safar Khan V. Board of Revenue***, 1984 (supp) SCC 505;
8. ***Ramrameshwari Devi and others*** (supra).

16. In the case of ***South Eastern Coalfields Ltd*** (supra), the apex Court while dealing with the question held as under :

“28. ...Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim

orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation”.

17. The question of award of cost is meant to compensate a party who has been compelled to enter litigation unnecessarily for no fault on its part. The purpose is not only to compensate a litigant but also to caution the authorities to work in a just and fair manner in accordance to law. The case of ***Ramrameshwari Devi and others*** (supra) rules that it the party who is litigating, is to be compensated.

18. In the case of ***Centre for Public Interest Litigation and others V. Union of India and others***, (2012) 3 SCC 1, the Hon’ble Supreme Court after considering the entire facts and circumstances and keeping in view the public interest, while allowing the petition, directed the respondents No 2, 3 and 9 to pay a cost of Rs. 5 crores each and further directed respondents No 4, 6, 7 and 10 to pay a cost of Rs. 50 lakhs each, out of which 50% was payable to the Supreme Court Legal Services Committee for being used for providing legal aid

to poor and indigent litigants and the remaining 50% was directed to be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

19.. In the case reported in ***National Textile Corporation (Uttar Pradesh) Limited V. Bhim Sen Gupta and others***, (2013) 7 SCC 416 the Hon'ble Supreme Court took note of the fact that the Textile Corporation has not placed the correct facts before the Court and so the contempt petition was dismissed and the cost was quantified at Rs 50,000/-.

20. In view of our observations made hereinabove, we quantify the cost to Rs. one lac to be deposited by the respondents in this Tribunal within four months. The Registry shall pay the cost to the petitioner through bank draft. Bank draft shall be handed over by the Registrar, deducting clearance charges.

21. The plight of old people (in the present case, petitioner is aged about 103 years) has been noted by C.B. Langston, to reproduce a few couplets:-

*“This is old age! A slow and sure decay!
A tott'ring edifice, crusted with mould,
Failing in strength and beauty ev'rywhere!
Its vaults, and noble arches, choked with weeds!
Its casements dark, and chambers thick with dust
Its pillars bowed or prostrate on the ground!*

Its fine imposing aspect gone forever!

.....

*My growing talk of olden times,
 My growing thirst for early news,
 My growing apathy to rhymes,
 My growing love of easy shoes,
 My growing hate of crowds and noise,
 My growing fear of taking cold,
 All whisper, in the plainest voice,
 I'm growing old!
 I'm growing fonder of my staff;
 I'm growing dimmer in the eyes;
 I'm growing fainter in my laugh;
 I'm growing deeper in my sighs;
 I'm growing careless of my dress;
 I'm growing frugal of my gold;
 I'm growing wise; I'm growing—yes—
 I'm growing old!*

*I see it in my changing taste;
 I see it in my changing hair;
 I see it in my growing waist;
 I see it in my growing hair;
 A thousand signs proclaim the truth,
 A plain as truth was ever told,
 That, even in my vaunted youth,
 I'm growing old!"*

22. The T.A. deserves to be allowed, hence allowed. We set aside Telegram No. BNA-863 dated 03.04.2007 of the Principal Controller of Defence Accounts (Pension) Allahabad and copy

of Post No. At/Nepal Cell/OA/CA/9/05/Pokhara dated 25.04.2007 with all consequential benefits. The respondents shall refund the recovered amount of pension i.e. rupees one lac seventeen thousand and odd to the petitioner along with interest at the rate of 10% per annum from the date of recovery within a period of four months and continue to pay her pension on account of death of her father Late RFN Naina Singh Gurung for life with all other consequential benefits. The arrears of pension shall be paid within four months.

23. Cost of Rs. one lac shall be deposited by the respondents in this Tribunal within four months which shall be paid to the petitioner through Bank Draft payable by a Bank of petitioner's vicinity/residence.

24. It shall be open for the respondents to recover the costs to be paid to the petitioner from the salary of person or persons responsible in stopping the petitioner's pension by appropriate inquiry.

25. T.A. is allowed accordingly.

(Air Marshal Anil Chopra)
Member (A)

anb

(Justice D.P. Singh)
Member (J)