

RESERVED
Court No. 2
(List 'B')

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

TRANSFERRED APPLICATION NO 41 of 2012

Tuesday, this the 11th day of Jul 2017

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

Smt Indra Kumari Gurung Ist wife/widow of Late Mr. Nar Kaji Gurung, Resident of Bhalam, V.D.C. Ward No. 6, District-Kaski, Nepal through her representative Sri Shiva Shankar Gurung son of Sri Bhuwan Singh Gurung, resident of House No. 23, Ward No. 15, Laxmi Tol, Ram Bazar, Post Office-Pokhara, District-Kaski Gandki, Nepal.

....Petitioner

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

Verses

1. Government of India, through the Secretary, Ministry of Defence, New Delhi.
2. The Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Allahabad-211014 (U.P.).
3. The Officer Incharge, Indian Embassy Records, Kathmandu, Nepal.
4. The Officer Incharge, Indian Embassy, Nepal Pension Paying Office, Pokhara, Nepal, Post Box No. 11.
5. The Director, Department of Pension and Pensioners' Welfare, Lok Nayak Bhawan, Room No. 320, IIIrd Floor, New Delhi-110003.
6. Smt. Ram Kumari Gurung, alleged IInd wife of Late Mr. Nar Kaji Gurung, resident of Bhalam V.D.C. Ward No. 6, District Kaski, Nepal.

...Respondents

Ld. Counsel for the : **Shri Amit Jaiswal**, Central
 Respondents. Govt Counsel assisted by
 OIC, Legal Cell.

ORDER**“Per Hon’ble Mr. Justice Devi Prasad Singh, Member (J)”**

1. The petitioner wedded to late Sub Maj & Hony Lt Nar Kaji Gurung, resident of Bhalam, V.D.C., ward No 6, District-Kaski, Nepal preferred Writ Petition No 71431 of 2011 in the High Court of Judicature at Allahabad for payment of family pension in lieu of her deceased husband which has been transferred to this Tribunal under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 41 of 2012.

2. We have heard Shri P.N. Chaturvedi, Ld. Counsel for the petitioner and Shri Amit Jaiswal, Ld. Counsel for the respondents, assisted by OIC Legal Cell and perused the records. In spite of service of notice to respondent No. 6, Smt Ram Kumari Gurung, alleged second wife of late Nar Kaji Gurung (deceased), no one turned up and we have proceeded ex-parte.

3. Nar Kaji Gurung joined the Indian Army on 01.09.1948 and his date of birth as recorded in Army was 01.09.1931. Admittedly Nar Kaji Gurung got married to first wife on 15.08.1960. It appears that in the service record he has shown the first wife as absconded on 10.05.1968 and thereafter he got married to second wife Smt Ram Kumari, respondent No. 6 on 26.05.1968. Nar Kaji Gurung retired from Army service on 31.08.1980 and left for heavenly abode on 17.02.2008.

4. While filing affidavit, it has been admitted by respondents 1 to 5 that Late Nar Kaji Gurung was married to the petitioner on 15.08.1960 as per Part II Order No. 32/03/1963 but later she was declared absconded with effect from 10.05.1968 by the deceased while he was still in service and

this was notified vide Part II Order No 16/09/1971. From petitioner, Smt Indra Kumari (first wife), two sons and one daughter were born out of wedlock before she alleged to have absconded. However, according to Part-II order of the Army, respondent No. 6 Smt Ram Kumari Gurung solemnised marriage with the deceased Army personnel (supra) on 26.05.1968 and from this wedlock, she gave birth to three daughters and two sons. The marriage certificate has been filed as **Annexure CA-3**. After demise of Nar Kaji Gurung, when matter was investigated by the Army, it was found that Smt Ram Kumari Gurung was the genuine wife of the pensioner and Smt. Indra Kumari (petitioner) was not found to be genuine wife of the deceased Army person (supra). It was further found by the respondents during inquiry that the relationship of the petitioner with deceased Army person is found to be proved according to documents of Government of Nepal including citizenship card issued by the Government of Nepal and voter list, whereas relationship of respondent No. 6 was established based on Part-II order notified vide No. 32/03/63, the deceased Army person remarried her on 26.05.1968.

5. It was also submitted by the respondents that petitioner Smt Indra Kumari Gurung was living separately since she absconded along with her children and did not even attend post funeral rituals of the deceased. It is also submitted by the respondents that the petitioner approached District Court, Kaski (Nepal) against respondent No 6 (second wife) for confirmation of her relationship as co-wife claiming 50% share of family pension. According to the respondents, the Court held that family pension can be obtained only by will of person in the context of Nepal. The Court held that pension granted by Indian Army is not within their jurisdiction.

Copy of the judgment has been filed as **Annexure CA-5** to the petition.

The relevant portion of decision of District Court, Kaski is reproduced as under:

*“Upon the hearing of the case which is lodged as per law, with the plaintiff’s claim detail-my late husband Mr. Nar Kaji Gurung belonged to J.C. 34107 of 2/5 GR of Indian Army and he expired on the date 2064/11/5 BS (Feb. 17, 2008 AD). I have a right to the half of the family pension of the deceased husband but the co-wife Mrs. Ram Kumari Gurung didn’t let me have it. Pursuant to the clauses 1,2, 20 of “Scionlessness” section of Muluki Ain, I have my right to the pension amount. The advocate employed by the plaintiff namely Mr. Rohit Raj Bastola advocated that his party is still in the true faith and worth of her husband. The record in the pension camp mentioned as ‘Absconded’ is all malicious. She hasn’t eloped anywhere. The deed of 2064/06/12 BS (Sept. 29, 2007 AD) also allows her to have the half of the pension. My party needs to be decided with just her right to the pension of the deceased husband. Advocate Mukunda Sharma Paudel, in support of the defendant, pleads that the plaintiff does not have any ground to sue in the court. Only the defendant has her absolute right to the pension. The provision of clauses 3, 6, 7, 11 of “Scionlessness” section of Muluki Ain enhances her. This court doesn’t entertain any jurisdiction to decide on pension distributed by Indian Pension Paying Office. The petition of the plaintiff is thus to be rejected. After the hearing of the pleadings of the Advocates of both parties, the court comes to the conclusion that, and as per the precedent maintained in the case of Kanchanmala Chalise vs. Cabinet of Nepal (Decision No. 7755) decided by the Special Bench of the Supreme Court of Nepal, with a statement that “the family pension can be obtained only by the willed person in the context of Nepal”. The provision of pension right can be diverse and different and clause 4 of Preliminary section of Muluki Ain can’t determine it. **So far as the case between Mrs. Indra Kumari Gurung and Mrs. Ram Kumari Gurung is concerned, since it is the matter of Indian Pension, it can’t be decided from a Nepali Court due to the lack of jurisdiction.** The deed of 2064/06/12 BS (Sept. 29, 2007 AD) does not have any meaning in this context. Mrs. Indra Kumari Gurung had been separate from her husband previous to his death. A person can will anyone as per his own interest for the posthumous pension. The case is thus rejected.”*

6. From the findings recorded by District Court, Kaski (supra) there seems to be no scope of doubt with regard to petitioner’s claim to be first wife of deceased Army person. However, the Court declined to interfere

with the matter on merits for the reasons that controversy relates to pension payable by India. It appears that the petitioner herself filed Suite No. 234 of 2066 B.S. (AD 2009) in the District Court of Kaski, Nepal. The findings recorded by the District Court of Kaski, Nepal dated 24.012.2009 is reproduced as under:

*“As the case pertains within the jurisdiction of District Court as per clause 29 of Court Management Section of Muluki Ain and clause 7 of Justice Administration Act 1991 A.D, the court comes to the point of finalizing the case. So far as the claim of the plaintiff Mrs. Indra Kumari Gurung is concerned, she demands to have the relationship of co-wife maintained between herself and the defendant Mrs. Ram Kumari Gurung, as both of them are the living wives of late Mr. Nar Kaji Gurung and as both of them were married to him. This is the main claim of the plaintiff. The advocate employed by the plaintiff namely Mr. Rohit Raj Bastola pleads that the plaintiff was married to the husband in 2019 B.S. (1962 AD). The husband returned home retired on 2033 B.S. (1977 AD). The plaintiff has been living separate with her own part of property since 2063/01/25 B.S. (May 8, 2006 AD). The husband died on 2064/11/05 B.S. (Feb. 17, 2008 AD) when the plaintiff reached in the pension paying office, it was found that Indra Kumari Gurung was recorded as being absconded but she has been living in due faith and sincerity of her late husband and the relationship should be maintained between the co-wives. Advocate Mukunda Sharma Paudel, employed by the defendant, pleads that the plaintiff does not have any due reason to sue in the court. She has obtained her part of property from the husband and a citizenship card as well. Thus there is no dispute in regard of relationship. So far as the term **absconded** is used on the record of pension paying office of the Indian Pension Camp, it does not necessarily mean that she eloped. Relationship has already been maintained in regard of pension. This court doesn't entertain the jurisdiction to divide on pension distributed by the Indian Pension Paying office. The claim of the plaintiff is not genuine. Thus the law suit should be dismissed. After the hearing, the court eventually has brought together the case matters and pleadings/proofs of both parties. When studied, it is found that the first wife is recorded as being **absconded** in the Indian Pension Paying Office which means “to escape from the place you are not allowed to leave without permission”, as per Oxford Dictionary. It was the record of 2023 B.S. (1966 AD), when the husband was remarrying his second wife. The plaintiff has demanded to proceed and get the case decided as per clause 5 (A) of ‘Spouse’ section of Muluki Ain, but there doesn't seem to be any illusion in regard of relationship. It is already understood. The plaintiff and defendant would have*

compromised if the deed of 2064/06/12 B.S. (Sept. 29, 2007 AD) was accomplished within Indian Pension Paying Office, Pokhara. It is apparent that the plaintiff has right to have the relationship of co-wife maintained with her step but this is not the issue of dispute. The previous records indicate that they have been co-wives to each other and this fact hasn't been denied anywhere. The late husband married the plaintiff in 2019 B.S. (1962 AD), granted her a citizenship card in 2045 B.S. (1988 AD) and provided her a part of his property too. The plaintiff's claim for relationship confirmation is not thus applicable and necessary. Do as follows on other matters."

7. A plain reading of the subsequent judgment shows that the finding has been recorded by the District Court of Kaski, Nepal that the petitioner married with the deceased Army person and inherited part of his property; hence relationship confirmation is not required.

8. Keeping the arguments advanced by the Ld. Counsel for the parties, there appears to be no scope of doubt that the petitioner is the legally wedded wife of the deceased Army person. The allegation that she deserted her husband relates back to 10.05.1968 and marriage of Smt Ram Kumari Gurung (respondent No. 6) with deceased Army person took place on 26.05.1968. The matrimonial difference between the date of desertion by petitioner and second marriage with respondent No. 6 speaks volumes. It appears that illicit relationship has been validated by the marriage of deceased Army person with respondent No. 6.

9. However, in any case, by ex-parte proceeding, on the statement of deceased Army personnel, the petitioner's name was deleted from the Army records by respondents through Part-II order.

10. Regulation 216 of Pension Regulations provides that family pension shall be paid to the legally wedded wife. For convenience sake, Regulation 216 of Pension Regulations is reproduced as under:

“216. *The following members of the family of a deceased individual shall be viewed as eligible for the grant of a special family pension, provided that they are otherwise qualified:-*

(a) *Widow/widower lawfully married. It includes a widow who was married after individual’s release/retirement/discharge/invalidment.*

(b) *Son actual and legitimate/including validly adopted.*

(c) *Daughter, actual and legitimate/(including validly adopted).*

(d) *Father.*

(e) *Mother.*

(f) *Brother.*

(g) *Sister.*

Note 1.-The term “widow” used in the above or any other regulation in this sub-section in respect of special family pensionary awards shall be deemed to include such a widow who was married after the individual’s discharge/invalidment.

Note 2.- The term “child” used in the above or any other regulation in this sub-section in respect of special family pensionary awards shall be deemed to include such a child born out of a marriage after discharged/invalidment of the individual.

Note 3.- The term “father” and “mother” or “parents” used in the above or any other rule in this sub-section shall also be deemed to include such putative parents (or surviving parents as the case may be) as had not contracted a lawful marriage but were living as head of the family or got lawfully married subsequent to, the conception of deceased member of the forces.”

11. Thus, marriage of the petitioner with deceased Army personnel is not disputed. Two judgments of District Court, Kaski, Nepal also concurred that the petitioner inherited part of property of deceased Army personnel. Under Indian customs and traditions and the provisions of Hindu Marriage Act, the second marriage without divorcing first wife shall not be lawful and valid, but the children, even if illegitimate, born from second wife will have right to get share in the property.

12. It has been argued by Ld. Counsel for the respondents that under the customs and traditions prevailing in Nepal, the marriage with second wife, i.e. respondent No. 6, shall not be illegitimate. She will have a right to share the family pension. A statement was made by Ld. Counsel for the petitioner on instructions received that 50% of the family pension may be paid to respondent No. 6, i.e. the second wife so that she can fulfil the financial requirements to bring up three children of deceased pensioner. Relevant portion of Order Sheet dated 30.05.2017 is reproduced as under:

“During the course of argument, Shri P.N. Chaturvedi, learned counsel for the petitioner, on the basis of instructions received from parties, submits that petitioner has no objection in case 50% pension is paid to the second wife from the date of death of her husband.

On the other hand, learned counsel for the respondents submits that substantial portion of the pension has already been paid to second wife and at this stage recovery is not possible.

In the meantime, the payment of pension by the respondents shall remain suspended till the delivery of judgment.”

13. Though respondent No. 6 has not put in appearance, but keeping the consent of the petitioner and having no assistance from the parties to look into the customs and traditions prevailing in Nepal with regard to second marriage and the orders passed by the District Court, Kaski (supra), we are of the view that family pension may be divided into two equal parts and the petitioner and respondent No. 6 be paid 50% each.

14. In view of observations made herein above, the T.A. deserves to be allowed in part.

15. Accordingly, T.A. is **allowed** in part with regard to petitioner's entitlement to family pension of deceased, but it shall be to the extent of

50% only and rest 50% shall be paid to respondent No. 6 with consequential benefits. Amount paid to respondent No. 6 as family pension shall not be recovered. However the arrears of family pension and other post retiral dues, if any, shall be divided equally between the petitioner and respondent No. 6. Let the order be complied with expeditiously, say, within a period of four months from today providing all consequential benefits.

T.A. is **allowed** accordingly.

No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice Devi Prasad Singh)
Member (J)

Dated: July, 2017

Rathore