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Editorial:

The free and fair justice as sought by the people is possible only if there is an independent judiciary. Conventionally, our Supreme Court has been exercising the power of interpreting all the laws enacted by the state and, in that course; it also passes verdicts which, sometimes faces criticism of the government in office, if its interests were not met. In all such circumstances, the government not only hesitates to abide by the court's ruling but also raises questions of judicial accountability. It is an utmost duty of the government to extend cooperation in implementing the court's verdict. When the government itself remains adamant to the court's verdict; justice to be delivered by the court cannot be materialized its thirst and the essence. Consequently, the overall government systems become a failure and loose the confidence of the people. People may suffer much from such helplessness of law and justice. Therefore, the issue as to who, the legislature-parliament or the judiciary should be made empowered to review or alter the government decision must be finalized first to ensure the independence of judiciary.

Ahead are the challenges to be coped with more cautiously and accountably. There are lot of punishment and fine yet to be recovered as arrears by the court as per the orders and decrees made so far. They are almost impossible realizing without the meaningful cooperation of the government. Added to this entry of new types of cases associated mainly with need-based rights such as; equal distribution of state means and resources together with the enjoyment of the basic human rights and the third generation rights overwhelmed by the fever of globalization, have been increased enormously. Taking into account all these works load, the Supreme Court has to broaden its scope and jurisdiction and recruit capable manpower to address all these new issues. Only the quality judgment will be able to satisfy the quest of justice seekers, thereby upholding the dignity of the judiciary.

Apart from day to day business, the Supreme Court has been issuing its verdicts, decisions and orders through *Nepal Kaanoona Patrikaa* (a monthly law journal) and a fort-nightly bulletin, in Nepali language. In addition to this, it has started its English version which covers some major decisions passed throughout a year. Currently, it is releasing its third issue which covers decisions on cases regarding other property matters, inheritance, recognition of the decisions made by the court of foreign countries, right to information, heinous nature of criminal cases such as rape, intentional killing of man by vehicular mishaps, on positive discrimination as well as on contractual liability and issues relating to the appellate court's jurisdiction on arbitration, besides public interest litigation.

Many graft related cases are being brought into book everyday. The court, within a couple of years, has achieved great success in punishing the real culprits; however, the leadership complacencies and indifferences are still the factors to discourage the rule of law and good governance. Financial misconducts arising from foreign employment and its avoidance measures are outlined. Benefits related to elderly people are also talked of giving due vigil to resources available. Precisely, the Supreme Court has proven its track record of tackling many significant issues these days.

It is a commendable job of regularizing its publication in English. This will certainly enable the non- Nepalese readers to know more about our court deliberation and current practice and procedures. These publications will also benefit to the students and teachers who are involved in advance studies of law in abroad and locally, too. We hope our efforts will be appreciated by all concerned.

We expect good comments and constructive suggestions from our readers for making the next issue better and useful. Thank you.

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Writ No. 68-ws-0014

Subject: Tenth Amendment to the Interim Constitution of Nepal 2063 be declared null and void.

Petitioner: Bharatmani Jungam, a resident of Kathmandu Metropolis Ward No. 34 of Kathmandu District & others.

Vs

Respondents: Office of the President & others

- **Where there is a clear specification of time limit, the action thereof must be done or completed within the time limit so specified. The time period stipulated in Article 64 of the Interim Constitution for the making of a Constitution through Constituent Assembly must not be taken as a formality or a show.**

- **While framing the Interim Constitution, its framer had a fine speculation on the necessity of time specification in order to cause the timely promulgation of it. If this truth is undermined and attempted to draw an archaic interpretation of the original spirit of Article 64 of the constitution to mean that the right to amend constitution includes also the right to extend time period again and again by pushing the task of promulgating into uncertainty constitution into uncertainity shall go against the mandate given by the people. It is also unreasonable through the view point of the constitutional jurisprudence to unusually extend its time period by the Constituent Assembly itself so as to create a limitless and uncertain situation.**
- **It is in fact a legitimate expectation of people to be assured in the timely making of the constitution when the Constituent Assembly itself has announced the work plan and time schedule of bringing the constitution in order to satisfy the just expectations of the people. Any agency which is bestowed with a historical liability of making constitution is bound to respect such legitimate expectation of the people and become responsible to fulfill the pledges accordingly. If it fails to fulfill its responsibility within the time frame so prescribed and extends time limit again and again on its own accord this trend not only develops a situation of uncertainty and dilemma but also raises question in the legitimacy of its work. One of the key features of democratic rule is to provide also a government accountable to the people in such a rule, the pledges made before the people are required to be fulfilled. In the failure of which people shall have right to ask the reason why ? In this it will be wise to take and perceive the present writ petition as part of seeking the reply of that accountability.**

- **The respondent agencies are found reluctant and differed to fully capitalize the intent of the constitutional interpretations made in the decisions with clear expression and called for demonstrating their worthiness. Although both the earlier writs were vacated, however, there were made elaborative discussions on the legitimacy of the amendment of Article 64 and defined doctrine of necessity including the time limitations and are based on clear justification of the fact auxiliary to it. No serious attention was found paid on the reasoned proposition made by this court and the judicial viewpoints expressed in them. In such a situation, a conclusion derived only taking their vacation as threshold cannot be held as worthiness to claim that the frequent amendments in Article 64 is recognized and given validity.**
- **It is worthless to repeatedly mention that the only duty of CA is to make constitution. The mere echoing of such a gospel time and again will not help to reach a meaningful conclusion. It is equally unwise to neglect Article 64 and state that the tenure of the CA will be terminated only after the CA makes constitution and brigns into operation. In fact, the intention of Article 82 is not to prolong the time period and make it uncertain by effecting frequent amendments in Article 64 nor such rationality of extending the CA term up to the unknown future will be logical.**
- **It is not a judicially manageable subject about whether to form a new CA in pursuant to Article 63 of the Interim Constitution, 2063 resorting on the fact that the making of constitution is not possible by the existing CA or give it continuity and ratify the commitment it may make for writing a constitution within a fixed time period by conducting referendum or think about other options available to the people to ensure their right of making a**

new constitution. Since it is purely a political issue, the solution thereof must be sought by the political level remaining within the boundary of constitutional framework, not going beyond it.

- **There is likely to be created a situation of looming suspicion and doubt among Nepali people about whether the issues associated with democracy, peace , prosperity and the major economic and social changes also may fall into the crisis of overall problems to be furthered along with the continuation of transitional period . To free the people from such a fear, there is no option available to the court for now other than giving assurance of coming new constitution through the existing CA itself. This court is not also in favor of making an attitude of continuing such an agency forever as universal and option less which cannot fulfill its major responsibility of bringing a constitution till the uncertain future. Any agency or body created under the constitution by assigning certain duties and responsibilities will have also a fixed reasonable time limit and duration, the present Constituent Assembly also cannot be an exception to it.**
- **Any individual or institution liable to discharge the assigned duties and responsibilities when fails to do so by his incapacity or due to arising a situation beyond control is referred to as a circumstance beyond control. It is the very intent of the doctrine of necessity. If such a situation cannot be neglected or avoided and it compels to take a decision and if such a decision would not have been lawful even in a normal situation and the reasonableness and legality of occurrence of such a condition is when substantiated by the time and situation, the doctrine of necessity could be attracted. Provided that, the doctrine of necessity cannot be applied in concealing one's own fault, inaction and the problems created by one.**

- **It does not shove to any lively organization to take the doctrine of necessity as tool of defense for ones own miscreants. The constitution always hopes the positive response and liveliness on its and its components doings. The constitution is such a lively instrument which bears the capacity of operating the whole state mechanism actively and dynamically even when there are possibilities of arriving multifold of obstacles, a hardships and difficulties across the life of the nation. So a constitution does not imagine a situation of lifelessness of the state which impairs the whole process by considering the one and the same problem as the never ending one.**
- **The aspirations of Nepalese people to bring about a new constitution through the Constituent Assembly, the fund consumed by the state to date after the initiation of constitution making process and to secure the achievement CA has accomplished up to now in course of drafting the constitution are the most significant constitutional responsibilities to be carried out by this court. It is natural to expect that all possible efforts will be made to promulgate the constitution within the time period extended by the tenth amendment. In otherwise condition, it will be more appropriate and justifiable to provide the last opportunity to the present CA if it needed the additional time period in order for the completion of remaining works and bring about the constitution.**

Decision

Khil Raj Regmi,C.J: The facts in brief and the particulars of the order made on the present writ petition filed in this court pursuant to Article 32 and Article 107(1) and (2) of the Constitution seeking nullification of the truth amendment to the Interim Constitution of Nepal, 2063 made

on 2068/5/14 since it is in contravention to the provisions enshrined in the constitution, is as follows:

Article 64 of the Interim Constitution of Nepal, 2063 has provided for the tenure of the Constituent Assembly. Except when the CA passed a resolution for its premature dissolution, the tenure of the CA will of two years from the date of convening its first meeting. In regard to such provision, the Supreme Court has given opinion in writ No.0056 dated 2068/2/11. In this, it is argued that the term of the CA should be maximum of 2 years and in special circumstance, or when there exists an emergency period in the country, it may be extended not exceeding 6 months. From above proposition it is clear that the tenure of CA will be not more than 2 years and additional 6 months only in view of the doctrine of necessity. The respondents were obliged to take that decision into account as a guideline but in contrary they caused 3 months extension on 2068/2/14 unethically. We the petitioners had made complain against such act of the respondents through Writ No.0071. The opinions expressed in the earlier decisions were sustained also in this writ petition. In such a situation, a notification published in Nepal Gazette Vol.61, Supplementary Issue 21, dated 2068/5/14 so as to extend additional 3 months term of the CA. Since the tenth amendment to the constitution effected as per that notification is illegal and contrary to the law, we are here with this writ petition with a plea that such an act of the respondents be invalidated.

Until before the eighth and ninth amendments to the constitution, there was a clear provision that the tenure of the CA will be of 2 years. The writ petitions filed with this court in connection with those amendments were clearly outlined about the term of CA. At that time even if those amendments were not declared invalid, though were not recognized lawful as usual. In such a situation, again there effected the tenth amendment, therefore, such an act should be the subject of judicial review. Article 148 provides for the amendments to the constitution. While affecting the eighth, ninth and tenth amendments, the said Article are fousnd ignored. Likewise, Article 64 provides for the manner about how to make changes in the term of CA is as prescribed under the same Article. In case the constitution did not

come into force within the stipulated time, there may ipso facto rise a political question about which the preamble of the constitution suggests that the only way out of the problem is to go into the periodic election. In such a situation the act of frequent extension of time limit about which the Article 64 clearly specifies shall be ipso facto void in the eyes of law.

The trend of extending time period once and again in this way and the relative progress in relation to making the constitution is if not achieved within the time period so extended, such an act will hinder the making of constitution till the uncertain future. In that course, there has been the gross misuse also of the doctrine of necessity. The doctrine of necessity should not become the reason for making the Article 64 inoperative. If the representatives sent by the people failed to accomplish their mission within the prescribed time period and the expectations of the people were not met, the inherent right of people to select new and qualified representatives should be honored, and for this and in such a situation the election will be the only way out for receiving the fresh mandate. The mandate given by the people through election is only for 2 years which was speculated also by the maker of the Constitution. Therefore, no time period other than what the people decide could be extended.

Now therefore, the tenth amendment to the constitution is fully unconstitutional and illegal on the basis of the ground mentioned above and also on the basis of the opinion expressed by this court in the decision made upon Writ No.0056 and 0071. It is against also the spirit of the preamble and the Articles 2, 13, 32, 63, 64, 83, 85 and 148 and involves serious constitutional and legal issue of public right and interest. So it requires an order of prohibition, certiorari or any other order as it may deem appropriate to be issued in pursuant to Article 1, 32, 107(1) and (2) and be declared invalid the tenth amendment to the Interim Constitution of Nepal, 2067 published in Nepal Gazatte part 61, Supplementary Issue V declared invalid from the very date of its commencement.

Moreover, an interim order also is hereby requested to be issued in the names of respondents Prime Minster and the speaker of the

House prohibiting them to register any bill in the Parliament so as to cause any change or alteration in the wordings and phrases contained in Article 64 of the constitution until this writ petition is finally disposed of. The petitioner, in petition also requests to be given priority in the hearing since it involves a complex constitutional question and asks to have the date of hearing fixed.

The single bench of this court orders on 2068/6/5 requiring the respondents to submit their written reply in writing with explanation about how this situation arrived ? Why the orders as sought by the petitioner need not to be issued? If there exists any reason or ground for not issuing the order, submit a reply thereof in writing through the office of the Attorney General within 15 days of receiving this notice of the order. The respondents be sent also a copy of the writ petition each along with the notice and notify the matter thereof to the office of the Attorney General by fixing the date of 2068/7/1 so as to present the case for hearing. Similarly, inform Nepal Bar Association and the Supreme Court Bar Association for representation of 3 senior advocates or advocates each to assist the court (amicus curie). The earlier decisions made by this court in this connection also be accompanied with this case file. Write the concerned Bar Association to inform those legal practitioners desirous of submitting written plea prior to the date of hearing and let know to the concerned legal practitioners about the same.

The constitutional as well as the legal questions raised by the petitioners in this writ petition have already been answered by the full bench of the Supreme Court through the writ Nos. 066-ws-0057 and 067-ws- 0071 filed by these petitioners in regard to the eighth and the ninth amendments to Interim Constitution of Nepal. So there exists no reason and justification in filing the present writ petition again raising the same question challenging the act of extending the CA term for 3 years and 6 months by the tenth amendment. In paragraph 12 of the petition, the petitioners have made a claim that the Supreme Court has not given validity to the eighth and the ninth amendments. This fact is not supported by the order made by the Supreme Court. The court, in reference to writ No. 0066-ws-0056 has reasoned the

vacation of the writ on the ground that the time period extended by the eighth amendment has already been terminated whereas in reference to writ No.067-ws-0071, the court denies the claim on the ground of doctrine of necessity and thus legalized both the amendments on that ground. The claim of the writ petitioners therefore appears baseless and extravagant.

The concern shown seriously in writ petition about the need of timely bringing of the constitution as mandated by the people is praiseworthy. The CA had developed a work-schedule (time table) on 1st Marga, 2065 and commitment shown in completing the writing of constitution within the period stipulated in Article 64 and has been working accordingly. Despite such efforts, the mission could not be accomplished within the time frame which compelled for extending the time period up to 3 years. This is the ground reality witnessed by all concerned.

The task of writing constitution was in progress giving due vigil to the limitations fixed by the CA Rules and allowed by the time table. In that course of action, there formed 40 teams from among the total member of the law-makers and assigned to all the 240 constituents of the country to conduct opinion poll of the people through questionnaire for a period ranging from 2065/11/16 and 2065/12/9 which could be taken this as a historical achievement. All the subject committees and the constitution committee, working under their respective frame works for a period between 2066/2/9 and 2066/10/20 prepared the concept paper on the future constitution and a preliminary draft report thereof and, submitted to the CA and had held discussions over the report of each committee allocating to each paper a 30 hours deliberation. The CA gave nod to the report of the committee on natural resources, the economic right and revenue allocation, determination of the structure of the constitutional bodies and the protection of right of minority and marginalized community and has sent to the constitutional committee on 11th Magh, 2066, 19th Falgun and 21st Chaitra, respectively in order to prepare the first integrated draft. The task of preparing the first draft of the constitution had began from the month of Falgun 2066 by preparing a preliminary frame work of the future constitution

enclosing with the preliminary draft of the committee received after their approval from the CA which was divided in 27 parts along with other collateral facts (basic elements) to be contained in the constitution together with the preamble and schedule. The said business is still in progress. Because of the collision of facts such as, duplication, contradiction, omission and to overcome the unresolved and disputing report of the various subjects committees, a 15-memberd concept paper and preliminary drafting report study committee was formed by the 29th meeting of CA held in 2066/2/13 to finalize those misgivings through consensus and to integrate them in one and give final shape. The said committee completed the study of report of all the subject committees and submitted the final report of the committee on 2067/6/14 to the chairman of the CA along with 210 questionnaires unable to be settled by it. In order to reach a political consensus over those unresolved questionnaires there held a meeting of all parliamentary party leaders representing in CA in the move of the chairman of CA and reached consensus on 132 unresolved issues, between 2067/6/19 and 2067/8/26.

This process of constitution making suffered many times from the incidents occurred outside the CA. Because of frequent government reshuffle and the failure of peace process to reach a meaningful conclusion in time as expected which has very close relation with the making of the constitution caused obstruction in the writing of constitution, time and again. These are the reasons why the writing of constitution did not completed within the time period hoped by the people and thus needed extension of CA term. After making one year extension in CA term by the eighth amendment on 14th Jestha, 2067 and accomplish the mission within the time frame, it involved heavily in that job with necessary alternations in its work schedule for 11th time. Many issues resolved during this period and in 78 issues related with the report of the 7 committees and 78 issues related with state restructuring, the constitutional committee itself shall prepare the first draft by bringing consensus on its own. If no consensus reached on any issue, it shall be presented to the CA for decision. In this way, the reports of the 7 committees and report related with state restructuring have been forwarded to the constitutional committee on 2067/10/12

and 2067/12/3, respectively. This is the reality. The constitutional committee has formed a Dispute Resolution Sub-committee on 2067/11/13 consisting of the top leaders of the major parties to hold discussion and reach consensus on the unresolved issues and coming up to 2068/2/14, there has reached consensus on 53 issues out of 78 issues related with the 7 committees and only 25 issues were remained to be overcome. The other 78 issues related with restructuring were required to have obtained the opinion of the experts and reach conclusion about which the discussion was holding on .

In this manner, the CA has been successful in preparing the significant base for a democrating constitution and the disputes also were relatively narrowing down. It was ready in preparing the first draft of the constitution by resolving the remaining issues so as to be completed after collecting the opinion and advice of the sovereign Nepali people. It was the most needed thing of the hour and so compelling to effect the 9th amendment to the Interim Constitution of Nepal, 2063 which the legislature- parliament by did extending the tenure of the CA by 3 months. Within the period of this extension there held the 9 consecutive meetings of the Dispute Resolution sub-committee under constitutional committee. These meetings reached consensus on 3 issues whereas the 78 issues related with state restructuring narrowed down to 25. Now there are only 47 issues left to be settled by the Dispute Resolution Sub-committee and then immediately the first draft of the constitution will come out and the tens of years of long awaited aspiration of Nepali people to make a constitution through representatives elected by themselves will be fulfilled. This being the main reason and ground of the doctrine of necessity, I, most respectfully request to this revered court that the Legislature- parliament has made the tenth amendments to the Interim Constitution of Nepal and extended the tenure of CA by 3 months. There is no apparent reason for not coming out the constitution. Now the constitutional committee has been working in preparing the draft of all the subject matters so far resolved and includes it in the frame of the first draft of the constitution.

There is no dispute on the fact that the main objective of the Interim Constitution of Nepal is to make a constitution through Constituent Assembly. It is clearly manifested by the facts mentioned in various paragraphs above that the CA is heavily, involved in this task. The Interim Constitution does not provide for the fresh election of the CA if the CA formed after the first election fails to bring about the constitution. It is compulsory to make amendment to the Interim Constitution of Nepal, 2063 also to form another Constituent Assembly as complained of by the petitioners because for taking a fresh mandate there needs to held election for which the political powers existing in Legislature – parliament are required to be consented to add such provision in the constitution. It is a political issue whether or not to opt for such a risk and this should be concluded only through the political level. If there exists any possibility of political consensus - making the peace process reaching near to end into meaningful conclusion and standing on the achievements so far accomplished by the CA, there appears a clear ground for bringing about a democratic constitution. For this the political powers and Constituent Assembly also are found committed. Against such background, it is thought more relevant also to the political view point to make the constitution by this very CA. To forge political consensus towards reaching the nearly completing process to the conclusion will preserve the best interest of the people. The Legislature-parliament, while effecting tenth amendment to the Interim Constitution of Nepal, 2063, has fully respected the intent and spirit of the order made by this revered court on 2068/2/11 and 2068/5/11, respectively, and, the 3 months extension of the term of CA was motivated with the legitimate objective of performing the task of making constitution as per the mandate given by the people which is consonant also with the doctrine of the necessity. Hence, no order as sought in the petition seems necessary to be issued. The writ petition is requested to be quashed. These were the contents of the written reply submitted separately by the CA secretariat and the speaker of the Parliament, with similar version.

The petitioners in their petitions are unable to clearly mention the reason about how and by what action or the decision of the Office of

the Prime Minister or the Council of Ministers have been unconstitutional. While making claim of judicial review of any action or decision referring it as unconstitutional, the reason thereof must explicitly be mentioned and require to furnish the proof and evidences with the petition to substantiate the claim. In the lack of such evidences, the mere claim will not deserve any value. The present writ petition lacks those requirements. Hence no order could be issued as demanded and the writ petition is requested to be quashed.

The Interim Constitution of Nepal, 2063 was adopted with the objective of making a new constitution through the Constituent Assembly and is also a provisional instrument for operating the state affairs during interim period until the new constitution comes into force. Since the Constituent Assembly is a basic structure within the Interim Constitution of Nepal, 2063, without Constituent Assembly we cannot just imagine the existence of Interim Constitution, 2063. Though Article 64 provides for the tenure of Constituent Assembly, in Article 82 there is a provision of ending the purpose of Constituent Assembly only from the date of commencement of the Constitution adopted by the Constituent Assembly. In addition to this, the provision contained in Article 64 cannot be taken as amendable since Article 148(1) provides for a condition according to which any bill concerning amendment or repletion of any bill concerning amendment or repellation of any Article of the constitution could be tabled in legislature- parliament. So the Article 64 of the constitution cannot be taken as independent, derive its individual meaning and interpret similarly. The provision contained in Article 64 is required to be interpreted putting together with the preamble, the basic structure as well as Article 82 and 148 of the constitution. Therefore, in order for respecting and safeguarding the right of Nepali people of bringing their constitution by themselves through Constituent Assembly, the tenth amendment motion of the constitution registered in the legislature - parliament on behalf of the government of Nepal to cause amendment in the provision contained in Article 64 by giving special focus on the key essence and spirit of the preamble, Article 82 and 148 of the Interim Constitution of Nepal, 2063, which is passed by the two-third majority of the legislature- parliament and has already been

brought into effect. Hence, no order as sought by the petitioner should be issued. Similarly, the claim that the decision made upon Writ No. 0056 and 0071 by this revered court has not given validity to the eighth and the ninth amendments in Article 64 also are not true. In addition to this, since the matter of bringing any amendments lies under the special jurisdiction of the constitution lies under the special jurisdiction of the legislature parliament, this revered court should not speak on such matters. Hence, the writ petition which appears irrational on the basis of the above reason and ground is requested to be quashed. These are the contents of the written reply submitted by the Office of the Prime Minister and the Council of Ministers and on behalf the prime minister himself.

In a circumstance when the task of writing the constitution is not completed, the tenth amendment to the Interim Constitution of Nepal, 2063 was brought by taking into account the inevitability of the said amendment. Although there has been made notable achievement in the writing of constitution by reaching consensus among the parties on many disputed issues raised in relation to the writing of constitution during the period extended in the motion of the ninth amendment bill of the Interim Constitution of Nepal, 2063, by this revered court through writ No.067-ws-0071, however, the peace process and the task of writing constitution has still to reach a meaningful conclusion. Since the ninth amendment to the Interim Constitution of Nepal, 2063 was made on the basis of the doctrine of necessity, and the writ petition was vacated on that ground, the argument raised against the validity of the (tenth amendment) in the Interim Constitution of Nepal, 2063, does not sound reasonable.

The Constituent Assembly is the only elected body representing the people in under the Interim Constitution of Nepal, 2063. So it's only responsibility is to write the future constitution of Nepal. The sovereign Nepali people, through the way of writing constitution, shall exercise their sovereign power of making their constitution on their own and the formation of such assembly in the life of the nation appears very rear. So the Constituent Assembly should be viewed differently to that of other elected bodies. The Interim Constitution of Nepal, 2063 has not

seen the possibility of conducting the election of CA when desired. In this circumstance, there is no option available before CA, acting as legislature parliament, other than extending its term in order for fulfilling the expectations of the Nepalese people to make their future constitution, by completing the rest of the businesses. I would like to mention here the ultimate need of extending its working period by exercising the power of amending the constitution conferred to it by the constitution in an urging situation. Any action done or performed by any agency shall have to receive legitimacy on the ground of necessity. Necessity makes that lawful which otherwise would not be lawful (Necessitas facit licitum quod alisa non est licitum). This is an established norm of jurisprudence. So, the extension of CA term is substantiated by reason and legitimate as well. The arguments put forth against its legitimacy do not sound logical. This remained the content of the written reply submitted on behalf of the Ministry of Law and Justice.

The Interim Constitution of Nepal, 2063, Article 148(1) provides for condition in which any bill related to the amendment or rescind of any Article of the constitution could be submitted to the legislature parliament. Similarly, Sub- Article (2) states that any bill tabled under sub- Article (1) if approved by the two-third majority of the total members present, the bill shall be deemed to have been passed. This is one of the modes of amending the constitution. Article 165(1) (d) provides for the definition of a bill according to which bill means a draft document of a constitution or a statute tabled in legislature parliament or in Constituent Assembly. Article 87 clearly states that a bill passed by the legislature parliament shall become law after verification by the President. In this way, the Interim Constitution of Nepal, 2063 had a clear provision on the amendment of constitution, meaning of a bill and its verification criteria.

The Office of the President in its written reply mentions that since a request received in writing by the speaker of the legislature parliament to office through a letter dated 2068/5/31 with a request for the verification of the tenth amendment to the Interim Constitution of

Nepal, 2063 and when the same was verified by the President of Nepal, no order as sought by the petitioner should be issued.

The present writ petition which is duly submitted before this bench seeking an order for the nullification of CA term extended by the tenth amendment states that since Article 64 of the Interim Constitution of Nepal, 2063 provides for the term of CA, the task of writing constitution had to be completed within that time period but demonstrated a tendency of only extending the time period again and again instead of writing constitution within the time period stipulated by the original constitution as well as the opinion expressed by the Special Bench of this Court upon writ No 066-ws-0056 and 067-ws-0071 filed in this court about eighth and ninth amendments offering clear guideline while making interpretation of the Article 64 relating to the CA term is ignored, now therefore, such action of the respondents should declare null and void. The respondents in their written reply argued that a noteable progress has been made in the writing of constitution because many contentious issues have been resolved concerning the making of the constitution. During the hearing of the petition, the learned legal practitioners representing from both sides and the amicus curie putforth their respecting arguments, for and against. The lawyers representing from the petitioners:

Senior Advocate Devendra Lal Nepali:

The Article 64 has been interpreted by the court as a mandatory provision. The written reply has wrongly interpreted stating that the said decision favors the amendments of extending the CA term. The rule of law and constitutional supremacy would become meaningless if the unlawful activities were encouraged taking defense of the doctrine of necessity. The respondents are likely to extend the time period again. Now therefore, the writ of prohibition along with other necessary orders as it may require shall be necessary to be issued to stop those unlawful acts of the respondents.

Senior Advocate Sita Ram Adhikari

It is necessary to come clear interpretation from the Court for how many times the doctrine of necessity could be used. The court has

already spoken of that the term of CA could not be protracted till the unknown future. It is contrary to the constitution continue time extension on the ground of doctrine of necessity in regard to matter for which the constitution itself clearly specifies. The doctrine of necessity does not allow acting unconstitutionally.

Senior Advocate Pavan Kumar Ojha:

The interpretation of the doctrine of necessity should be made so as to receive universal recognition. The CA has been failed to prove the rationale of time extension. The purpose for which the election of CA was done, the representatives of the people will be competent to exercise sovereign power until for a period prescribed for that purpose. Such a sovereign parliament cannot be remain forever, it remains only for a prescribed time period for the prescribed duty. The rule of law is equally applicable also in the case of CA. No one can act going beyond its limitations.

Advocate Ramji Bista:

Since the constitution clearly provides for the election and formation of CA, there is no constitutional hurdle to hold the fresh election. Where there is a clear provision in the constitution itself, the doctrine of necessity cannot be attracted.

Advocate Matrika Prasad Niraula:

For now, it will be more reasonable to ascertain the limitation of doctrine of necessity to what extent could be made flexible. The respondents have extended the term of CA by making amendment to the constitution; it is really treacherous act committed against the people. No one shall have right to underscore the original testament of the people. Such a frequent amendments to the constitution will render the democracy, human rights and adult franchise ineffective and valueless. So the writ as demanded by the petitioners should be issued.

Advocate Dr. Chandra Kanta Jha:

No notable achievements are found made within the extended time period. This could not be read as that it demonstrated its sufficient willingness in the job. Till date, it has not initiated producing even a single draft of the constitution. However, the issuance of writ may cause further complexity and uncertainty for managing the transitional period. So constitutional ambiguities should be ended by extending the time period to make the CA responsible to have its liability fulfilled, but the state treasury should not sustain further burden. This means no cost extension should be allowed.

Advocate Vijayaraj Shakya:

The doctrine of necessity has been the tool for extending the time period after the court gave its interpretation.The doctrine of necessity is not that subject matter which could be defined and used when needed. To prolong the transitional period gives birth of many problems. It has created a situation of exercising constitutional anarchy. So for the court, it has been inevitable to come with clear conscience to overcome such oddities and therefore, an order as requested should be issued.

Petitioner as well as Advocate Balkrishna Neupane:

The representatives of the people shall have no right to remain in office beyond the period authorized by the people by delegating their sovereign power. In a situation of clear time stipulation, it should not be meant as to remain continue after the termination of such period neither the people's representatives can extend the period exceeding more than what the people had given mandate. The preamble of the constitution has paved the way for a periodic election. So the law and constitution also had no objection if such a situation arises. In a circumstance, when the constitution could not be made within the stipulated time period, only the CA members will have their tenure terminated. It does not mean that the existence of Constituent Assembly also will be ended together. It can be reinstated by the fresh election. So it is requested to have an order issued as demanded.

Petitioner Bharatmani Jungam:

The people have scared their sovereignty and right to adult franchise by the act of the respondents. The preamble provides for a periodic election which signifies the possibility to arise such a situation. The intention of the respondents to further the CA term which has already been terminated, has impaired the sovereign power of the people. So the writ petition should be materialized.

The Learned councilors representing the respondents:
Attorney General Mukti Pradhan:

The petitioners are found to have demanded the end of CA instead of testing the constitutionality of the amendment to the constitution, which does not seem possible through the present writ petition. The writ petition is erroneous in itself. The CA is busy working in drafting the constitution and has narrowed many contentious issues relating to the making of the constitution. Since the peace process also is one of the most crucial parts of making the constitution and has been progressed more hopefully in the later days. So the writing of the constitution is likely to be completed soon. At a time when the nation as a whole is suffering from the transitional period, the court is essential to perceive sensitiveness of the situation. The relevancy of the doctrine of necessity still exists, so the writ petition should be dismissed.

Deputy A.G. Pushpa Raj Koirala:

The Interim Constitution of Nepal, 2063 does not provide for the unamendability of any Article which equally applies also in the case of Article 64. The preamble emphasizes on the fact that the constitution should be made only through the Constituent Assembly. So the task of making constitution is being focused. The court while issuing order should be taken into account the situation of voidness likely to appear if the term is not extended. If there is no CA, the country may face serious crisis of conflict. So the doctrine of necessity should be attracted in the existence of such a situation. Hence the writ petition

should be quashed because there is no alternative arrangement of CA for now.

Joint Attorney Yuva Raj Subedi:

Our constitutional practice lacks the tradition of testing the legality of amendment to constitution. The present constitution also had no provision of testing legality of amendment to the constitution by the court. Now therefore, the judiciary should not interfere more frequently in the activities done or made in course of making the constitution. The writ petition should be quashed.

Joint Attorney General Kiran Poudel:

The most urgent need of the hour before the nation today is to make constitution through the Constituent Assembly hence; we must not hunt for other options. During the extended time period, many burning issues in relation to constitution making have been resolved through consensus reached among various parties and remarkable progress has been achieved in the making of constitution. The Interim Constitution is silent about the possibility of frequent election of CA; no order as demanded in the writ petition should be issued.

Joint A.G. Krishna Prasad Pokhrel:

The act of addition of time period of CA has been directed towards making the constitution. Since this constitution is the outcome of political consensus, it could be amended also through the political agreement. So the writ petition should be quashed.

Sub AG Dharma Raj Paudel:

To cause obstruction in the path of making of the constitution is to cause disturbance in the smooth functioning of the state and invite a situation of revolt. This is the reason why amendment provisions are mentioned in constitution. It is the basic structure of the constitution to

bring about it through Constituent Assembly. So, while submitting the tenth amendment bill the government has clearly mention the reason and was spoken of about its rationality. In such a circumstance, there exists no chance for issuing any writ.

The synopsis of the pleading of Amicus Curie represented from Nepal Bar and Supreme Court Bar Associations and other advocates:

Senior Advocate Bipulendra Chakravarty (Amicus Curie):

Today, there is a growing a tendency of getting the solution of all the problems from the court and court alone. It is not possible in all circumstances and should not happen as such. There is no Article in the present constitution which could not be amended. However, the frequent addition of time period has made the prospect of coming a constitution more feeble. Now, the CA is necessary to demonstrate the ample chance of promulgating a constitution. So, more vigorous form of directive order has been necessary to be issued in the name of respondents and dismiss the writ petition.

Senior Advocate Kishor Kumar Adhikari:

The decisions of this court made earlier to this are self-explanatory and more clear. The matter related with the amendment of constitution is the outcome of an urging situation and the situation is that the recognition to the amendment has been granted on the ground of the doctrine of necessity. Though, no other option would become appropriate to haunt by CA in making the constitution, however the growing trend of extending the term time and again, anyway has to be discouraged. For this, it would be the best option for the court to know also the intent of the political parties represented in CA.

Advocate Sabita Baral:

If any order is issued as demanded by the petitioner, the blame of aborting the constitution would come upon the court. Since, there is

no alternative of making constitution from other than CA, it could not be rendered in the verge of dissolution. The writ petition should be vacated on the basis of the doctrine of necessity.

Advocate Surendra Kumar Mahato:

Even though, the present constitution had no provision of judicial review in regard to the amendment to the constitution, nevertheless if such amendment is made so as to grow tyrany and squeezing of civil rights it may be the subject of judicial review. For now the court has two alternatives available. One, it is a political issue, so to order for the preparation of conducting fresh election to settle the disputed matter setting aside the issues resolved hereinbefore. If such a situation arises, it must be clearly spoken of describing all the pros and cons.

Advocate Megha Raj Poudel:

At the time of commencement of the constitution whether any formal announcements were nade or not some basic characteristics certainly does carry or hold which could not be changed or altered through amendments. The principles of basic structure of the constitution also are based on the similar values. After the termination of tenure of the Constituent Assembly, the head of the state may issue an ordinance on the basis of doctrine of necessity and make legal arrangements for conducting fresh election. If such a situation arises, the fresh election may be conducted only for settling the unresolved issues by the CA itself giving nod to the issues already finalized.

Advocate Madhav Kumar Basnet:

The court while making interpretation of the constitution shall be necessary to ensure the continuation of the constitution. Since this provision contained in Article 166(2) of the constitution has constitutionalized the day to day politics. The interpretation of the existing constitution also should be made differently than those of the constitutions of other normal situation. The respondents in their written

reply have made only claim that the efforts are underway in making the constitution and at a time when the time extension has been legalized, they are required to answer the progress so far made in this regard and the time needed to complete the remaining business. It will be better to reach a decision only after seeking their commitment in these matters through the Office of the Attoney General.

The present writ petition which, is scheduled for today to pronounce the judgment, it has been necessary to give verdict about whether the orders as demanded by the writ petitioners should be issued or not after hearing the arguments of the learned legal practitioners representing from their respective parties and of the amicus curies as well as studying the contents of the writ petition and the written reply including the relevant constitutional and legal provisions.

While considering upon the decision to be reached, the writ petitioners are found claimed that the act of extending CA term for 3 months effecting tenth amendments to the provision relating to the tenure of CA contained in Article 64 of the Interim Constitution of Nepal, 2063 as well as the opinion expressed by this court in writ No.066-ws-0056 and 067-ws-0071 are in contravention to the constitution, hence such acts should be declared null and void. While observing the written reply of the respondents, their only logic is that many achievements have been made so far concerning the making of the constitution and there are some business yet to be finalized due to arising various circumstantial reason, the extension of the time period was necessitated by the legitimate objective and on the ground of doctrine of necessity.

While delivering verdict on a writ petition with writ No. 066-ws-0056, moved between Office of the Prime Minister and the Council of Ministers and advocate Balkrishna Neupane, in connection with the right amendments to the Interim Constitution of Nepal, 2063 involving similar issue of extending term of CA for a year, this court, giving interpretation of basic principles and structure of the constitution together with the interpretation and explanation of Article 64, 82 and 148, have expressed the clear view in relation to the scope of the doctrine of necessity and also about the possible optimum period up

to when the term of CA could be extended. In like manner, the verdict has clearly put forth its judicial opinion that the issues involving the amendments to the constitution could become the subject of judicial review. This court concurs with those opinions so requires no further explanation. In the present writ petition, basically, the question remains to be settled only about the rationality, the necessity and the constitutionality of the tenth amendment to the Interim Constitution.

In earlier writ petitions filed in this court about extending the term of CA through amendment to the constitution have expressed clear opinion that if there exist unavoidable complexities in making the constitution and needed additional time period to overcome them despite making maximum effort concentrating on the job and arrived a urging situation and need to effect amendment to Article 64 of the constitution in accordance with the doctrine of necessity to extend the term of CA, the special focus shall be given to the time limit directed by the restrictive Clause of Article 64 and the amendments shall be considered expedient and appropriate, and if any attempt found made to have an unnecessary extension or give continuity to such situation it entangles the spirit of the Interim Constitution and shatters the dream of the sovereign people expressed through election.

Even in a critical situation of emergency period the maker of the constitution has envisioned that the term of CA should not be extended by 6 months.The same is also endorsed by the people through the election of CA. In such a circumstance, there is no dispute on the fact that the tenure of CA could not be extended till the unknown future.

Where there is a clear specification of time limit, the action thereof must be done or completed within the time limit so specified.The time period stipulated in Article 64 of the Interim Constitution for the making of a Constitution through Constituent Assembly must not be taken as a formality or a show.

While drafting the Interim Constitution, its maker had a fine speculation on the necessity of time specification in order to cause the timely promulgation of it. If this truth is undermined and attempted to

draw an archaic interpretation of the original spirit of Article 64 of the constitution to mean that the right to amend constitution includes also the right to extend time period again and again by pushing the task of promulgating constitution into uncertainty till the unknown future would dishonour against the mandate given by the people. It is also unreasonable through the view point of the constitutional jurisprudence to unusually extend its time period by the Constituent Assembly itself so as to create a limitless and uncertain situation.

The meaning of writing a constitution through constituent Assembly is a practice in which the people delegate their constituent power to their representatives to make constitution within the given period which represents their feelings. They believe that the representatives elected by them will complete the task within the prescribed time. It is in fact a legitimate expectation of people to be assured in the timely making of the constitution when the Constituent Assembly itself has announced the work plan and time schedule of bringing the constitution in order to satisfy the just expectations of the people. Any agency which is bestowed with a historical liability of making constitution is bound to respect such legitimate expectation of the people and become responsible to fulfill the pledges accordingly. If it fails to fulfill its responsibility within the time frame so prescribed and extends time limit again and again on its own accord this trend not only develops a situation of uncertainty and dilemma but also raises question in the legitimacy of its work. One of the key features of democratic rule is to provide also a government accountable to the people. In such a rule, the pledges made before the people are required to be fulfilled. In the failure of which people shall have right to ask the reason why this has happened. In this it will be wise to take and perceive the present writ petition as part of seeking the reply of that accountability.

During, the period following the initiation of constitution making process through CA, though there has been prepared a work schedule, no sufficient readiness and desired concern demonstrated rather seemed reluctant to the assigned mission and appears as if that the making of such work schedule is no more than fulfilling a mere formality. During the period, how many contentious issues as basic

elements of the constitution resolved and included in the draft? The time consumed for the purpose, achievements made so far and what are the tasks yet to be finalized and the approximation of reasonable time period needed therefore are not disclosed nor the people are informed about such developments. This bench even during the hearing had proposed the learned government lawyers to submit overall report about the progress so far made in this regard. But it is argued that the court has no right to inquire into such matters. Even so, the concerned details came to receives in due course of time by the order of the court itself. After the study of those documents it came to reveal that during a period ranging from 2068/2/18 and 2068/4/15, various decisions were found reached by the constitutional committee and Dispute Resolution Sub-Committee. Also, the tenth amendment bill presented in course of hearing by the government lawyers reads the reason and purpose of the amendment reads: "the Article 64 of the constitution provides that the term of CA will remain for 2 years from the date of the first meeting of CA during which the constitution could not be enforced, however the notable progress has made reaching consensus among parties on many contentious issues during the extended time period, the peace process and constitution making has yet to reach conclusion, Article 82 provides that the tenure of CA terminates from the date of operation of the constitution after promulgating new constitution by CA. So the task of writing constitution should be done by this very CA and, since the remaining business could not be finished within the time frame given by the Article 64, now therefore, this amendment bill is forwarded with the objective of extending the term of CA." All these details do not reflect that the CA has been fully employing it in making of the constitution from the date of its formation to till date and there has holding intensive discussion on basic elements but despite such continuous efforts, the task of constitution writing has yet not been completed. Rather, it appears that the majority time has been consumed by the external factors than the key agenda that affected the writing of constitution. Similarly, it is found taken Article 82 as the basis of constitution amendment arguing that the CA tenure will be terminated after the new constitutions made by the CA comes into operation. In

fact, it is not the intention of the constitution nor is the expectations of the people.

While observing the written reply of the respondents the Constituent Assembly found to have drawn the meaning that when the earlier both writ petitions challenging the previous amendments extending time period were vacated, those amendments got legitimacy. The respondent agencies are found less attentive and complacent to fully capitalize the intent of the constitutional interpretations made in the decisions having clear expression and called for attention demonstrating their worthiness. Although both the earlier writs were vacated, however, there were made elaborative discussions on the legitimacy of the amendment of Article 64 and defined doctrine of necessity including the time limitations and are based on clear justification of the fact auxiliary to it. No serious attention was found paid on the reasoned proposition made by this court and the judicial viewpoints expressed in them. In such a situation, a conclusion derived only taking their vacation as threshold cannot be held as worthiness to claim that the frequent amendments in Article 64 is recognized and given validity.

In the context of earlier petitions, the amendments were not declared void just taking into account the existing situation and work progress of the CA, though the time period stipulated in Article 64 was expired. To take those amendments as legitimate and use Article 64 to which this court has referred as unamendable and mandatory, time and again taking as right under Article 148, is against the interpretation and the decision made by this court. It contravens also the provision made in Article 116.

Though the CA has developed schedule of work writing the constitution, however, it has been rendering it ineffective and void rather than demonstrating the desired willingness and the same trend is continuing. Even while submitting written reply in this writ petition, it is found lamented that the 11th correction has been made in the work schedule and is still working more actively. This proves that the work schedule has been loosing its credibility. It is worthless to repeatedly mention that the only duty of CA is to make constitution. The mere

echoing of such a gospel time and again will not help to reach a meaningful conclusion. It is equally unwise to neglect Article 64 and state that the tenure of the CA will be determinated only after the CA makes constitution and enforces it. In fact, the intention of Article 82 is not the protraction of the time period and makes it uncertain by effecting frequent amendments in Article 64 nor it seems rational. For that, it is required to make believe that CA is fully motivated to its key responsibility of writing the constitution, which is substantiated also by the fact. If the CA is found intensifying discussion on the basic elements of the constitution, the people could be assured in the coming of a constitution. But in the written reply submitted on behalf of the chairman of CA and its secretariat had a mention that the external factors as frequent reshuffle in government and failure in reaching the peace process into a meaningful conclusion on time which has much striking relation with constitution making has hampered the progress. This does not suggest that CA is involving uninterruptedly in the constitution making and even so the writing of constitution is yet not completed. Their say is that the external factors are responsible in hampering the task of constitution writing within the period so extended. So, they would like ever to extend the term without giving the constitution writing agenda. This regretful situation is rotating like a vicious circle. So the time has come to translate the hope of people getting new constitution through CA into reality. This must be guaranteed by the Constituent Assembly. However, the CA itself does not seem both objectively and subjectively committed and retaining work progress, accordingly. The CA, learning from the past should end the trend of ever extending the tenure and has been compulsory to work out a more realistic work-schedule and find out a lasting solution of the problem.

While considering also upon the request of seeking an order of prohibition as well as other appropriate order, it is not a judicially manageable subject right at the moment about whether to form a new CA in pursuant to Article 63 of the Interim Constitution, 2063 resorting on the fact that the making of Constitution is not possible by the existing CA or give it continuity and ratify the commitment it may make for writing a constitution within a fixed time period by conducting

referendum or, think about other options available to the people to ensure their right of making a new constitution. Since it is purely a political matter, the solution thereof must be sought by the political level remaining within the boundary of constitutional framework not going beyond it. The present CA, being an institution of the people's representatives, having mandate to give a constitution within the time period stipulated in the constitution, if fails from providing guaranty of fulfilling the prescribed duty within the stipulated time, it must be responsible also in opening the alternative way for making the new constitution. Until this comes to happen, no confidence will be built that there will not be a constitution nor disseminated this fact to the people.

Preamble of the constitution provides for multiparty democratic rule, civil liberty, fundamental right, human rights, adult franchise, periodic election, full press freedom, independent judiciary and the concept of rule of law and commitment towards democratic norms and values. Those commitments are supported by the various provisions of the constitutions. In fact, these are the pillars of democracy. Though this has been taken s a historical occasion of making constitution by Nepali people on their own through Constituent Assembly, however, such a historical obligation would not be completed only by forming a Constituent Assembly. If the CA fails to preceive this pious responsibility and did not become active and accountable to the people, the Nepalese people will not have their aspirations fulfilled. Not only that, if the constitution did not come until for a long time, we all must be serious of the long term effect it may likely to have. Exigency of such a situation may naturally hinder the civil liberty, fundamental rights, human rights, adult franchise, periodic election, full press freedom, independent judiciary and the concept of rule of law as well as the pillars of democracy internalized by the interim constitution. There may arrive a situation of squeezing the rights of the Nepalese people day after day. There is likely to be created a situation of looming suspicious and doubt among Nepali people about whether the issues associated with democracy, peace , prosperity and the major economic and social changes may face the crisis of overall problems to be furthered altogether with the continuation of

transitional period . To free the people from such a fear, there is no option available to the court for now other than giving assurance of coming new constitution through the existing CA itself. This court is not in favor also of making a view of continuing such an agency as universal and optionless which cannot fulfill its major responsibility of bringing constitution till the uncertain future. Any agency or body created under the constitution by assigning certain duties and responsibilities will have a fixed reasonable time limit and duration, the present constituent Assembly also cannot be exception to it.

The writ petitions filed against the act of extending the term of Constituent Assembly through the eighth and ninth amendments to the Interim Constitution were brought before this court pursuing that this court would give direction to the concerned agencies. So that they ensure of coming of a constitution. If we glanced through the light of the opinions delivered by this court in those writ petitions, it clearly comes to be sighted that those opinions provided ample opportunity and time to move forward by securing the contribution and achievements made by the state in course of making the constitution. Moreover, this court, with judicial self – restraint, has provided necessary guidelines by understanding the complexities of constitution writing taking into account also the possible obstacles likely to come across in such a serious and significant endeavours. However, instead of utilizing its maximum attention and time in constitution writing as those guidelines, its motivation found to have led the task of constitution writing towards uncertainty and indefinite future by poesing oneself more as legislature parliament rather than CA and focused only on the making and remaking of the government could be taken as the further deterioration.

It is not the intent of the Interim Constitution to cause frequent amendments to the constitution and extend its term and establish it as a everlasting institution by putting priority only in the forming and dissolving the government in capacity of Legislature-parliament by showing oneself reluctant towards the key responsibility ignoring the task of making the constitution. The Article 64 of the constitution had

no such speculation nor does the doctrine of necessity recognize this type of trend.

While looking through the perspectives of the claim made for the legalization of the tenth amendment on the ground of the doctrine of necessity as mentioned in the written reply and the pleas made by the attorney general and others during hearing any individual or institution liable to discharge his duties and responsibilities when fails to do so because of his incapacity or due to arising a situation beyond control could be referred as a circumstance beyond control. It is the very intent of the principle of necessity. If such a situation cannot be neglected or avoided and it compels to take a decision and if such a decision would not have been lawful even in a normal situation and the reasonableness and legality of occurrence of such a condition is when substantiated by the time and situation, the principles of necessity could be attracted. Provided that, the doctrine, of necessity cannot be applied for concealing one's own fault as complacency, inaction and the problems created by one.

As the necessity compels to take any decision, it also defends that is such necessity justifiable. The necessity is the law of the time and place. This means, that necessity makes the lawful which otherwise could not be lawful. This is a settled principle of jurisprudence. It does not shove to any lively organization to take the doctrine of necessity as a tool of defense for ones own miscreants. The constitution always hopes the positive response and liveliness on its own and its components doings. The constitution is such a lively instrument which bears the capacity of operating the whole state mechanism actively and dynamically even when there are possibilities of arriving multifold of obstacles hardships and difficulties across the life of the nation. So a constitution does not imagine a situation of lifelessness of the state which impairs the whole process by considering the one and the same problem as never ending one.

Even from the objectives and reasons mentioned while submitting the written reply or presenting the tenth amendment bill, the amendment does not is correspond the ground reality and the need of the hour but appears as a normal and noncompulsory process. In both the earlier

petitions, there has been carried a elaborative discussion and expressed clear opinion that the doctrine of necessity is not a tool to be used time and again nor this bench has produced separate view. So it will be appropriate to get end of such an embarrassing situation of repeating the same issue again and again by the court and the CA to deviate from its right course ignoring key responsibility and the guidance of the court and the people always in a whirlwind of uncertainty of coming or not a constitution.

Now therefore, it will not be inappropriate to agree with the fact that the CA is only responsible agency to get the country free from an embarassing and deteriorating situation by assessing the overall scenario as that of the spirit of the Interim Constitution and the deep concern of the people that the constitution should be made only through the CA, social make up of the country, the contribution made by state in order for making the contribution, the achievements so far made by the CA, the political consensus reached time and again among the political parties as well as the commitment shown towards the interim constitution by making the people assured and show that the constitution will be made within the stipulated time period or by building political consensus on other alternatives such as conducting election, referendum etc. So much so, the existing CA as such, has been unable to float a message that it is competent to make the constitution and free the country from deteriorating situation by the fact it has been passing a time period nearly double to that of a time period specified by the maker of the constitution at the beginning due to the extension of time period through the eighth, ninth and tenth amendments to the constitution which looks parallel to a time period of a periodic election of a legislative organ in the normal situation if we evaluated the time period together with paying sincere vigil to the spirit of the restrictive clause of Article 64. Against such a background, it has been inevitable for this bench to accept the constitutional duty of directing the concerned agency taking into account the context of the opinion of the mass that the CA has been unable to demonstrate that it has understood its liability and shown desired promptness, readiness and the seriousness towards its historical obligation.

Now therefore, on the basis of the appraisal made above with consideration of the guidelines issued by this court in writ Nos. 066-ws-0056 and 067-ws-0071 relating to the eighth and the ninth amendments besides the responsibility entrusted by the Interim Constitution along with the time period stipulated in Article 64 as work mandate through the election of the Constituent Assembly, there is no room for dispute that the key responsibility of the present CA is to give a new constitution to Nepali people within the prescribed time period. Since the Article 64 of the constitution is special arrangement in itself, a clear vision has been reflected by this court also about its unamendable and mandatory character. Now, it will not be expedient to haphazardly turn into void the activities done or performed in course of writing constitution following the formation of the present Constituent Assembly, in the light of the present writ petition. However, this court hads not issued writ on the basis of doctrine of necessity in earlier writ petitions field against the amendments to the constitution nevertheless was provided sufficient time period and opportunity in order for completing the task of writing constitution by this CA itself within the stipulated time period. It is not being witnessed that the CA has been focusing desired attention towards making of the constitution nor the constitution making agenda is getting priority inside the Constituent Assembly.

Hence, it has come to reveal that the legitimate expectation of people to make constitution through the Constituent Assembly and the judicial views expressed by this court has been found grossly violated, which also manifests a situation also of derailing the constitutionalism, rule of law and the people –oriented system of government. Even so, the aspirations of Nepalese people to bring about a new constitution through the constituent Assembly, the fund consumed by the state to date after the initiation of constitution making process and to secure the achievement CA has accomplished up to now in course of drafting the constitution are the most significant constitutional responsibilities carried out by this court. It is natural to expect that all possible efforts will be made to promulgate the constitution within the time period extended by the tenth amendment. In otherwise condition, it will be more appropriate and justifiable to provide the last opportunity to the

present CA if it needed the additional time period in order for the completion of remaining works and bring about the constitution. Now therefore the Constituent Assembly shall ascertain the achievements made after the formation of present CA those yet to be finalized in relation to making the constitution and so as not exceed the duration stipulated by the restrictive Clause of Article 64 of the Interim Constitution of Nepal, 2063 and the time period likely to be actually needed for the last chance and complete the task of constitution making within the said period and , in case the writing of the constitution could not be completed within the given period, the tenure of CA will be ipso-facto terminated thereafter. Hence, this (directive) order is issued in the name of respondents, the chairperson of the Constituent Assembly and the Government of Nepal, Office of Prime Minister and the Council of Ministers, to conduct or have conducted necessary activities and make required arrangement either for conducting referendum under Article 157 or for holding election of the fresh Constituent Assembly or any other arrangements as provided in the constitution.

The respondents be notified about this order through the office of Attorney General. The present writ petition be removed from the regular proceeding and the file of the case be handed over as per rule.

We concur with the above opinion.

Justice Damodar Prasad Sharma

Justice Ram Kumar Prasad Shah

Justice Kalyan Shrestha

Justice Prem Sharma.

Done on 9th Mangsir, 2068. (25th Nov. 2011)

Translated by Bhimnath Ghimire

The possession through the means of violent or threat or temporary possession through a request to the legal owner adversely affecting his right do not create possessing right. But when the owner silently consents such possession for a long period of time there may create possessory right.

The Supreme Court, Full Bench

Hon'ble Justice Meen Bahadur Rayamajhi

Hon'ble Justice Ram Prasad Shrestha

Hon'ble Justice Balaram K. C.

Hon'ble Jusice Damodar Prasad Sharma

Hon'ble Justice Tahir Ali Ansari

Civil Appeal No. 30 of the Year 2060

Case: Prayer for registration of land on cancelation of erroneous registration.

Appellant/defendant: Ram Dulari Saran, resident of Dhanusa District, Janakpur Municipality Ward No. 8, Bihar Kunda

Vs

Saligram Saran Vaisnav, resident of Dhanusa District, Janakpur Municipality Ward No. 8, & others

- **We need to understand adverse possession as the open use of land as owner by a third person who is not the real owner or legal title holder and the legal owner knows the use of land by third party and silently consents for the use.**
- **If one possesses a property on a state that the property belongs to him and the legal owner has notice of this and the owner silently consents for the possession, this may**

create possessory right to the possessor. But the possession through violence or threat or temporary possession granted through a request to the legal owner without adversely affecting the owner's right, do not create possessory right.

- **The acceptance of the true owner for a long time of the use of his land by another person by constructing a building or in other forms may be taken as one of the forms of adverse possession.**
- **For establishing adverse possession, it is necessary to establish without doubt that the legal owner has ratified or consented to the possession for a long time through his conduct.**
- **There is no question of adverse possession where the legal owner possesses the property. It is an extraordinary act by which the legal owner is departed from the right to posses the property that belongs to him. For the party who claims adverse possession should prove that he possess the property for a long time on the capacity of owner rejecting the ownership of the legal owner and it is essential that he physically possess the property.**
- **The possession should had been enjoyed openly which is noticeable to all including the legal owner and the legal owner had accepted the possession directly or indirectly for a long period of time. There should be no dispute over the possession or objection by the legal owner nor there be break in the continuation of possession.**
- **It is the rule under our legal provisions that the legal owner of the land remains the real owner of the land. Such person enjoys all rights to transfer his ownership in different ways including sale of the land. But the person who has adverse possession over the land enjoys only the right to use.**

- **Legal ownership cannot be established in the absence of a proof of that ownership has been transferred by extinguishing the right of the previous true owner.**
- **There is only a limited concept of adverse possession in Section 6(5A) of the Survey and Measurement of Land Act, 2019. Except this provision there is no legal provision and judicial practice in our system that provides for creation of ownership on the basis of adverse possession. Thus, legal ownership cannot be created on the basis of adverse possession.**
- **The conclusion of the judgment of the case on the issue of unlawful encroachment on land was that the plaintiff can enjoy the building and hut till they remain there but did not transfer the legal ownership. In this situation, the judgment ordering the registration of the land in dispute in the name of plaintiff by cancelling the registration that was registered in the name of the defendant is against the concept of adverse possession.**

Decision

Meen Bahadur Rayamajhi, J: A special leave petition as per the Section 12 of the Administration of Justice Act, 2048; for the revision of the judgment of the Appeal Court Janakpur delivered on 1996/06/04 was approved by this Court. This case was referred to the Full Bench as per the Rule of 3.1(d) of the Supreme Court Rules, 2049, since, it was necessary to settle a complex legal issue—whether ownership can be created by possession for a long time—by the full bench for establishing a clear legal principle. A brief discussion of the facts and decision of this case is as follows:

The plaintiffs in the suit has stated that they have been continuously using the land of plot No. 9 situated in Dhanusa District, Janakpur Municipality, Ward No. 8 (e) and measured 0-2-1-3 in bigha. A case filed by defendant Ram Dulari against them for unlawful encroachment of land and building was dismissed by Dhanusa Distict Court on 1978/01/08. This judgment was upheld by Janakpur Zonal Court on

1979/02/26 and Mid-Regional Court on 1982/12/28 respectively. A special leave petition for revision of the judgment of the Mid-Regional Court was refused by the Supreme Court on 1984/01/ 15. The plaintiffs has a claim that the decision made by the defendant Survey that the land in dispute be temporarily registered in the name of the defendant, Camp on the basis of the application filed by the defendant, is erroneous and subject to cancellation. Further, they asked for registration of the land in their name so that the ownership of the land belongs to them.

The defendant claimed that he is the owner of the land in dispute. The decision of the Janakpur Urban Area Survey Camp to register the land in his name is based on law and justice. The claim of the plaintiffs is false and not based on evidence. Thus, the claim deserves dismissal.

Dhanusa District Court rendered a verdict on 2049/4/14 to the effect that the decision of the Janakpur Urban Area Survey Camp to register the land having plot No 9, situated in Dhanusa District, Janakpur Municipality, Ward no 8 (e) and measured 0-2-1-3 in bigha in the name of the defendant is not based on law. The judgment ordered for the registration of the land in the name of the plaintiffs.

The defendant filed an appeal on 1992/09/25 against the judgment rendered by the Dhanusa District Court on the ground that the judgment was subjective and erred on law. The appellant prayed for the reversal of the judgment and for an order to register the land in his name.

On 1993/09/17 Janakpur Appellate Court accepted the appeal as per No. 202 of the Chapter on Court Management of the Country code(Muluki Ain). The acceptance was given on the ground that there is no clear legal provision in the Nepali law to register the land on the ground of adverse possession while the land is registered in the name of other person. Thus, the judgment of the original court to register land in the name of the possessor was subject to review.

The judgment of the Court of Appeal Janakpur rendered on 1996/05/28 held that the as the provisions registration had been made ineffective by the judgment and consequence of the final decision of the court. It was contrary to the previous judgment to hold that the the

ownership of the land belongs to the appellant on the basis of registration that was already held ineffective. Thus, the judgment of the Dhanusa District Court, cancelling the registration of the plot No. 9 and maintain registration in the name of the plaintiff was sustained and the claim of the appellant was dismissed.

The defendant applied to the Supreme Court for special leave petition for the revision of the judgment of the Janakpur Court of Appeal under Section 12 (1) 9 (a) and (b) of the Administration of Justice Act, 2048. The revision petition claimed that the judgment of the Jankpur Appellate Court to register the said plot in the name of the plaintiff on the basis of long term possession is contrary to the principle laid down by the Supreme Court in *Mahananda Upadhaya and others* v. *Kapil Mani Upadhaya* Ne. Ka. Pa. 2045. Vol 9, Decision No. 3576, p 885. In this case, in the absence of the proof of the termination of ownership of the owner, ownership cannot be created on the basis of possession.

This court granted special leave for the revision of the judgment of the Janakpur Court of Appeal, under Section 12 (1) 9 (a) and (b) of the Administration of Justice Act, 2048. The petition was granted on the ground that in the previous case of land encroachment between Ram Dulari Saran Baisnav and Saligram and others, the complain of the plaintiff was dismissed by Dhanusa District Court on the ground of filling the case after the expiry of time limitation under No. 18 of the Chapter on Land Encroachment of the Country Code (Muluki Ain). This judgment was upheld by Janakpur Zonal Court. The Mid-Regional Court held that since the plaintiff did file the case after many years from the time the defendant made hut and temple and enjoyed the use of the land, the claim of the plaintiff is not maintainable and the defendant cannot be ordered to leave the land. The judgment did not make clear whether the registration of the land in the name of the plaintiff remains valid or not. In civil appeal No. 69 of the year 2056, the case of cancellation of decision and maintain rights, Krishna Giri v. Mangal Thakur Hajam a full bench of this court had laid down a principle on 2000/01/17 that only due to the enjoyment of land by constructing a building ownership cannot be created . Thus, in this case the judgment of the Court of Appeal Janakpur that upheld the

judgment of Dhanusa District Court ordering for the cancellation of registration of the land in the name of the plaintiff, appears the situation mentioned in Section 12 (1) 9 (a) and (b) of the Administration of Justice Act, 2048. On this ground on 2002/01/09 the court granted leave for the revision of the judgment of the Court of Appeal Jankpur.

A division bench of this court on 2004/09/25 ordered under Rule 3(1)(d) of the Supreme Court Regulations, 2049 that the case be heard by a special bench to maintain uniform principle, since, it is clear that the ownership of the land in dispute having previous plot no. 1854 and current plot No. 9, belonged to defendant Ram Dulari and possession has been enjoyed by Saligram Saran Baisnav and others. In the case, filed by the defendant of this case against the plaintiff of this case, in respect of the land in dispute of this case, praying for the removal of the land form the unlawful encroachment by the plaintiff the final judgment rendered by the Central Regional Court on 1983/01/04 had held that due to the long time use of the land by the defendant they cannot be removed from the land. Thus, in this case in one hand the judgment of the Regional court that due to long time use of the land the owner of the land cannot remove the possessor of the land and on the other hand, a full bench of this court (NE.Ka.Pa. 2030, p 346) had laid down a principle that a court cannot decide against a final judgment of a court. Similarly, in civil appeal No. 69 of the year 2056, the case of cancellation of decision and maintain rights, Krishna Giri v. Mangal Thakur Hajam a full bench of this court had laid down a principle on 2000/01/17 that only due to the enjoyment of land by constructing a building ownership cannot be created. The factual situation of that case does not resemble to the situation of judgment of this case. In this situation, a complex legal question—whether ownership can be created on the basis of adverse possession—arises and it is appropriate to hear the case by a full bench to establish a consistent legal principle.

A full bench of this court on 2005/10/25 found that the judgment of a three full bench of this court on civil appeal No. 69 of the year 2056,

Kriahna Giri v *Mangal Thakur Hajam* the case filed for restoration of right, was also questioned. Thus it was appropriate that this case be heared by a full bench consisting more than there justices and ordered accordingly.

This case was included in the daily cause list of the cases and presented according to the rules. Learned advocate Vijay Kumar Singh representing the applicant/defendant argued that for the extension of one's ownership over the land the owner of the land should have transferred the ownership over the other person. Ownership cannot be created by adverse possession. Except the provision of Section 6 (5) (a) of the Land Measurement Act, 2019, no law provides for creation of ownership through adverse possession. The said provision is not applicable to the present case. For the creation of ownership a sale deed, a will deed or a deed of exchange or a deed of similar nature of ownership transfer is essential. A judgment of a court to the effect that one person enjoys possession over a land, cannot be a source of creation of ownership. He further argued the judgment of the Appeal Court that declares the opposition's ownership over the land on a case filed by the opposite party for ownership on the ground of adverse possession, is erroneous and be reversed.

Learned advocates Kamal Narayan Das and Satish Jha representing the respondent/plaintiff argued that there is no dispute on the fact that the previous plot No. 1854 the owner of the land was Ram Dulari and the land was possessed by the plaintiffs. A deed of the year 2007 B. S. had provided for to register the land in the name of the God. Violating the condition of the deed Ram Dulari registered the land in his name. Since the plaintiffs also belong to the same family tree, it cannot be claimed that he forcefully captured the land. Where in a case of violation of religious requirement had been established, as per No. 4 of Chapter On Trusts, the defendant has no right over the land. Thus, on this ground the judgment of the Appeal Court that sustains the judgment of the District Court cancelling the decision of the Janakpur Urban Survey Camp to register the land in the name of the

defendant should sustain. Upon perusal of case file and the above mentioned arguments, it deems that the decision should be made in the following issues.

What is the concept of adverse possession? Whether ownership can be created through adverse possession or not?

What extent of impact of the judgment of the Mid-zone Regional Court on the case of illegal house and land between the plaintiff and defendant of the present case is upon this case?

Whether the judgments of the court of the first instance and appellate court that cancelled the registration of land in the name of the defendant on the ground of adverse possession sustains or not?

To consider the first question, it is necessary to be clear about the concept of adverse possession and our judicial practice in this regard. We need to understand adverse possession as the open use of land as owner by a third person who is not the real owner or legal title holder and the legal owner knows the use of land by third party and silently consents for the use. Longus Usus, Nec Par Vim, Nec Clam Percario. (Long use not by violence stealth or entreaty). Or it seems that the sound basis of adverse possession is the long time use of land without violence, theft, request or special permission.

It is a conventional wisdom that the legal owner of property possesses the property. However, in some cases the property may be possessed by a person other than the legal owner. If one possesses a property on a state that the property belongs to him and the legal owner has notice of this and the owner silently consents for the possession, this may create possessory right to the possessor. But the possession through violence or threat or temporary possession granted through a request to the legal owner without adversely affecting the owner's right, do not create possessory right. The acceptance of the true owner for a long time of the use of his land by another person by constructing a building or in other forms may be taken as one of the forms of adverse possession. For establishing adverse possession, it is necessary to establish without doubt that the legal owner has

ratified or consented to the possession for a long time through his conduct. There is no question of adverse possession where the legal owner possesses the property. It is an extraordinary act by which the legal owner is departed from the right to posses the property that belongs to him. For the party who claims adverse possession should prove that he possess the property for a long time on the capacity of owner rejecting the ownership of the legal owner and it is essential that he physically possess the property. The possession should had been enjoyed openly which is noticeable to all including the legal owner and the legal owner had accepted the possession directly or indirectly for a long period of time. There should be no dispute over the possession or objection by the legal owner nor there be break in the continuation of possession. Undisrupted continuation is the essential element of adverse possession.

While observing of our legal provisions, it seems that ownership cannot be created on land through adverse possession. There is a special provision under Section 6(5A) of the Survey and Measurement of Land Act, 2019 to register the land which has not been registered and rent has not been paid in respect to that land. The condition for registration is the ownership over the land has been enjoyed through a household deed done at home which has not been registered and that the person has possessed the land continuously for fifteen years on the capacity of owner and there is no dispute over the deed in any court of law. On the basis of that provision, it seems that despite non-registration of such deed, land may be registered on the basis of undisputed and continuous possession for a period of fifteen years. The household deed clearly means that there is consent of the legal owner. Thus, there is no incorporation of the concept of adverse possession under this provision. Similarly, under Section 6(c) of the Land Survey and Measurement Act, 2019 has provided for non-registration of government and public land in the name of the person who has possession of such land through incursion. Section 6(9) of the same Act where a dispute between two persons over a registered land arises the registration shall be finalized on the basis of prevailing

registration records. It seems, on the basis of those provisions, land cannot be registered on the basis of possession over the land.

It is the rule under our legal provisions that the legal owner of the land remains the real owner of the land. Such person enjoys all rights to transfer his ownership in different ways including sale of the land. But the person who has adverse possession over the land enjoys only the right to use. The person who has adverse possession over a land registered in another person's name cannot transfer ownership or other rights over the land by way of registration of the deed of the transaction. Legal ownership cannot be established in the absence of a proof of that ownership has been transferred by extinguishing the right of the previous true owner. There is only a limited concept of adverse possession in Section 6 (5A) of the Survey and Measurement of Land Act, 2019. Except this provision there is no legal provision and judicial practice in our system that provides for creation of ownership on the basis of adverse possession. Thus, legal ownership cannot be created on the basis of adverse possession.

To consider the second question, the dispute on the case has been arisen through a suit filed by the plaintiff: Shyam Kishor Sharan Baisnav and Saligram Jha Saran Baisnav. The claim of the plaintiff is that they had continuously possessed the disputed land which had previously plot No. 1854 and current plot No. 9. They asked for cancelation of the decision of Jankpur Urban Area Survey Camp on 1989/09/11 to temporarily register the land on the name of Ram Dulari Saran Baisnav and for an order to register the land on their name. The defendant claims that the plot No. 1854 was transferred to him by Guru Ramdas Baisnav on 27/06/1950. He had filed a case against the plaintiff of this case on 28/12/1976, claiming that the defendants of the case had unlawfully encroached the land. The suit was dismissed on the ground of limitation of time. Despite the dismissal of the case, the judgment has established my ownership over the land. The decision did not establish ownership of the plaintiff of this case. They had only possessory right during their lifetime. Thus, the disputed decision is not subject to cancellation. The judgment of the District Court, the

court of first instance, had cancelled the registration by Jankpur Urban Area Survey Camp and subsequent registration of the land on the basis of previous registration and ordered for the registration of the land in the name of plaintiffs. This judgment has been endorsed by the Court of Appeal.

On the study of case file, the plaintiffs has not countered the statement of the defendant that the disputed land's previous plot No 1854 corresponds to the Pidari Sudaul Guthi in the name of Ramdas and his successor Ramdas and the defendant Ramdulari Das Baisnav did acquire ownership of the land through a will deed executed by the Ramdas Vaisnav on 1950/6/ 27. The plaintiffs have stated that they had continuously used the land. In response, the defendant has accepted the land had been possessed by the plaintiffs but ownership had remained his own. In this respect, Ram Dulari Saran Baisnav had filed a suit for release from unlawful encroachment of land, which he claimed was unlawfully encroached by Shyam Sharan Basinav and others on 1977/01/04; against Shyam Saran Baisnav on 1977/01/20. In reply to this issue in this case, the defendants claimed that they had been enjoying the ownership over the land for last 19/20 years, filled No 7. Inventions form jointly in BS 2020, and using the land they had built a building in the land which was registered in the name of Ram Dulari. The Dhanusa District court held that the date of cause of action of the case made-up and dismissed the suit on the ground that it was not filed within the time limitation mentioned in No. 18 of the Chapter on Unlawful Encroachment of Land and number 11 of the Chapter on Building Construction of the Country Code (Muluki Ain). This judgment was upheld by courts of different levels including the Regional Court. On the basis of this judgment it is clear that Ram Dulari Saran did acquire ownership of the land though a will deed in the year 2007 B S, on that land Saligram Saran Baisnav and others did build a hut, temple and garden and used the land from long time. On this ground, it is clearly established that the legal ownership over the land belonged to Ram Dulari and the land was possessed by Saligram Saran Baisnav and Shyamsharan Das Baishnav. The judgment of the

mid-zone Court on a suit of unlawful encroachment of land and building, in which Ram Dulari Saran was a plaintiff and Saligram Saran Baisnav was defendant, had not otherwise established the legal ownership of the defendant Ram Dulari Saran Baishnav.

On considering the third question, in this case there is no dispute on the fact that the land on dispute was acquired by the defendant Ram Dulari Saran Baishab on 1950/06/ 27 through a will deed executed by his guru Ramdas Baisnav. The suit of encroachment of the land and temple build there in 2033 B S brought against the plaintiffs for the of this case had been dismissed on the ground that the suit was filed after the expiry of beyond the time limitation. Despite the dismissal of the suit, the judgment proved the defendant Ram Dulari Saran Baianav as the legal owner and Saligram and others as the possessor of the land. Further, the judgment has not created ownership of the plaintiff Saligram Saran and others by ending the ownership of the defendant. It does not seem that only on the ground of possession legal ownership can be created nor the ownership of the legal owner can be ended. The conclusion of the judgment of the case on the issue of unlawful encroachment on land was that the plaintiff can enjoy the building and hut till they remain there but did not transfer the legal ownership. In this situation, the judgment ordering the registration of the land in dispute in the name of plaintiff by cancelling the registration that was registered in the name of the defendant is against the concept of adverse possession.

Thus, on the basis of above mentioned grounds and reasons, the judgment of the Courts of Appeal that ordered for the cancellation of the registration of the land in dispute, having plot No. 9 of Dhanusa District, Jankkpur Municipality Ward No. 8(e), in the name of the defendants by reversing the judgment of the District Court does not stand. The erroneous judgment is hereby reversed and the claim of the plaintiffs for registration of the land by cancelling the earlier registration is not maintainable.

Particulars

As stated in the above judgment section, the judgment of the trial court and appeal court had been reversed and the claim of the plaintiff was found not maintainable, it is not necessary to act as per No. 1 of the particular section of the judgment of Dhanusa District Court so, it be referred to the concened court to cancel the record … 1

Since court fee Rs 30.00 deposited by the plaintiff at the time of filing the suit had been deposited by the defendant by receipt No. 122 dated 2002/09/25, let it be referred to the concerned court to return the court fee to the defendant …… 2

When the defendant claims with the time fixed for the recovery of the court feeRs. 4.50 deposited by the defendant in the Appal Court and Rs. 4.50 and in this Court totaling Rs 9.00 from the plaintiffs assets, it be referred to the trial court for the recovery of the amount. ……... 3

It is instructed for the removal of the case from registry and the case file be handed over as per the rules.

We concur with the above decision.

Justice Ram Prasad Shrestha.
Justice Balaram K.C.
Justice Damodar Prasad Sharma.
Justice Tahir Ali Ansari.

Done on this day of 19th Ashar 2065 (June 3, 2008)
Translated by Rishikesha Wagle

The Parliament has sole right to enact amend or affect the laws. Likewise when the conflict arises between the public and private interests the public interest shall prevail. The rights guaranteed by the constitution cannot be narrowed by the Acts promulgated there under.

Supreme Court, Special Bench
Hon'ble Justice Ram Prasad Shrestha
Hon'ble Justice Balaram KC
Hon'ble Justice Damodar Prasad Sharma
Writ No. 77 of the Year 2058

Case: Certiorari Mandamus and others

Petitioner: Advocate Prakash Mani Sharma, resident of Kathmandu Metropolitan City (KMC), Ward No. 14, on behalf of his own right and authorized as such by Pro Public (Janahit Samrakshan Manch)

Vs.

Respondent: Government of Nepal, Council of Ministers Secretariat, Singha Durbar, Kathmandu and others

- **With the creation of Trust, rights of a person cease to exist and the rights of group, community or a sect are established. Hence, it shall be the legal duty of agency or instrumentality of state or its organs like the Guthi Corporation to preserve and ensure perpetual continuity of the will manifested by the founder of Trust through his/her will-deed.**
- **The Constitution has conferred the right for protection and promotion of cultural civilization and heritage, and for this regard, right of operation of religious sites and**

religious Trusts and their preservation. As such, the legal provision meant to terminate the existence of Trust property cannot be deemed to be in consonance with the Constitution.

- Once named as a Trust, it shall have to remain as the Trust and it shall have to be utilized as per the objectives it has embodied.
- There is no doubt as regards the status of misuse of the property of the Trust the main causative factor being the provision of Act of converting the Trust into registered land- which cannot be deemed to be appropriate.
- In case the rights regarding culture and religion conferred by the Constitution are meant for a community or sect, then it shall incur a corresponding duty on the State.
- A person may seem reluctant to preserve property of the Trust; however, the State is not permitted to make such an exception as a basis to devise policies regarding public interest, benevolence and social use. In the conflict between individual and public interests, public interest shall always have to prevail. Hence, the State cannot afford to be complacent regarding the issue of protection of any religious or cultural heritage.
- In course of enacting laws, the State cannot do so in contravention to the Constitution, recognized principles of justice and the Conventions on Human Rights and other subjects to which Nepal is a party and which apply as the laws of land.
- The subject of perpetual continuity of Trust and the activities in accordance with the Trust objectives fall within the purview of rights regarding culture and religion. Hence, when hindrance is created in the exercise of such rights, the Court shall have to assume obligation for the unfettered enjoyment of such rights.

- The Trust heritage forms an inextricable component of the rights regarding culture and religion. Hence, the legal provision and decisions allowing for the exchange of Trust lands and for converting the Trust lands into registered lands of individual holding by establishing a perpetual fund and enabling the sale and purchase of such converted lands, amount to the annihilation of Trust heritage. Therefore, those legal provisions and decisions, as they seem to be inconsistent with Articles 18 and 19 of the contemporary Constitution, they shall be void to the extent of such inconsistency as per Article 1 of the Constitution.
- For the guarantee of constitutional right regarding the protection and promotion of culture and of religious shrines and Trusts, the Sections 25(2) (c) and 36 of the Guthi Corporation Act, 1976 are declared to be null and void with effective from this day as per Article 107(1) of the Interim Constitution of Nepal, 2007.
- The decisions not supported by the Act and contravening to the constitutional rights meant for protection and promotion of culture and of religious shrines and trusts, and the circulars thereof also stand repealed through an order of certiorari.
- Even though a law is promulgated in contrast with the Constitution, which law does not incur a question as to its validity until it is declared to be unconstitutional and unacceptable by the Court. Hence, if declared void from the date of inception of Act, all the legitimate actions and decisions done under the valid Act shall suffer disastrously. As such, saving the actions and decisions undertaken before this day as per the Sections declared to be void on this day, and through giving effect to prospective over-ruling, the aforementioned Sections of the Act decisions and orders of the Government thereof also stand to be null and void from this day.

Decision

Balram K.C., J ; The brief description of the facts and decision of the present writ petition filed to this Court pursuant to Articles 23 and 88(1) (2) of the then Constitution of Kingdom of Nepal, 1990 and presented before this bench are as follows:

A majority of shrines, temples, taps, sheds inns and other religious structures bearing cultural and archaeological significance have been the heritages of Nepal since ancient times. These heritages are now increasingly subject to degradation, dilapidation, destruction and encroachment by the day. As such, many temples, stone water-taps and sheds are now being converted into individual homes, shops and recreational private properties.

The founders had established the Trust properties with a view to facilitate different aspects of religion and culture and to render service to society by making charities for philanthropic purposes doing acts of benevolence. For this they had provided for lands as a means of income to sustain and maintain the properties of Trust for long. The Guthi Corporation was established in 1964 with an objective of protecting and promoting these religious and cultural heritages. The Trust lands (Guthi) are of three types: 1) Public Trust (Raj Guthi) 2) Private Trust (Niji Guthi) and 3) Concessionary Trust (Chhut Guthi).

All the Trust lands are classified under 4 heads, viz.

1) Guthi Raitan Nambari land, Guthi Nambari land, Guthi Tainathi land and Guthi Adhinastha land.
2) As per the details collected by the Guthi Corporation in the fiscal year of 1998/1999, the land distribution all over Nepal under the Trust (Guthi) system was as follows:

S.No	Type of Trust (Guthi) Land	Holding in the Hills (Pahad) (in Ropanis)	Holding in the Plains (Terai) (in Bigahas)
01	Guthi Raitan Nambari	312268	61637

02	Guthi Adhinastha	201543	2287
03	Guthi Tainathi	2521	2113
The details of other lands are yet to be updated, the lands mentioned as Trust (Guthi) lands at the time of land-surveying.			

Even in the annual report of the Auditor General in 2002, it has been mentioned that the Trust lands are subject to rampant misuse and embezzlement and no heed is given for their protection and utilization.

Many of the Trust ponds are not registered under Trust, these lands are utilized by schools, the income of which does not reach to the Trust, there are dues in the amount of Rs. 2.65 million from the annual contracts of 159 ponds registered under Trusts, for the collection of which the Corporation has been inactive, and the gardens of Trust are misused by the priests as well. A majority of houses, sheds and other physical structures are in the need of repairs and maintenance, out of which some are being used by Government offices, organizations, from where no revenue is generated to the Corporation and the persons illegally possessing the Trust properties have also not contributed in their repair and maintenance. The main asset of Trust (Guthi) is the Guthi Tainathi land. There were no tenancy rights prior to the Guthi Corporation Act, 1972, they were realized only after its inception. As such, tenancy rights have been secured in nearly 1500 Bigahas of land. However, these lands are also prone to severe encroachment and since they have not been contracted out due to several reasons, it has amounted to loss for the Trust.

Another source of income for Trusts is its houses and shops. The dues to be collected from these houses and shops rented out totals more than Rs. 1 million. Low rentals, managerial weaknesses, the tendency of non-payment of rents and of intervention when pressed for payment are marring the Trust sector, as pointed out in the report of the Auditor General.

Several commissions and taskforces also have been formed and reports been submitted in the past regarding necessary recommendations on the issues of protecting Trust heritages and to prevent other concerning problems. For instance, the report of the Inquiry Commission on the Activities of Guthi Corporation, 2048 BS, the report prepared by Ram Bahadur Rawal in 2051 BS, the report of the Study Task Force for Preventing the Problems of Guthi Corporation, 2052 BS, and the report of the High-level Guthi Reforms Commission of 2063 BS. However, the Corporation and Government of Nepal have shown no expediency in implementing the reports of these bodies.

The Constitution of Nepal, 1962 in Article 59 and Constitution of Kingdom of Nepal, 1990 in Article 74 had provided for the exclusion of Ttrust revenue in the public fund. Hence, there is a constitutional policy to spend the trust revenue only in trust-related matters and not elsewhere. As such, with a view to manage the public Trust (Raj Guthi) separately the Guthi Corporation was established and it has been gaining continuity through the Guthi Corporation Acts of 1964, 1972 and 1976. Though the Guthi Corporation Act of 1976 was formulated to protect and appropriately manage the movable and immovable of trust estate and to avoid their dissolution, some legal provisions of the Act are serving for encouragement of dilapidation and embezzlement of Trust properties, rather than preserving them. Hence, these provisions seem to be inconsistent with some of the Articles of Constitution of Kingdom of Nepal, 1990. Section 36 of Guthi Corporation Act, 1976 lays down that the registered tenant who is possesing and enjoying the Ttrust land can convert it into Guthi Raitan Numbari land under individual ownership if he deposits a stipulated amount of money in prescribed manner. This has led to a legal route to permit the registration of Trust property under private ownership. This has led to the dissolution of these Trusts which are the religious and cultural heritages and to the miscarriage of religion. Hence, the provision in Section 36 of the Act has infringed the fundamental right enshrined in Article 19(2) of the Constitution of Kingdom of Nepal,

1990 regarding the operation and preservation of religious shrines and Trusts. Moreover, that legal provision has also violated the fundamental right enshrined in Article 19(2) of the Constitution regarding promotion and protection of culture. Hence, that Section deserves to be declared null and void. Besides, the provision in Section 32(2) of the Guthi Corporation Act, 1976 that the right and status of Guthi Raitan Numbari land shall be same as that of Government-registered individual land and the provision in Section 25(2)(c) of the same Act that the Trust land may be converted into Guthi Raitan Numbari land by prescribing certain conditions, since they are unconstitutional, deserve to be declared null and void.

The Trusts are established for the objective of protecting and promoting the traditional Hindu religion and culture, and for public interest and purpose. So, while conferring tenancy rights over immovable property and land to the tenant, that measure shall cast a negative impact on the traditional functioning of the Trust. In the context of Article 4 of the Constitution of Kingdom of Nepal, 1990 declaring Nepal as a Hindu kingdom, it shall be the constitutional liability of the State to preserve the temples, shrines, sheds and other religious structures which have remained as the heritages of Hindu religion and culture. Article 26(2) under Part IV of the Constitution dealing with the Directive Principles and Policies of State also has provided that the State shall pursue a policy of developing the religion and culture. The provision included in Section 27 of the Guthi Corporation Act, 1976 that the real tiller shall obtain tenancy rights as per the prevailing laws is also contrary to the constitutional philosophy. So, I urge for the revocation of that provision as well.

In Guthi Corporation Act or Land Revenue Act, there is no provision to convert Trust land into other land or cash either. Still, the respondent Department of Land Revenue, through a circular dated Ashwin 30th, 2045 (16th October, 1988) has authorized for the registration of the deed of conversion in the condition that generates income with an increment by 1.5 times more than that of private Trust. This act is unlawful. Moreover, the Ministry of Land Reforms and Management

has decided on Paush 2nd, 2049 (17th December, 1992) that private Trust land may be converted into land under individual ownership (Raikar land) by depositing in a perpetual fund the minimum value prescribed for registration. This decision has led to the increased encroachment of Trust lands. Therefore, such acts shall have to be stopped with immediate effect. Among other things, the legal provision regarding applicability of tenancy rights (Mohiyani rights) is also responsible for the embezzlement and misappropriation of Trust resources. As per Section 9 of Guthi Corporation Act, 1976, the primary responsibility of protecting the property of Trust and to stop it from being embezzled rests with the Board of Directors of the Guthi Corporation. However, the Board has shown complacency in clearing the financial arrears pointed out by the Auditor General, in taking departmental action against the persons indicted by Commission on the Investigation of Abuse of Authority (CIAA), and in enforcing the reports of various commissions formed to recommend measures for enhancing capacity of and relieving arrears from the Guthi Corporation. It has been laid down that the Board of Directors of Guthi Corporation shall be constituted by the Government of Nepal and the Corporation shall submit an annual report of its activities to the government itself. However, it is the responsibility of Government of Nepal to monitor and provide necessary directives to the Guthi Corporation in issues of performance of functions, effectiveness and efficiency, after assessing these indicators.

The Constitution is the fundamental law of the land and no Act or statute can be made inconsistent to it. However, the respondent Government of Nepal, Secretariat of Council of Ministers, Ministries of Land Reforms and Management, and Law, Justice and Parliamentary Affairs as well as the Secretariat of Parliament have not delivered their constitutional responsibilities by formulating such laws. As such, the constitutional liability to direct the respondents to work within the ambits of law and Constitution is vested in the Supreme Court.

Therefore, I urge, for the cause of protecting the Trust resources which are being the heritages of religion and culture, that the

respected Court declare the following legal provisions null and void in accordance with Article 88(1)(2) of the Constitution of Kingdom of Nepal, 1990, as they are inconsistent with the Constitution: Sections 36, 32(2), 25(2)(c), 27 and the last Clause of Section 26(1) of the Guthi Corporation Act, 1976.

Moreover, I also request for the issuance of mandamus in the name of concerned agencies for the performance of the following functions with immediate effect:

A The trust lands which were being possessed and used by the Government and public corporations should be transferred into their ownership after paying a reasonable price to the Guthi Corporation.

B Where illegal encroachment has been effected upon the temples and other religious structures under the trust, to determine their four boundaries and to demolish all the houses and sheds built within that land.

C The Guthi Corporation shall prepare a complete inventory of trust lands of all variants and submit it to the Land Revenue Office. It shall also coordinate with the concerned agency to enable the collection of land revenue from the Land Revenue Office, as in the case of individual land (Raikar).

D To immediately provide for the collection of damages meted out to the trust properties of Trust on account of the irregularities in Guthi Corporation and embezzlement of trust resources, as pointed out in the annual report of the Auditor General, 2002.

E As the valuable lands of Trust were allowed to exchange with other cheap lands on the basis of decision of Department of Land Revenue, it has resulted in the extensive loss of Trust resources. So, the real value of such lands should be ascertained and the differing price shall have to be reimbursed immediately. Moreover, those responsible for

registering Trust land as individual holdings (Raikar) shall have to be put to action immediately as per Section 39 and 55 of the Guthi Corporation Act, 1976. The lands registered under individual holdings (Raikar) shall have to be retained and registered under Trust ownership.

Upon this, the Single Bench of this Court ruled on Chaitra 20th, 2058 (2nd April, 2002) that the petition be submitted after obtaining written replies from the respondents as to why the order sought by the petitioner is not to be issued, or upon elapsing of duration.

The Ministry of Law, Justice and Parliamentary Affairs, in its written reply stated: The Constitution of Kingdom of Nepal, 1990 has given the Parliament a unilateral right to decide on what types of law are to be enacted and which amendments are to be affected. As such, the writ does not deserve to be issued. The provisions of Guthi Corporation Act, 1976 do not seem to be inconsistent with the Constitution and there is also no ample reason to make this Ministry a respondent. Hence, the writ petition needs is subject to be quashed.

The Secretariat of Council of Ministers in its written reply stated: The Council of Ministers, Government of Nepal took a decision on Baisakh 4th, 2049 (16th April, 1992) and forwarded it to the Ministry of Land Reforms and Management to perform or conduct in accordance with the decision which provides for: taking action upon the irregularities and errors as pointed out in the reports submitted by inquiry commissions on Guthi Corporation, taking immediate action against the indicted employees of Government and Corporation as per the concerned laws, taking in their ownership by the Government of Nepal and public corporations of the Trust lands which they have been using, after paying a reasonable amount of money to the Guthi Corporation, demolishing all the houses and sheds built illegally by encroaching Trust lands and disfiguring temples and religious structures, after determining the four boundaries of such lands, converting the houses built by infringing Trust territory into the price

fixed by the Government, converting the lands with tenancy rights to Guthi Raitan Nambari land in the names of tenants themselves, registering the remaining Trust land in the name of the highest bidder, preparing a complete inventory of all Trust lands within 2 years and submitting it to the Land Revenue Office and providing for the collection of land revenue from the Land Revenue Offices as in the case of individual lands (Raikar). Hence, this Secretariat should not have been made the respondent. As regards the inconsistency of some Sections of the Guthi Corporation Act, 1976, the subject of what types of law are to be enacted and which amendments are to be effected lies in the effective domain of Legislature. Hence, the writ needs to be quashed.

The Ministry of Land Reforms and Management in its written reply stated: The acts done in accordance with the Guthi Corporation Act, 1976 are intended for the protection and promotion of trusts themselves. Nothing has been made to impair the religious practices. Out of the various lands of Trust, the issues of how to register which type of trust land in what person's name and in which types of land is the peasant entitled to tenancy rights fall within the jurisdiction of Guthi Corporation. There is no basis to proclaim that Article 88 (1),(2) of the Constitution attracts to the activities and functions undertaken by Guthi Corporation, as per the plea of the petitioner. Hence, the writ needs to be quashed.

The Central Office of the Guthi Corporation in its written reply stated: The right of the practising peasant over the trust land which he/she is possessing and enjoying as provide in Section 27 of the Guthi Corporation Act, 1976 is simply a continuance of the provisions of Guthi Corporation Act, 1972. As per the decision of Government of Nepal of Baisakh 4th, 2049 (16th April, 1992) to gradually implement the recommendations of Basanta Ram Bhandari Commission, correspondence is underway to receive compensation for the Trust lands used by the Government of Nepal. As regards the employees indicted by the Commission on the Investigation of Abuse of Authority (CIAA), action is being initiated through asking for clarifications. The

registration of Trust lands is also underway. To evict the illegal occupants who have been forcibly occupying Trust assets, and to preserve the movable and immovable Trust properties, requests have been made to the local administration, police, Village Development Committees (VDCs) and the municipalities. The Corporation has also prepared a draft bill for effective changes in the Trust management and has submitted it to the Government of Nepal. Hence, the writ needs to be revoked.

The Department of Land Revenue in its written reply stated: The Government of Nepal, Departmental Minister took a decision on 22nd Mangshir, 2049 thereby providing for: The Trustees while registering land of private Trust in their names shall have to deposit the minimum amount required for registration purposes in any bank as a perpetual fund, but they are entitled to draw the interest only. The expenses of the Trust shall be borne from that interest amount so that religion and rituals are not abandoned. No other measure has been taken apart from that action. Hence, the writ needs to be dismissed.

In the writ petition duly submitted before the Bench, the learned advocates present on behalf of petitioners, Mr. Prakash Mani Sharma, Ms. Rama Panta Kharel and Sharmila Shrestha argued that the provisions of Guthi Corporation Act permitting the conversion of Trust (Guthi) land into Guthi Raitan Numbari and the establishment of tenancy (Mohiyani) rights over such lands are inconsistent with the Articles 18 and 19 of the Constitution of Kingdom of Nepal, 1990 and Articles 17 and 23 of the Interim Constitution of Nepal, 2007. Those inconsistent laws shall not prevail and hence should be declared null and void. The State should assume the responsibility of protecting Trust estates, even according to Public Trust Doctrine. However, since it has failed to do so, the condition has come for the Court to assume such liability. The respondent Department of Land Revenue has issued circular regarding the exchange of Trust land, which is not recognized by the concerned laws. The Ministry of Land Reforms and Management has decided to permit the conversion of private Trust lands into individual lands (Raikar) after establishing a perpetual fund.

These decisions and circulars have contributed in encouraging encroachment of Trust lands. So, these decisions rivaling with laws and Constitution deserve to be annulled.

Though the Trust issues related with were studied by different commissions and committees, their reports have not yet been implemented. The concerned agencies have not seriously taken in their cognizance, the issues of irregularities and embezzlement, as pointed out in the reports of Commission on the Investigation of Abuse of Authority (CIAA) and Auditor General (AG). So, it has become expedient to make the concerned agencies accountable through issuance of a Directive Order by the Court. Hence, for the protection of Trust resources which have remained as national heritage, the provisions in the Guthi Corporation Act which are in opposition to the Constitution shall have to be repealed and a Directive Order be issued in the name of concerned agencies. The arguments of the learned advocates and their case comments summarized these matters.

Likewise, learned Deputy Attorney Mr. Brajesh Pyakurel, who represented the Government side argued that neither State nor Government are involved in the movable or immovable Trust assets, rather they are in the control of a separate agency, there is no condition for any interference by the Government in the matters of Guthi Corporation, the Government is serious about the overall development of Trust and for positive utilization and protection of property of the Trust and that the Government has issued directions so that the religion, culture and rituals are not disintegrated.

He further argued that as regards religion, in principle, a State has no religion, however, the State allows equal opportunities for the adoption, practice and publicizing of each religion of all groups of people. The Interim Constitution of Nepal, 2007 has also provided for similar arrangements. The petitioner, who has pleaded that various Sections of Guthi Corporation Act are inconsistent with the Constitution, could not elaborate how they have come into conflict with the constitutional provisions. There is no reason to differ on the

petitioner's plea that Trust resources shall have to be preserved. However, since the provisions of Guthi Corporation Act are not found to be inconsistent with the Constitution, the writ petition needs to be quashed. His arguments and case comments summarized these matters.

As the date was fixed for today to pronounce verdict in the present writ petition bearing the facts as above, we have studied and listened to the petitioner's plea and its various corroborating documents, written replies and the corresponding arguments, case comments and other papers.

As such, the major plea espoused in this writ petition seems to be: The provisions of Sections 25(2),c), 26(1), 27, 32(2) and 36 in the Guthi Corporation Act, 1976 are inconsistent with the Articles 18 and 19 of the Constitution of Kingdom of Nepal, 1990 and Articles 17 and 23 of the Interim Constitution of Nepal, 2007. Further, the decision of Department of Land Revenue of Ashwin 30th, 2045 (16th October, 1988) regarding the exchange of Trust land and the decision of Ministry of Land Reforms and Management of Mangshir 22nd, 2049 (7th December, 1992) have enabled the encroachment of Trust lands. Moreover, the concerned agencies have not shown the desired seriousness on the issues of irregularities and embezzlement, as pointed out by the Commission on the Investigation of Abuse of Authority (CIAA) and Auditor General (AG). Hence, it is demanded that the laws and decisions inconsistent with the Constitution should be repealed and a Directive Order for the protection of Trust resources should be issued.

However, from the written replies supplied by respondents, it is deduced that the Government is not complacent towards protection of Trust resources, as claimed in the petition, the activities and functions under the Guthi Corporation Act, 1976 are devoted to the protection and promotion of Trusts, the recommendations of the commissions and committees are in the process of implementation, as per the decision of Government, and the discretion over which types of laws

are to be enacted and which sort of amendments have to be effected rests with the Parliament. Hence, the order as demanded by the petitioner need not be issued.

At this premise, justice seems to be reached by concentrating on the following questions:

1.

2. Upon converting the Trust land into Raitan Numbari as per the provisions of Guthi Corporation Act, does the existence of such Trust sustain or not?

3. If existence of trust over such lands is extinguished, can that be treated as tantamount to infringement of the constitutionally accorded right to protect religious and cultural heritage derived from Trust? In other words, whether the provisions of Guthi Corporation Act allowing for the conversion of Trust land into Guthi Raitan Numbari land and the corresponding Government decisions are inconsistent with the Constitution or not ?

4. Whether it is a matter of responsibility of the stakeholder person, community or sect to protect any of the religious and cultural heritage or the state also incurs certain liability in this regard?

5. Whether the order as sought in the writ petition has to be issued or not?

Prior to analyzing these questions, it shall be relevant to discuss on the subjects of what is a Trust? How has its concept evolved? What is the significance of Trust from religious and cultural perspective, etc. The term *Trust* has been defined as 'a trust founded by a contributor by bequeathing his/her proprietary rights upon the movable/ immovable property or other income-generating property or cash for the purposes of: to run and manage the festivals, worship or processions of any shrine, temple, God or Goddess, to build, operate, manage or to maintain for any religious or philanthropic purposes - any temple, place of worship, sheds, other religious structures, well, pond, lake, tap, road, crematory, bridge, pasture, shelter, garden, orchard, jungle, library, school, dispensary, hospital, house, building or institution'.

From the above definition laid down in the Guthi Corporation Act, 1976, it is evident that a Trust is established for operating, maintaining and furthering the religious, cultural, welfare traditions, standards, rituals and custom. A trust embodies religious and cultural significance. Since, donor renounces their ownership on their movable, immovable or other property which generates regular income or money and surrenders them for the purpose of public benefit. So, Guthi is also the transfer of right to property or ownership for conducting social and religious activities continuously, who establishes or keeps the Guthi, together they waive their right on their property. Individual's right end with the creation of Guthi. Guthi, being the process of ending the individual's right and creation of group right, it is legal duty of the state or the state's agency or acting as the body of government called Guthi Corporation Agency or Instrumentality of State, is to conserve the wills expressed by the founder of Guthi through will from destruction to provide for the perpetual continuity.

It is seen that, for building different temple and shrine, worshiping of them, conducting different cultural festivals and jatras, making rentd house, shelter, inn, road, bridge for philanthropic purpose and for their conservation, donors provide the type of land whose source of earnings or income has already been decided, is kept as Guthi. It is seen that, the use of the income of such land, is in the activities related with worshiping and conducting the jatras and festivals along with the conservation and protection of the public estate. In this way, it is seen that Guthi is the process and system of obtaining the generosity benefit or profit by the community from a single generous person who is dedicated towards the public welfare, which seemed to remain as a continuous system once it has been installed. Guthi is one of the indivisible parts of our social, cultural, religious tradition. To provide the heart to this important part, from initial, the legal provision for management and regulation of Guthi seen to have been placed in separate Chapter in County Code (Muluki Ain) of Nepal. Later, in 2033, as they felt the necessity for systematic operation of Guthi from separate legal law, Guthi corporation as a corporate body has been established to conduct the Guthi, to protect and to perform the activities related with worship or feast of any God. Motivated by the principle, *Sarbajana Hitaya and Sarbajana Sukhaya,*, it is thought that,

Guthi placed on Guthi System, the community will take Guthi as their own, effective enjoyment of the Guthi for the benefit and not letting them to be misused can guarantee the sampatda *jivantata. (Perpetual wel-keeping of the heritages).*

After the conceptual clarity related with Guthi Corporation, it is suitable to describe the concerned Sections and related constitutional provision which are inconsistent with Article 18(1) or 19(2) of Constitution of Kingdom of Nepal prevailing at that moment.

Sec 25(2)(c)

To convert the land into …… the *Guthi Raitan Numbari* land and register it with specification of the terms and conditions as prescribed.

Sec 26(1)

Upon the commencement of this Act, all rights and powers of the registration holder in any *Guthi* controlled land in relation to which the tiller (*jotaha*) pays the crop rent to the registration holder and the registered tenant pays rent in kind in whole or partly in kind and partly in cash as per the rate of the *Guthi*, in the Kathmandu Valley and the hilly areas shall cease to exist and the Corporation shall have full ownership in such a land; and the actual tiller farmer shall obtain the tenancy right in such a land.

Sec 27

The actual tiller farmer shall be entitled to the right of tenancy in a *Guthi* land in accordance with the prevailing law.

Sec 32(2)

The rights and status of the owner of a *Guthi Raitan Numbari* land shall be the same as those of the owner of a government *Raikar* land according to the prevailing laws.

Sec 36

In cases where any registered tenant cultivating any *Guthi* land desires to have such land converted into a *Guthi Raitan Numbari* land and registered in his or her name, the Corporation shall register

the *Guthi Raitan Numbari* land in his or her name if he or she pays the prescribed amount to the Corporation in the prescribed manner.

The prescribed written provision of Guthi Corporation Act 2033, being pleaded as inconsistent with Article 18(1) and 19(2) of previous constitution of kingdom of Nepal. But that constitution has been repealed by the Interim Constitution of Nepal 2063, so the following provision should be considered and described through the new constitution. Following shows the comparison between the Constitution of Kingdom of Nepal, 2047 and Interim Constitution of Nepal 2064

Constitution of Kingdom of Nepal, 2047	Interim Constitution of Nepal, 2063
Article 18(1) Each community residing within the Kingdom of Nepal shall have the right to preserve and promote its language, script and culture.	Article 17(3) Each community residing in Nepal has the right to preserve and promote its language, script, culture, cultural civilization and heritage.
Article 19(2) Every religious denomination shall have the right to maintain its independent existence and for this purpose to manage and protect its religious sites and Trusts.	Article 23(2) Every religious denomination shall have the right to maintain its independent existence and for this purpose to manage and protect its religious sites and religious Trusts, in accordance with law.

After presentation of related constitutional and legal provisions, based upon the Guthi Corporation Act, now it is necessary to search the answer of the first question prescribed above. In situation of Guthi, converted into the Raitan Number, based on the provision of conversion of Guthi land into Raikar land of Guthi Corporation Act, whether this provision will loose the identity of Guthi or it still exists? Regarding this issue, the provision of Sec 25(2)(c) and Sec 23 of Guthi Corporation Act 2033, of converting and registering different Guthi Land into Raitan Number, should be viewed. Among them Sec 25 has the provision of converting the land into …… the *Guthi*

Raitan Numbari land and register it, with specification of the terms and conditions as prescribed and Sec 36 has the provision which states that- “In cases where any registered tenant cultivating any *Guthi* land desires to have such land converted into a *Guthi Raitana Numbari* land and registered in his or her name, the Corporation shall register the *Guthi Raitana Numbari* land in his or her name if he or she pays the prescribed amount to the Corporation in the prescribed manner.” After converting them into Guthi Raitan Numberi, whether the status of that land is like that of Guthi or it changes is regarded here as the central issue? Guthi Corporation Act has the provision of definition of Guthi Raitan Numberi which states that "*Guthi Raitan Numbari* land (*Guthi* land registered in the name of individual)" means a land the registration holder of which is required to pay the land revenue (*malpot*) to the Corporation. In this regard, seeing the definition of Land Revenue given by Revenue Act 2034, it states that "Land Revenue" means the land revenue and any other revenue similar thereto required to be paid by a land owner to Government of Nepal pursuant to the prevailing Nepal Law, and it also includes any fee (penalty) payable for non-payment of the land revenue within the time-limit referred to in this Act. From this definition, it is clear that, the responsibility of paying the land revenue is upon the land owner. Therefore, landowner along with the responsibility of of paying the registration revenue of Guthi Raitan Numberi, it ipso facto is seen to be converted into landowner. Not only this, Sec 32(2) states that, the rights and status of the owner of a *Guthi Raitan Numbari* land shall be the same as those of the owner of a government *Raikar* land according to the prevailing laws. In this way, although it is named as Guthi Raitan Numberi, but after converting Guthi land into Raitan Numberi, its existence is similar to that of Raikar land. Except paying the Revenue to the Guthi Corporation, it can be transferred or utilized like that of Raikar land. In those lands, there is no existence of Guthi which can even be seen clearly from the practices also. In this situation, defendant could not plead upon the existence of the Guthi on Guthi Raitan Numberi land from the perspective of law and the even from practices too. Therefore, it is clear that conversion of Guthi

into the Guthi Raitain Number will end the existence of Guthi in those lands.

From the above analysis, it is concluded that, the existence of Guthi in Guthi Raitan Numberi land. Now, whether the action of converting Guthi Raitan Numberi affects on the Constitutional Right and Guthi's objective of conserving and promoting religious and cultural property? It means that whether the provision of Guthi Corporation Act or decision of government related to the subject matter of converting Guthi Raitan Numberi is according to the constitution or not? It has to be considered. Regarding this, Guthi is not only the subject matter which is related to a particular religious community but it is a process or the system. This notion converts the so called object into ours. Though the donor is one and donated by a particular person but it is given for the social use and collective benefit. Any religious person can be the donor. They can put forward their property wholeheartedly, for religious benefit or cultural protection or for social utilization. In this way, the land which has been separated for above prescribed reason must be utilized for fulfilling that objective, is the main concern of the concept related with Guthi. Specially, Nepal being Guthi multi-linguistic, multi-cultural country, Guthi related property plays an important role to continue that multiplicity.

Constitution of Kingdom of Nepal, 2047 provided the right towards the conservation and promotion of every community's language, inscription and culture. Along with this it has also provided the right of conduction and conservation of religious place and Guthi, too. This notion is again being continued by Interim Constitution of Nepal, 2063. The previous constitution provided the right to citizens to profess their own custom, religion, and culture too. Additionally, Nepal has been placed under the Hindu Kingdom country, though the citizens of Nepal remain always as multi-linguistic and multi-religious but the indication of Hindu Kingdom by the constitution is seemed to be contradictory. The interim constitution does not include concept, of Hindu Kingdom country it believes that the country should have a particular religion but it has also provided the right to every citizen to exercise their

religion and culture based on their faith. This shows that the present constitution has transformed Nepal from Hindu Kingdom Country to a Secular State. In this context, conservation, protection and promotion of those cultural civilizations, heritages and religious Guthi become an important subject matter. Because, without discrimination or giving priority to a particular religion and culture, state should put the equal value to all culture and creates an environment for their benefit and growth. So, concerned religious and cultural follower through the medium like Guthi should take responsibility for conducting religious Guthi, conserving and protecting religious civilization and heritage, religious place and other religious Guthi. In this context, if the prevailing Guthi continuously is converted into the Guthi Raitan Numberi then, there is not only the extinction of the Guthi heritage but the donor also loses the Trust towards Guthi System. That religious, cultural, social basis dependant upon that heritage also gets disturbed. In this situation, the constitution has provided the right to conserve and promote those cultural civilization and heritages. Guthi is also established with the same objective to conserve and promote the religious place and religious Guthi. The legal provision made to end the existence of Guthi heritage should not be thought to be in accordance with the constitution.

Guthi Corporation Act defined "*Guthiyar* (trustee)" means a person who is entitled to enjoy the surplus income (*shes kasar*) of the *Guthi* or operates the *Guthi* and is the endower of a *Chhut Guthi* or personal *Guthi* or the heir to the endower. In the context of limiting the right of Guthiyar, transferring Guthi to anyone's name by trustee of Guthi land through auction. The process of ending the existence of Guthi land by converting them into the private property will not preserve the of Guthi estates. There is competition of converting the Guthi land into Raikar Land without taking into account about the objective of creating it. Due to this, there is a danger of unceasing extinction of Guthi heritages. Sec57 If any person does not perform the function which he or she is required to perform as envisaged in the deed of gift or endowment, stone inscription (sheelapatra) etc of the Guthi and is thus guilty of

dereliction of religious duty (dharmalop), such a person shall be liable to a fine not exceeding Rs. 500/-, and such a person may be compelled to perform the functions according to deed of gift or endowment, stone inscription etc of the Guthi. The Mahants, priests, trustees and other functionaries who are guilty of such dereliction may be dismissed and other persons may be appointed to replace them. Guthi is established with the definite purpose and it can be expressed through the different medium like the document of will or the deed, of copper plate inscription, as well as inscriptions on stone and the likes. The Guthi is not kept without any objective. In this way, the process of converting those Guthi into Guthi Raitan Number forgetting the original objective and encourage such act which is even protected cannot be taken as good from any sense. If those Guthi were to be converted into the personalize then why it is named as Guthi ? It is a very serious question which needs to be dealt. Once it has been named as Guthi it should be consider as its purose, the utilization should also be done according to their objective. The report prepared by Guthi Corporation's Work and Action related Examination Committee, HMG 2048, also stated that, the immovable property of Guthi like land, house, temple, shrine are not mobilized properly. As a result, they are decreasing in number because those properties and heritages are being encroached. It has been accepted also by the report of High Level Guthi Reform Committee's 2053. To reach to the conclusion, it is seen from the report that the commission has done excessive research. The conclusion drawn from those researches cannot be proved otherwise. The initiation of the implementation of the report as told by Government shows that the Government is also agreed with the conclusion of the report. There is no dispute about the fact that the Guthi are being misutilized and the main reason or the actor for this is the legal provision. So it cannot be argued that, this legal provision is reasonable.

That, who giving up their property to Guthi is known as beneficiary, the person, who makes donations is a donor. Once the things are relinguished, it cannot be taken back and even their successors

cannot take back the property given in donation by their ancestors. It is also an act of veneration and the successor of that donor should not do those activities nor encouraged to do so which erodes the veneration of their ancestors. But provisions of Guthi Corporation Act of converting Guthi into Guthi Raitan Numberi have shown clearly that it endangers Guthi related heritages and affects upon the constitutional right. Likewise, considering the decision made by Land Reform and Management Ministry, and Land Revenue Department on 2045/6/30 and 2049/8/22. On 2049/8/22, the following decision has been made on 2049/8/22.

On the basis of 1.5

> *"The policy to exchange the private Guthi established on the basis of 1 and half income earning needs to be amended. Such provision needs to be replaced to allow the exchange of private Guthi on the basis of the minimum value shown for it during registration. Moreover, when such types of Guthi are transferred to the respective trustees, the allocated minimum amount needed for registration should be deposited in a bank as non-expendable fund. The trustee should only be allowed to withdraw the interest from the deposited in order to run Guthi and ensure that religion, cultural and religious practices are prevented from disappearance."*

The said decision is found to be related with Private Guthi. The decision made by Land Revenue Department and Land Reform and Administration Ministry to exchange the private Guthi or register them in their own name by depositing the cash in non-expendable fund, appears to be against the concept of Guthi. It can be said that, the provision of non-expendable fund appears be against the principle that the work which cannot be done directly cannot be tried to even to work indirectly too. This provision of that exchange opened the way to keep the low graded land instead of good land and sale and distribute those good and valuable lands. And while depositing amount at non-

expendable fund, people will deposit the minimum money and register the valuable land in their own name and they even sale and distribute that land for their own benefit. Those decisions does not protect and promote the Guthi heritage, rather it encourages misutilizing those properties. From the order of the court, the report brought on 2052 by Government and Public Land Investigation or Conservation related High Level Commission, shows that instead of valuable land of Kathmandu, they provide land from remote villages of the hill areas and the provision of keeping non-expendable fund and exchange of land is against the concept of Guthi. So, those decisions need to be examined. But, to investigate and examine upon those decisions is very impractical and even not contextual from the point of duration of time. The decision made to make those Guthi as private Guthi and use for the purpose of their personal benefit is against the objective of Guthi, i.e, the welfare of the people. It is also felt that those decisions are against the constitutional right of protecting and promoting the cultural heritage.

Now, we should deal about the third question. Is it only the duty of a particular group, community to protect any religious or cultural heritages, or whether the country also has the responsibility towards its protection? Definitely, it is the responsibility of group, community, or other who takes care of that Guthi, towards the protection of any religious and cultural heritages. Religion and culture is also a matter of identity. Therefore, everybody tries to protect their own identity. Though the state does not have their separate religion and culture of its own but every religion, culture of the state expect to get the equal protection from the state. To protect the culture and religion of a particular community or group is a constitutional right, so it is also the duty of the state to protect the constitutionally guaranteed right of the people. The right of groups or community created the obligation to the state. So the state cannot remain impartial or independent. The statement that, the state does not have its separate religion, culture, does not mean that state should ignore those cultures and the religion of others. The state being the guardian of the fundamental right of the

people should give equal respect to all religion and culture. It should not give concern only to a particular community or groups and completely ignore the other. It is also seen in the constitution that, the policy of state is strengthening the unity of the nation by maintaining the cultural diversity of the country through the promotion of healthy and harmonious social, religious, culturals, castes, communities, sects, origin, languages and linguistic groups by assisting in the equal promotion of their language, literatures, scripts, arts and cultures. Article 15(1) of ICESCR also states that, to take part in the cultural life is also seen as the responsibility of the state. Convention on concerning the protection of the World Cultural and Natural Heritage, 1972 also has accepted that the state has responsibility in protecting the cultural life of people which states as follows:

> *"Each state party to this convention recognizes that the duty of ensuring the identification, protection, presentation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primary to that State. It will do all it can to this end, to the utmost of its own resources and where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical which it may be able to obtain."*

Not only this, this Convention has also prescribed about the process to be adopted by the state for the protection of those cultural heritages which are as follows:

To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State party to this Convention shall endeavor, in so far as possible and as appropriate for each country.

a. To adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to

integrate the protection of that heritage into comprehensive planning programmes.

b. To set up within its territories, where such services do not exists, one or more services for the protection, conservation and preservation of the cultural and natural heritage within an appropriate staff and possessing the means to discharge their functions

c. To develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural or natural heritage.

d. To take the appropriate legal, scientific, technical, administrative, and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritages and

e. To foster the establishment or development of national or religion centers for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Section 9 of Treaty Act 2047, states that the provisions of treaty is implemented as law. In this context, the commitment shown by Nepal should also be found in constitution and other laws. It is the duty of the state to give life to the cultural right of every people. So it is the responsibility of State, to maintain the suitable environment not to estrange on the utilization of the right. If anybody tries to create disturbances or hurdle while ensuring those right then at that time state should not remain silent. And to stroke upon the Guthi heritage, cultural related Guthi and the value or standard dependent upon those cultural values, provides the big loss to the State. In this way, if the property of State are misused or destroyed then, one day there is possibility of disappearance of the fundamental redentition of State, Guthi can be the best example. The provision of Guthi Raitan Numberi can be taken as the latest utilization done in the management of Guthi. Those provisions were not included in Guthi Corporation Act, 2021 and 2029 and Guthi Corporation Act, 2033. In one hand Sec 25(4) of Guthi Corporation Act, 2033 has provision that,

notwithstanding anything contained in Sub-sections (1), (2) and (3), no religious as well as public barren land where shrines are situated or which is related with temples, festivals, worships and feasts shall be registered in the name of any person. Even if such a land has been registered, the Corporation may invalidate the registration of such a land. The last line of the provision is the unconditional one and the subject matter of responsibility of state for protection and promotion of Guthi has been made secondary. Due to the dejection of State, those Guthi who has been the example of successful Guthi, has been converted to the subject matter of buying and selling. Those activities are not accepted and recognized by the constitutional commitment and multicultural, multi-linguistic notion of the State. One can be seen uninterested to protect the Guthi heritage. The country should make the policies based on these exceptions. In times of conflict between the social and individual interest, social interest must prevail. So, in subject matter of protection of religious and cultural heritage, the State should not show their dejection towards this issue. States have to bear the responsibility.

Now observing the last question, whether the decision must be done as per the demand made in the application, according to the Article 18(1) and Article 17 (2) of the Constitution of Kingdom of Nepal? Those provisions of previous constitution are continued by Article 17(3) and Article 23(2) of Interim Constitution of Nepal, 2063 respectively. In one hand, to protect and promote cultural and religious places and conduct the activities as per the establishment of Guthi is guaranteed through the constitutional; and on the other hand Sec 25 (2) has the provision like to convert the land into …… the *Guthi Raitan Numbari* land and; register it, with specification of the terms and conditions as prescribed and Section 36 of Guthi Corporation Act, 2033 has the provision like in cases where any registered tenant cultivating any *Guthi* land desires to have such land converted into a *Guthi Raitan Numbari* land and registered in his or her name, the Corporation shall register the *Guthi Raitan Numbari* land in his or her name if he or she pays the prescribed amount to the Corporation in the prescribed manner. Likewise, based on decision of

Land Reform and Administration Ministry, HMG related with exchange of Guthi on 2049/8/22, and has been issued also a circular.

We are governed by the written constitution. The repealed Constitution of 2047 which is also a written constitution. The provision related to main law of Article 1 and fundamental right Article 11-22 of that constitution were the most importation provision of that constitution. Article 1, says (1) This Constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, be void and Article 3 says the sovereignty of Nepal is vested in the Nepalese people and shall be exercised in accordance with the provisions of this Constitution. Among them Article 18 and Article 19 related with the cultural and religion are regarded as important rights Article 18(1) says, each community residing within the Kingdom of Nepal shall have the right to preserve and promote its language, script and culture. Article 19(1) every person shall have the freedom to profess and practice his own religion as handed down to him from ancient times having due regard to traditional practices: Provided that no person shall be entitled to convert another person from one religion to another and 19(2) every religious denomination shall have the right to maintain its independent existence and for this purpose to manage and protect its religious places and Trusts. Also Article 25(3) and Article 26(2) have given the importance role of the State in promotion of religious and cultural heritages.

Among the rights prescribed the right included in Article 18 and 19 are directly implemented by the State mechanism. So, the law cannot be made by the Sate ignoring the constitution the fundamental law of the land, fundamental basic principle of law and even against the ratified international instruments related to human rights and others. Therefore, those legal provisions are ultra vires according to Article 1 of the Constitution.

In a circumstance that, that Constitution does not specifically indicate that to keep Guthi is constitutional right. But, inference can be drawn that Article 18 and 19 of Constitution has provision regarding the cultural and religious right, and Guthi does the activity related with culture and religion. So, the constitutional provisions are directly

related with Guthi related provisions, too. In one hand the constitution has provided the religious and cultural related right as fundamental right and Government through their different decision limits the right of the Guthi on the other. The provision of exchanging of Guthi and converting Guthi into Raikar land, establishing non-expendable fund shows that it is against the constitutionally protected right related to culture and religion. This ultimately created the situation of disappearance of identity of Guthi. Guthi is kept with different objective. Guthi is kept for establishment of any temple according to the prevalent custom or give continuance to the activities related to worshiping of God or fixing any customary prevalent practices. These objectives can be seen through different written documents like copper plate inscription, stone inscriptions and others. Guthi existed in that way, comes under the domain of religion and culture of the certain groups or community. If there is creation of disturbances in ensuring that right, then court should bear the responsibility to ensure those violated right. Constitution has made provisions of three different organs like legislative, executive and judiciary. Its functions, duty and right are also described in detail. For the purpose of ensuring and guaranteeing fundamental right of the people, court is given the extra-ordinary power. In case there is violation of the right then the court with their extraordinary jurisdiction helps to revive the fundamental right of the people. The written constitution of Nepal has provided the right to make law to legislature only within the limit of constitution That means, law made by legislature should not be inconsistent with the constitution.

Now observing the claim of the application, Guthi being the important part of cultural and religious right, seen to be inconsistent with Article 18 and 19 of Constitution. The legal provision and the decision made allowing the exchange of Guthi, conversion into Raitar Land by non-expendable fund and permitting the land to buy and sell is seen to be inconsistent with the Article 18 and 19 of Constitution of Kingdom of Nepal. According to Article 1, this Constitution is the fundamental law of Nepal and all laws inconsistent with it shall, to the extent of such inconsistency, be void. And Article 88(1) says Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution

because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either ab-initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution. Therefore, the said provisions of Guthi Corporation Act has created the situation to convert them in Raitan Numberi, a shock to the constitutionally protected right to conserve and promote their cultural places and perform the Guthi related activates. In order not to create those situations and for guaranteeing the constitutional right of protecting, conserving and promoting the religious place and performing activities related with Guthi, Sec 25(2) (c) and Sec 36 of Guthi Corporation Act 2033, according to Article 107(1) of the Constitution of 2063 is declared as void effective from this very date.

Similarly, the Circular issued to exchange the Guthi by decision of Revenue Department on 2045/6/30 and decision made on 2049/8/22 by Land Reform and Administration Ministry, to register the Guthi in the name of any trustee by keeping them in non-expendable fund is not found to be according to any provision of Guthi Corporation Act 2033. Therefore, the decision made to issue the Circulars and other decisions are against the law and against the constitutional right of the people related with the enjoyment of the cultural and religious right related with Guthi. Hence, through order of certiorari, those decisions are declared as ab-initio or from the date of its decision.

Article 88(1) of previous Constitution of Kingdom of Nepal, 2047 has given the authority to the court to declare the law as void if it is inconsistent to the constitution. The provision of Article 88, is important basis related to the concept of independence judiciary. That means, in context of Nepal, Article 88 is the basic structure of the independence of Nepalese Judiciary. Supreme Court has the power to declare that law as void either ab initio or from the date of its decision if it appears that the law in question is inconsistent with the Constitution. Sec 25(2)(c) and Sec 36 of the Guthi Corporation Act 2033, has seen to be implemented from 2041/8/24. From the date of implementation, the works has been done according to those provisions. The bench comes to the conclusion that that those sections of Guthi Corporation Act are inconsistent with the Article 18

and 19 of the Constitution. The description of today's decision is to be applied from the date of the implementation of Act, and then it negatively effects the decision made or the activities done according to the valid legislation. From the universal principle of Prospective Overruling, the prescribed Provision should be void effecting from today.

If we see, the concept of prospective overruling in context of Nepal, while declaring the unconstitutional provision as void according to Article 88(1) of Constitution of Kingdom of Nepal 2047 and Article 107(1) of present Interim Constitution of Nepal 2063, court has extraordinary power. Additionally, whether to implement their decision from the date of decision of those provisions as ultra vires, or from the date of the promulgation of the Act itself, depends upon the discretion of the judge. If the provision is to be declared void ab initio then it negatively affects upon the works and activities performed earlier depending on those provisions. The law which is promulgated by following all due process is regarded as valid law. The promulgated law even if it unconstitutional, until and unless it is declared as void by the court, the question of validity cannot be raised. Therefore, declaring void ab initio on those valid laws may create the irreparable loss as so many decisions has been made on the basis of that valid law. So, the court hereby declare the prescribed written provision as void from the date of declaration of those provision as unconstitutional and not to have the retrospective effect upon the activities or the decision made by the Government. Hence, the prescribed written legal provision and the decision done by the Government herby declared as void. For the information of the dependant, the photocopy of this decision is to be provided through Office of Attorney General and file is to be submitted according to law.

We concur with the above decision.
Justice Ram Prasad Shrestha
Justice Damodar Sharma

Done on this day of 10th Magh, 2064 (2008 January 24)
Translated by Rewati Raj Tripathi

Since the problem, practice and behavior of one group or community differs with the other such differences cannot be resolved through the indiscriminate laws. They demand a separate statutory arrangements protection and treatment. In such a situation, the equality among equals, however must be preserved.

Supreme Court, Special Bench

Hon'ble Justice Khil Raj Regmi

Hon'ble Justice Ram Kumar Prasad Shah

Hon'ble Justice Gauri Dhakal

Writ No.: 063 ws 0022

Subject: Certiorari.

Petitioners: Tek Bahadur Raika, acting chairman of DNF, Kamalpokhari; Kathmandu and others

Vs

Respondents: Government of Nepal, Office of the Prime Minister and the council of ministers and others

- **The philosophy of equality turns to be a hollow doctrine and a mere formality in the absence of its practical realization, in substance. There have been enumerated various sub- Principle of principles of equality for enjoying in real sense. Of them, the protective discrimination, affirmative action and reasonable classification may be taken as vital.**

- **Since the problem, practice and behavior of one group or community differs with the other group or community hence these differences cannot be addressed using indifferent notion of indiscriminate laws and behaviors, they demand a separate statutory arrangements, protection and treatment. In such a situation, the equality among equals, however, must be preserved.**
- **No indifferent interpretation of equality can be drawn so as to injure the traditional norms, values and customs of the Lord Pashupati Nath temple and areas adjacent to it, incurring disturbance in the right to adopt and practice them.**
- **The principles of non- interference to the right of others while exercising, one's own right contributes to strike proper balance also among fundamental rights. So the matter relating to the conduct of worship with the full observance of traditional religious norms also deserves special significance. Since these types of practice have direct impact on the religions faith and belief of certain religious group or community, now therefore, it will be improper to observe such practice through indifferent point of view of equality. They must be perceived and practiced through various angels and treated fairly and distinctively providing special status and identify.**
- **Our constitution has indisputably accepted the notion of reasonable classification and protective discrimination under the provision of right to equality so as to make special arrangements for the protection, empowerment and development of women, dalits, indigenous, Madhesis or peasants, workers, children, old or socially or culturally back warded group as well as disabled or physically impaired or mentally retarded or differently disabled persons. Similarly, commitment has been made so as not to treat discriminately to any citizen on the ground of religion, color, sex, caste and creed, origin, language or faith or anyone of them and provisioned**

under the application of general law. The direct meaning carried by the right of equality under that Section construe that the aforementioned provision cannot be used as an obstruction the provision of "special arrangement made by special enactment". The Pashupati Area Development Act 2044 BS and the Pashupati Area Development Trust (Working Procedure) Rules, 2054BS are the special enactments. So the provision laid in Rule 3(1) of the said Rules is required to be interpreted taking into account the sensitivity of the overall Pashupati Nath Area.

- **The provision enshrined in Rule 3(1) of the said Rules is not the general law but the special enactment and the constitutional rights regarding equality shall be applied only in the use of general law and not in the use of special law. Hence, the provision of the said Rule 3(1) shall not be held contradicting to the right of equality guaranteed by the constitution.**

Decision

Khil Raj Regmi, J; The summary of the fact of this writ petition filed and submitted in this court in pursuant to Article 88(1) and (2) of the then Constitution of the Kingdom of Nepal, 1990 and the decision reached thereupon is as follows:

Since the Rule 3(1) of the Pashupati Area Development Trust (Working Procedures Rules) 2054BS, is contrary to Article1(1), (2), (3) and (4) of Article 11 of the Constitution of the Kingdom of Nepal, 2047B.S and the spirit of its Preamble, it is therefore requested for the invalidation of that archaic Rule by issuing order of certiorari along with mandamus as well as the other appropriate orders as may required therefore under Article 88(1) and (2) to ensure constitutional equality. Further, through this petition, we also plea as under that the provision of the said Rule 3(1) in question contradicts with the

constitution and the international treaties and agreements endorsed by the country.

In sub-Rule 1 of the said Rule in question provides that a person who, by birth is the follower of Hindu religion, orator of Vedas, righteous possessed through knowledge of Hindu religions scriptures, Sanskrit scholar, bachelor learned Brahmin as well as he who has married in his own caste shall be qualified for the chief priest and a widower or a person who has married a more than one wife shall not be qualified for the post of the chief priest. This forbids women, person of non-Brahmin caste or origin to become the priest under law. This also overrules what the constitution and current Nepal law provides for Article 116 of the 2047 constitution respects the spirit of the preamble as its core value which protects the basic human rights of all Nepalese people and aims at forging fraternity and unity on the basis of freedom and equity. Therefore, the Rule in question which has ignored the inamendable central provision of the constitution is contradictory and voidable.

Article 1(1) has placed the constitution as the fundamental law of the land and all the contradicting laws to be void to the extent of their contradiction. The reason why the constitution is called the fundamental law is because no law contrary to its value, ideals and spirit could exist and take effect. Likewise, Article 1 has guaranteed equality among all citizens and prohibits discriminatory treatment among equals. To treat discriminately or doubly among equals appear neither constitutionally acceptable nor practically expedient.

Similarly, sub-Article(2) clearly provides that no discrimination shall be made among citizens on the ground of religion, color, sex, caste, creed or faith or anyone of them in the use of general law. However, the Rule in question encourages the discrimination based on race and sex for holding the post of a priest of a shrine like the Lord Pashupati Nath, which ignores also the core value of rule of law. Article 11(2) of constitution prohibits discriminatory treatment among citizens on the ground of religion, color, caste, creed or any other ground whatsoever. Further, the proviso clause mentioned in sub-Article (3) of the said Article clearly spells that the positive discrimination may be made by

enacting laws for the optimum good of the women and economically, socially as well as academically back warded community. Likewise, the sub- Article (4) of Article 11 of the constitution provides for ground of untouchability and race factor and further incorporated a provision in the constitution according to which no one shall be prevented participating or assembling in public places and utilizing public goods or utility by recognizing it one of the basic human right. Instead of assimilating women and back warded class and community of people into all sectors of societal activities, their segregation by enacting laws is a hostile classification. Therefore, it should be declared archaic and unlawful.

Part IV, Article 25 (3) of the constitution stresses on the end of all sorts of social and economic inequality and intends to promote harmony among different caste, creeds, religions, languages and sects of people and to establish and promote just and healthy social life based on morals has no placed as the state's social thirst. No one shall have right to act going against the Directive Principles and policies of the state. We would like to remind here in this petition that this Hon'ble court has spelled out these facts in various cases including in the case of advocate Prakashmani Sharma versus HMG, Cabinet Secretariat and others.

We also had a plea that this archaic Rule in question not only supersedes the provision guaranteed by the constitution but also enables for the continuity of century –old unscientific, immoral, impracticable and wrong trends of gender inequality, untouchability and similar other discriminating practices. Moreover, this unconstitutional character of it has undermined also its liability of respecting human right protocols and the expectations made in such other instruments aimed at promoting human dignity. So our request is for its dismissal.

Not only our constitutional provision but also Article 2 of Human Rights Declaration, 1948 has interpreted that all the members of human race shall have inherent rights to receive equal protection of law without discrimination. In like manner, Article 1 of International Convention against Discrimination on Women, 1979 has defined gender

discrimination and human rights deprivation as a discrimination which cause hindrance in women's identity question and results in the loss of their work-efficiency.

Article 2(f) of the said convention has directed the state party for the adoption of an appropriate legislation which declares all laws, regulations and policies encouraging gender discrimination, unlawful.

Similarly, Article 2(1) (c) of the International Convention on the Abolition of All Sorts of Racial Discrimination, 1965 has underlined the liability of declaring all the national level policy-based practices continuing racial discrimination, unlawful. Section 9 of the Treaty, Act, 2047 B.S has recognized the status of international treaties and agreements to be as that of municipal laws. The said arbitrary Rule has opposed the good will shown in these international norms and therefore should unlawful and voidable.

This arbitrary legal provision has solely aggravated the three basic elements of human development, i.e. equality, freedom and human dignity. The total freedom cannot be enjoyed until and unless, there is no equality. Though the indifferent equality does not seem so practical, however to create discrimination only on the ground of sex and race without reasonable classification shall negate the spirit of the Rule of Law as dreamt by the constitution. The Supreme Court has spelled out these facts in many cases. Discriminatory provision may be made on the basis of intelligential differentia; however, the unreasonable classification cannot realize the goal of justice. The Supreme Court on Iman Singh versus military court Ne.Ka.Pa 2049 BS Vol.8, Page 710 has spelled out this truth.

Similarly, no legislative as well as executive decision which denounces the right to equality shall receive constitutional endorsement. This arbitrary Rule contradicts also with the precedents set in various decisions including the case of Man Bahadur Bishwokarma versus HMG (Ne.Ka.Pa, Vol 12, and Page1010) and this voidable.

There is no room for doubt and dispute on the matter that one who would like to be nominated in the post of chief priest of Lord Pashupati

Nath shall be required to be a Hindu, orator of Vedas, a bachelor, well versed in Sanskrit language and of sound moral character. But further limitation made by the said arbitrary legal provision as requiring only a Brahmin male has clearly put restrictions on the right to equality of women, dalits and persons of other indigenous community other than Brahmin, guaranteed by the constitution and other human right instruments. Today there are women, and dalit priests in various shrines. In these circumstances it is not only unconstitutional and against basic instinct of right to equality ratified by the various treaties and conventions but it is also irrational and improper to entrust and empower only Brahmin male in the post of a priest of a public temple like the lord Pashupati Nath. Further, the People Movement II on 21st Jestha 2063 has given mandate to House of Representatives to declare the country as untouchability abolished nation. To continue these types of trends also in a new context are not the affirmative steps. Our social fiber is itself carries discriminatory practices. To give them legality will never be a positive approach, so we request for their annulment.

Since, the provision of Rule 3(1) of Pashupati Area Development Trust (Working Procedure) encouraging gender and racial discrimination contradicts with Articles (1), (2), (3), (4) Article 25(3) and the international treaties and convention abolishing all sorts of discrimination, it is subject to null and void under Article 1(1) of Constitution of Kingdom of Nepal 2047 and an appropriate order along with mandamus under Article 88 (1) ,(2) of the constitution be issued in the name of respondents to make or cause to make necessary arrangements so as to appoint women, dalit and indigenous people in the post of chief priest of Lord Pashupati Nath, for the protection of racial and gender equality.

The Supreme Court, single bench, on 14th Mangsir, 2063 issues an order in the name of respondents requiring their explanation about the event and also about whether order as sought by the petitioners should not be issued. Then duly submit the case file before the bench after the written reply from the respondents is received.

The office of the Prime Minister and the council of ministers in their written reply flatly denies the accusation made by the petitioners and responded that the plea made in writ petition does not concern with business to be performed by these offices. The issue concerning a Rule framed under an Act passed by the legislature cannot be regulated by these offices and there is no sound cause also to label these offices as respondents. Hence, the writ petition should be quashed.

The Ministry of Local Development, in its written reply asks to vacate the writ petition because the activities related with Pashupati Area Development Trust do not fall under its scope and jurisdiction of this ministry.

The Ministry of Women, Children and Social Welfare requests for the dismissal of writ petition referring it as illogical and thoughtless since the petitioners are silent about reasonability of filing the petition and are failed to exactly mention about which of the functions fallen under the scope and jurisdiction of this ministry has not been properly carried out.

The constitution of the Kingdom of Nepal, 2047 B.S and the Interim Constitution of Nepal 2063B.S has provided to each religious sect right to preserve, conduct and protect the religious spot. Provisions are made so as to secure the fundamental rights to religion by safeguarding the religious customs and tradition long since practiced. Therefore the provision laid in Rule 3(1) of Pashupati Area Development Trust (Working Procedure) Rules, 2047 B.S does not contradict with the Constitution. The ministry of Law, Justice and Parliamentary Affairs, thus requests for the vacation of the writ petition.

Often, Rules are brought about to ensure the easy and fair implementation of the mother Act. The Pashupati Area Development Trust (working procedure) Rules, 2047 B.S was framed in exercise of the power conferred by Section 21(1) of the Pashupati Area Development Trust Act, 2044BS. The writ petition has no objection over the mother Act. Therefore the writ petition is quash able because

its plea is only for the annulment of Rules framed under the Act. The Act is committed to its objective of conducting worship of Lord Pashupati Nath with the strict observance of the ancient religions customs and traditions, and the qualifications required to be the Chief priest of Lord Pashupati Nath is still continue from the past. The Rule was framed in exercise of the power conferred by the Act and for the continuation of the traditional norms. In such a situation it is inappropriate and improper that the said Rules contradict with the constitution. The Lord Pashupati Nath is the center of religions faith and belief of Hinduism. The qualifications determined for chief priest of Lord Pashupati Nath are also supportive to the faith and belief of the followers of Hindu religion. It does not save to anybody to remain indulge in such an act which hurts the faith and belief by causing disturbances in the faith and belief of the followers of Hindu religion. While rising the question of exercise of right to equality, the constitution does not impulse any restriction on the state to enact such law which does not harm the harmonious relations among different castes, creeds, religions and sects. The enactment and commencement of the Pashupati Nath Area Development Trust Act and Rules were brought to realize these objectives. Hence, it is meaningless to raise question in such matters. The then constitution of the Kingdom of Nepal 2047 B.S and Interim Constitution Nepal 2063 B.S both have granted each religions sect right to promote, conduct and preserve religious spot. In such a context, the writ petition filed alleging a practice long since adopted as the continuation of tradition against right to equality, is requested to be quashed. The Pashupati Nath Area Development Trust complains in its written reply.

In this writ petition which is duly submitted before this bench, neither the petitioner advocate Shyamkumar Bishwokarma who is represented also as an agent of the case nor his lawyers appeared before this bench despite repeatedly calling them. The Learned Deputy- Attorney Mr. Brajesh Pyakurel represented from Nepal government presenting his opinion before the bench says, there is a need also to take into account the fact that the then constitution of the Kingdom of Nepal, 2047 B.S and the Interim constitution 2063 B.S have guaranteed the right to religious equality. The section of people

indicated by the petitioner are not imposed any restriction on to enter into Pashupati Nath area, pay homage and conduct worship. The priesthood is not an employment or a job. So, there is no question of any discrimination. All must observe the customs and traditions and they vary according to the respective religions. The customs receives status of a law and deserves its own validity. The constitution respects them, too. Nepalese society is a highly civilized society. If will not be wise to produce rupture in our well-built social fiber, norms and values. No one should raise any dispute on traditional values long since adopted and hurt the religions faith and belief attached thereto. Hence, the writ petition should be quashed. Advocate Kamal Bahadur Bogati, who is also represented from one of the respondents Pashupati Area Development Trust admits that our is a country having multi-tribal, multi-lingual, multi-religious and multi-cultural specialties. Article 23 of the Interim Constitution of Nepal, 2063B.S has granted the religious right, whereas Pashupati Area Development Trust Act, 2044B.S has clearly spoken of the norms for the preservance of the traditional way of worshiping and veneration. The Lord Pashupati Nath temple has been comprised in the world of Heritage list. So, it is equally important to make its liveliness continue as ever by preserving the traditional rites regarding worships. No discrimination has made for entrance in Pashupati Nath temple and conducts worship and pay homage. Specific qualifications are determined in regard to the chief priest which is recognized by customs and traditions of the long past and cannot be pulled in dispute and debate. The Rule was framed for the implementation of Act and where the provision enshrined in the Act is not challenged the Rules thereunder also cannot be challenged.

While going through the entire case file along with the writ petition and hearing the pleas of the learned counsels and taking into account the remarks made by the petitioners for annulment of Rule 3(1) of the Pashupati Area Development Trust (working procedure) Rules, 2054B.S on the ground that it prevents women and the person of non-Brahmin caste which contravenes the right of equality guaranteed by the constitution , Universal Declaration of Human Rights, International Convention against all sorts of Discriminations on Women and the provisions of International Convention on the Abolition of all sorts or

Racial Discrimination whereas the respondent Pashupati Nath Area Development Trust in its written reply states that the Pashupati Nath temple which is comprised in world Heritage list has remained the centre of religious faith and belief of the followers of Hindu religion and stands as the continuation of the customs and traditions of the unknown past cannot be called against the right of equality. The provision regarding religious rights provided in the constitution also secures the right to respect the prevailing social and cultural tradition and follow, practice and protect the religion. Hence the writ petition filed so as to damage these recognized practices is quash able. In such a situation, the following questions are held to be settled in this writ petition:

Whether or not writ petition that enters any issue into the court coloring it as a Public Interest Litigation shall bear the responsibility in the judicial process of settling the question raised in the writ petition or it is enough for him only to enter the issue into court?

Whether the right of equality is an indifferent right or there is any exception or limitations to it ?

Whether or not the provision contained in Rule 3(1) of Pashupati Area Development Trust Rule, 2054B.S is considered to have made restriction on the fundamental rights regarding equality? Whether or not the provision made in the said Rule contends with the Constitution?

Let us dwelt upon the first question: The petitioners have made a claim that the Rule 3(1) of the Pashupati Area Development Trust Rules, 2054 B.S is against the right of equality provided by the constitution and requested for its annulment since it contradicts also with the provisions contained in various international conventions and presented this matter as an issue involving public interest. The petitioners further complain that the issue raised in the petition does not represent their self-interest or concerns they are affiliated to. While taking as basis the contentions made in petitioner by the petitions that the said provision prohibits women and other castes except the male in the case of gender and the Brahmin in the case of caste is

contrary to the right of equality provided in the constitution appears to be a matter involving public interest and concern. The contribution made by the petitioners in protecting and promoting the public interest by bringing such issue within the ambit of judicial settlement must be appreciated. It is the sacred duty of the petitioners to assist in the process of judicial settlement taking into account the sensitivity and seriousness of the matter by conducting research, documentation and the collection of the concerned literature, international instruments and of the court procedure. It is because the court is the final interpreter of law and the legal practitioners are as the key partners of the same process and proceedings. That's why the legal practitioners are called the officer of the court.

In order to keep with these sacred morals entitled to them, it is their duty to extend good will towards the court and the bench, assist in courts proceedings and in bench deliberations. The legal practitioner's code of conduct, 2054 B.S warns the legal practitioners for not creating any obstacles by remaining absent at the appointed time and disposing of cases. The basic principles relating to role of the legal practitioners 2047 endorsed by the UN general assembly empowers the legal practitioners in bringing into public discussion the issues related with law and justice including administration of justice and the promotion and protection of human rights and further elaborates that the use of such power however shall be in consistent with the prevailing law, professional ethics and morals. While viewing through the above perspective there is no doubt on the fact that to cause obstruction in hearing process is to create obstacles in judicial settlement and also appears against the professional ethics of the legal practitioners. The direct impact of rendering any obstructions in the regular hearing process injures to the users of justice. This bench concludes in the matter that the petitioner, who is also a legal practitioner, understands this sensitivity of the judicial proceedings. In contrary, despite repeated call of the bench, the person attending at the time and date fixed by the court did not appear in the bench to smoothly forward the hearing process and cooperate clearing the bench about the issue raised in the writ petition. Thus the legal

counsel representing the petitioners found reluctant towards their duty.

Although the petitioners have failed from reaching in logical end even on the issue themselves raised, however, the issue raised in the petition sounds involving the public interest. In such a situation, the court, however, cannot escape from its duty of settling the issue in course of hearing. Mere absence of the writ petitioner could not be the reason for dropping out or dismissing the issue involving the public concern or interest. The court has internalizing the concept of reaching decision on matters relating to public issue or concern by adopting due process of law (Prof. Chuda Nath Bhattarai Vs Public Service Commission, Ne Ka. Pa. 2054 B.S, Vol.7 Judgment No. 6402, Page 360. The court feels similar obligation also in this case and concluded on the fact that there is need to finalize the problem by analyzing the questions underlined above.

While considering upon the second question i.e.; whether the right of equality is an indifferent right or there is any exception or limitation to it? For this, it is necessary fully to comprehend the concept of 'Equality'. "Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike (Sir Ivor Jennings, on law of the constitutions, 5th edition, P-50). Within this concept the two viewpoints relating to equality: equal protection of law and equality before the laws are subsumed. While observing our constitutional practice both standpoint as equal before the law and equal protection of law are found incorporated in the then constitution of Kingdom of Nepal 2047B.S and also in the current Interim Constitution, 2063 B.S.

While looking into the conceptual aspect of equality, the equality remained always indifferent and appears as that it must not be viewed in relativity of other things. However, the equality always advocates the substantive equality but not a equality, based on formality.

The philosophy of equality turns to be a hollow doctrine and a mere formality in the absence of its practical realization, in substance. There have been enumerated various sub- principle of principles of

equality for enjoying in real sense. Of them, the protective discrimination, affirmative action and reasonable classification may be taken as vital.

These sub- principles have recognized that the equality cannot be indifferent. While looking through the concrete standpoint, the indifferent equality looks almost impossible because the society is made up of diversity. The basic instinct, the customs and traditions and behavior of one group or community differ with the other. So are their needs. These diversities cannot be addressed by the indifferent viewpoint of indiscriminate law and behavior. For this, a separate statutory arrangement, legal protection and behavior shall be imperative. But doing so the equality among equals however must be preserve. It is possible through the reasonable classification.

Since the problem, practice and behavior of one group or community differs with the other group or community differs with the other group or community and cannot be addressed these differences using indifferent notion of indiscriminate laws and behaviors, they demand a separate statutory arrangements, protection and treatment. In such a situation, the equality among equals however, must be preserved.

After achieving conceptual clarity of equality, now let us enter into the main issue raised in the petition. Whether or not provision contained in Rule 3(1) of Pashupati Area Development Trust (working procedure) Rule 2054B.S is deemed to have made restriction on the fundamental right relating to equality. Whether or not the provision of the said Rule contends with the constitution? Since it is the key issue of the dispute it will be appropriate to look into the relevant legal and constitutional provision prior to hold discussion on this matter.

The Pashupati Area Development Trust (Working Procedure) Rules, 2054B.S has determined the qualifications of the chief priest of Lord Pashupati Nath according to which one who is by birth, is the followers of Hindu religion, orator of Vedas, righteous having thorough knowledge of (Hindu) religious scriptures, Sanskrit scholar, bachelor, learned Brahmin and married in his own caste and a widower or a person having more than one wife shall not be qualified for the chief priest. These provisions have imposed restriction on other castes of

persons or women other than the Brahmin male to become chief priest. Since the said provision is contrary to the right to equality it should be declared void. This is the main contention of the petitioner. So much so, they said provision has determined the specific criterions for the particular qualification of the priest which are fixed in the relativity of anciently, customs and traditions, religious norms and values as well as the usages. It simply is understood from the preamble of Pashupati Area Development Trust Act, 2054 B.S, and the mother of the Rule and from the study of the objectives of the Trust and also from the provision of promulgating the Rules.

Pashupati Area Development Trust (Working Procedures) Rules, 2054 B.S

Rule 3: Qualifications and Appointment of the Priest of Lord Pashupatinath:

1. Any person who is the follower of Hindu religion by birth, has studied Vedas, righteous, having possessed expert knowledge of theology, Sanskrit scholar, bachelor, learned Brahmin and married in his own caste shall be qualified to become priest of the Lord Pashupatinath and, a widower or a person having more than one wives shall not be qualified to become the chief priest.
2. The claim made in the petition is that the said legal provision of the Rules is contradicted with the right of equality provided by Article II of the constitution of the Kingdom of Nepal, 2047 B.S. In a circumstance, when the said constitution has been repealed and the Interim Constitution of Nepal 2063 B.S has been prevailed now therefore, it is necessary to analyze the provisions relating to the right of equality contained in both the constitutions which is shown in the following table:

The Constitution of the Kingdom of Nepal 2047 B.S.	Interim Constitution of Nepal 2063 B.S.
Article 11: Right of Equality: (1) All citizens are equal before the law. Nobody shall be deprived of the equal protection of the law. (2) No discriminations shall be made to any citizen in the use of general law on the ground of religion, color, sex, caste, creed or faith or on any one of them. (3) No discrimination among citizens shall be made by the state on the ground of religion, color, sex, caste, creed or faith or on anyone of them. Provided that, the special arrangements may be made by law for the protection or development of women, children, or of physically or mentally disabled person or economically, socially or academically back warded group. (4) No discriminations of untouchability shall be made to any person on the basis of castes or shall not be deprived from attending in public place or in the use of public utility. Such actions shall be punishable by law. (5) No discriminations between woman and man for equal work shall be made in remuneration and social security.	Article 13: Right of Equality: (1) All citizens are equal before the law. Nobody shall be deprived of the equal protection of the law. (2) No discriminations shall be made to any citizen in the use of general law on the ground of religion, color, sex, caste, creed, origin, language or faith or on any one of them. (3) No discriminations among citizens shall be made by the state on the ground of religion, color, caste, creed, sex, origin, language or on anyone of them. Provided that, nothing shall be deemed to have made restriction on making special arrangements by law for the protection, empowerment and development of woman, dalits, indigenous people, Madhesi or peasant, worker of economically, socially or culturally back warded group or children, old and impaired or of physically or mentally disabled person. (4) No discriminations between woman and man shall be made in remuneration and social security for equal work.

Preamble of the Pashupati Area Development Trust Act, 2054B.S.

In order for maintaining peace and order situation, to take care of the belongings and development of the area comprising under the domain of the Lord Pashupatinath, the only venerable god of Hindus, it is expedient to make arrangements relating to Pashupati Area Development Trust to ensure good moral and comfort of all people in general.

Section: Objectives of the Trust:

The Trust shall have the following objectives:

6.1.1. Since the Pashupati Area where the Lord Pashupatinath, the one and only most venerable god of Hindus situates happens to be the only center for paying their sincere homage and has been a pilgrim from the long past, it shall be arranged and maintained so as to uphold the same spirit and faith.

6.1.2. Ensure security and carry maintenance and development works of Pashupati area in a planned manner keeping with the ideal (standard), glory and significance of the Lord Pashupatinath.

6.1.3 Maintain, preserve and promote the items (substance) or of the spots of ancient, historical, religious, cultural and as well as natural heritages of national importance.

6.1.3. A. Make arrangements for conducting worships keeping with the traditional religious orders in all the temples of gods and goddesses of Pashupati area belonging to state-owned (Rajguthi) land including the temple of the Lord Pashupatinath.

6.1.4. Undertake necessary activities in a planned manner in order to improve this holy pilgrimage site for the privilege of all the followers of Hindu religion within and without the country and also of the tourists, and

6.1.5. Conduct other activities in a well-managed way keeping with the objectives of this Act.

Section 21: Power to Frame Rules:

21.1. The Trust may formulate the following Rules to fulfill the objectives of this Act and the Rules so formulated shall require to be approved by the government of Nepal.

21.1.5 In relation to conducting the worship of Pashupatinath and Guhyeshwori keeping with the traditional religious practices.

The above-mentioned provisions of the Act also has undertaken the traditional practices of Pashupatinath temple with the objectives of giving continuation to the act of worship to be conducted keeping with those norms. Next, the Pashupatinath temple as well as religious and cultural heritages attached to it have been comprised in the World Heritage List and have to shoulder the obligation of the country to preserve them. It is equally important to take into account here also the provisions made by the convention concerning the Protection of the World Cultural and Natural Heritage, 1972:

> "Each state party to this convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generation of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain."

Likewise, even by the Article 2(2) of International Convention on the Abolition of All Sorts of Racial Discriminations, 1965 and Article 11(3) of the Convention on the Abolition of All Sorts of Discrimination on Women referred to by the petitioner have accepted the concept of classification and specific protection-oriented legal provisions.

In this way, the Pashupati Area Development Trust Act, 2044B.S deserves the quality of special Act and competent enough for carrying special arrangements by promulgating Rules for conducting worship of Pashupatinath temple keeping with the traditional rites of religious practices. The petitioner does not seem to have made challenge against the provisions contained in the Preamble and 6.1.3 A of Section 6 and Section 21.1.5 of the Act which produces the Rules. In a situation, where those provisions of the Act have remained unchallenged, the rationale of the claim made in petition for quashing the provision contained in such Rules backed by the Act cannot be substantiated.

Next, the provision relating to right of equality mentioned under the heading of fundamental right in the Interim Constitution of Nepal has provided also about right to religion in a parallel way. Among these two rights of equal vigor, the provision contained in right to religion reads as under:

(1) Every person shall have right to adopt, practice and protect his traditional religion in keeping with the existing social as well as cultural norms and values.

Provided that no one shall have right to transform the religion of others and act and behave so as to cause erosion in each other's religion.

(2) Every religions sect shall have right to preserve his religions spot and conduct or run religious trust maintaining his independent existence as law provides.

The above mentioned provisions contained in Article 19 of the Constitution of the Kingdom of Nepal and in Article 23 of the Interim Constitution has ensured the traditional right to adopt, practice and presence one's own religion, protect religious spot and conduct religious trust keeping with the existing traditional, social and cultural norms. No indifferent interpretation of equality shall be favorable which enforces the right to preserve traditional norms, and values concerning the Lord Pashupatinath's temple conducting the religious order thereof and follow and practice them.

- The principles of non- interference to right of others while exercising one's own right contribute to strike proper balance also among fundamental rights. So the matter relating to the conduct of worship with the full observance of traditional religious norms also deserves special significance. Since these types of practice have direct impact on the religious faith and belief of certain religious group or community, now therefore, it will be improper to

observe such practice through indifferent point of view of equality. They must be perceived and practiced through various angels and treated fairly and distinctively giving special classification and identity.

The following concept shall be important in this regard:

A statute based on a reasonable classification does not become invalid merely because the class to which it applies consists of only one person. A single body or institution may form a class. Legislation specifically directed to a named person or body would be valid if, on account of some special circumstances, or reasons applicable to a person, and not applicable to others, the single person could be treated as a class by himself. (M.P. Jain, Indian constitutional law, Fourth Edition Reprint 2002, P.481, Wadhwa and Company, Nagpur, India). Likewise, the Supreme Court of India has given the following verdict in a case related to Jagannath Temple :

A special law passed for Jagannath Temple was held valid for the temples held a unique position amongst the Hindu temples and so it could be given a special treatment (Bira Kishore Deb Vs Orissa, AIR 1964 SC (1501.)

Looking back into our own context, while any enactment is required to be brought in course of the administration of justice and if such an enactment has expressed reason to believe that it is proposed for only one section of the citizenry and there is rational link with the goal to be realized by such classification, in such a circumstance, that cannot be called contrary to the right of equality only on the ground that it is concentrated only one section of people not others. Thus the concept of reasonable classification is internalized also in our court practice assuming that it cannot be rated as unconstitutional and invalid merely on the ground of classification that it is applicable only one section of people not others. Iman Singh Gurung Vs. Military Court, Ne. Ka. Pa. 2049 B.S, Vol.8, Judgement No. 4597, Page 710). In constitution, even under the provision of right of equality, the concept of reasonable classification and the protective discrimination has been

accepted for protection, empowerment and development of women, Dalit, indigenous, Madhesis or peasants, workers or for socially, economically and culturally back warded groups and children, aged as well as of disabled or physically or mentally impaired persons.

Similarly, commitment has made so as not to treat discriminately to any citizen on the ground of religion, color, sex, caste and creed, origin, language or faith or anyone of them and provisioned under the application of general law. The direct meaning carried by the right of equality under that Section construe that the afore-mentioned provision cannot be used as are obstruction on the provision of "special arrangement made by special enactment". The Pashupati Area Development Act, 2044 B.S. and the Pashupati Area Development Trust (Working Procedure) Rules, 2054B.S. are the special enactments. So the provision laid in Rule 3(1) of the said Rules is required to be interpreted taking into account the sensitivity of the overall Pashupatinath Area.

Hence, on the basis of analyzation made above the provision contained in Rule 3(1) of Pashupati Area Development Trust (Working Procedure) Rules, 2054B.S is not subject to be covered by general law but the specific law and since the constitutional right as quoted by the petitioner appears to be applied only in the use of general law not in the use of specific law, in such a circumstance, this court cannot be agreed with the claim made in the petition that the provision of said Rule 3(1) contradicts switch right of equality provided by the constitution. The writ petition is decided to be vacated. The case file is handed over according to the rule, removing it from the case diary.
We concur with the above decision.

Justice Ramkumar Prashad Shah
Justice Gauri Dhakal

Done on this day of 14th Chaitra, 2064 (March, 2007).
Translated by Bhim Nath Ghimire

Our Judiciary is competent to use the law giving it different meaning and applying it in a different context than that used and interpreted by a fixed legal mechanism.

Supreme Court, Full Bench
Hon'ble Justice Khil Raj Regmi
Hon'ble Justice Girish Chandra Lal
Hon'ble Justice Bharat Raj Upreti
Criminal Case Ref. No. 065-CF-0006

Case: Homicide.

Appellant/Plaintiff: Government of Nepal by the First Information Report of Ram Lal Urav

Vs.

Respondent/Defendant: Shiva Kumar Yadav, resident of Ashopur Balkawa VDC, Ward No. 2, Siraha and others

- **The law has determined the processes by which to correct the mistakes within a decision. Thought must be given to the possible consequence of disturbing the set standards of justice and creating judicial anarchy if courts take on a proactive role and start reviewing the decisions of lower courts despite the absence of appeal on the decisions by the affected party.**
- **Among parties standing on equal terms, there should not be such an eventuality that one of the same parties is absolved of charge and punishment while the other is subject to punishment. However, for this to happen, the precursor is that at least one of the defendants has to file a complaint or an appeal. Only in the light of the**

complaint or an appeal, justice can be delivered in their cases. This being the clear intent of law, justice cannot be done to defendants by only relying on the appeal of the plaintiff alone.

- **The existing judicial system does not permit one to implicate different meanings to and address matters not included in the law. Nor does it permit one to implement the demands of one party in the reverse and henceforth provide remedy to the other party through this reversal.**
- **When justice has been dispensed at different levels of courts in a given case under ordinary jurisdiction of the court, existing legal provisions cannot be made useless. They can also not be interpreted to make their parameters extremely broad or narrow.**
- **The ascertained and fixed standards of justice cannot be tampered with in the name of dispensing full justice as argued under writ jurisdiction. It is not the goal and duty of the judiciary to be able to use the law by giving it different meaning and applying it in a different context than that used and interpreted by a fixed legal mechanism.**

Decision

Khil Raj Regmi, J; The brief description of the case presented before this bench registered in this court as an appeal filed on behalf of the Government of Nepal, pursuant to the Section 9(1) of the Administration of Justice Act, 2048 being aggrieved by the decision of the Court of Appeal Rajbiraj and as per the order of the division bench made pursuant to Rule 3(1)(d) of the Supreme Court Rules 2049 (1992) are as follows :

The applications of Batoran Tatma, resident of Fulbaria, Barauni, India and of Ram Lal Urav, resident of Ashopur Balkawa VDC, Ward No. 2, Siraha, dated 21st Jestha, 2060 read: Six persons including Shiva Kumar Yadav, resident of Ashopur Balkawa VDC, Ward No. 2, Siraha,

entered the orchard on 20th Jestha, 2060 around midnight and started beating us. Hence, we request for the medical examination of wounds and bruises inflicted on our bodies through the Wound Examination Case Form.

The application of Shiva Kumar Yadav, resident of Ashopur Balkawa VDC, Ward No. 2, Siraha, dated 21st Jestha, 2060 read: On the night of 20th Jestha, 2060 Batoran Tatma and Ram Lal Urav battered me. As such, I request for the medical examination of wounds and bruises inflicted on my body through Wound Examination Form.

The crime scene report dated 21st Jestha, 2060 mentioned: Ram Lal Urav's orchard situated in Ashopur Balkawa VDC, Ward No. 2, Siraha, was littered. A bamboo cane and a torch light with broken glass pane lay two feet west of the shack. That cane and torch were recovered and taken into custody by the police. On the night of 20th Jestha, 2060 Batoran Tatma and Ram Lal Urav were severely thrashed by miscreants including Shiva Kumar Yadav, resident of Ashopur Balkawa VDC, Ward No. 2, Siraha.

The Wound Examination Forms of the injuries and bruises inflicted on the bodies of Batoran Tatma, resident of Fulbaria, Barauni, India and of Ram Lal Urav and Shiva Kumar Yadav, both residents of Ashopur Balkawa VDC, Ward No. 2, Siraha, have been included in the case file.

The First Information Report (FIR) submitted by Ram Lal Urav, dated 22nd Jestha, 2060 read: In the course of guarding the mango orchard, on the night of 20th Jestha, 2060 I, Batoran Tatma and Rostam Miya were sleeping under a tree at Ashopur Balkawa VDC, Ward No. 2, Siraha. In the mean time, defendant Shiva Kumar Yadav entered the orchard around midnight and thrashed Batoran Tatma. After a while, he returned with other defendants, viz. Asarfi Yadav, Bechu Yadav, Ram Dev Yadav, Ram Ashish Yadav and Siltu Yadav and started beating me as well, both of us were wounded gravely as a result. Batoran Tatma succumbed to the same injuries and died on the night of 21st Jestha, 2060.

The body examination report stated: In the mango orchard situated at Ashopur Balkawa VDC, Ward No. 2, Siraha, and belonging to Avadh

Lal Urav, there laid the dead body of Batoran Tatma; his head facing west, feet facing east and his face gazing at the sky. There was also a black bruise around his left eye.

The arrested defendant Shiva Kumar Yadav in his statement before the investigation officer mentioned: On the night of 20th Jestha, 2060, after consuming snacks and liquor at Sandhya Hotel of Gol Bazar, I, Ram Briksha Sah and Ram Dev Yadav riding on the same motorcycle made our way to my house in Balkawa. Mid-way, we stopped and chatted for a while in Ram Briksha Sah's house. Then as I was returning home, I reached Avadh Lal Urav's mango orchard. I called on the sleeping Batoran Tatma who was guarding the orchard. He woke up all of a sudden and started to manhandle me. Enraged, I also hit back using my fists and torch light and then made by way back home. On my way back, I saw Asarfi Yadav, Bechu Yadav, Ram Dev Yadav, Ram Ashish Yadav and Siltu Yadav from the village going towards the orchard upon hearing the clamour. This is what happened. After that, I never came back to the orchard. They went there and I have no idea what they might have done.

The autopsy report of Batoram Tatma linked the cause of death to the rupture of the left kidney and its deposition in the stomach.

The statement made by Mohammed Ishrafil, resident of Barauni, India read: In course of guarding the mango orchard, Batoran Tatma, Rostam Miya and Ram Lal Urav were sleeping under the same mango tree while I was sleeping in another orchard nearby. While returning with the villagers, Rostam Miya informed me that around midnight, Shiva Kumar Yadav entered into the mango orchard and called up the sleeping Batoran Tatma. He suddenly rose out of sleep and in the process his hands struck the body of Shiva Kumar Yadav. Angered, Shiva Kumar Yadav started thrashing Batoran Tatma. When I reached the orchard myself, I saw Shiva Kumar Yadav mauling Batoran Tatma. The other defendants were heading eastward. On our arrival Shiva Kumar also headed eastward. Then, we arranged for the treatment of the wounded with the help of other villagers. Batoran Tatma died of the same injuries the next day, i.e. on 21st Jestha, 2060.

The statement made by father of the deceased, Bijal Tati read: My son Batoran Tatma died of the injuries on 21st Jestha, 2060 due to the

wounds inflicted upon him by Shiva Kumar Yadav and others the day before, i.e. 20th Jestha, 2060. On hearing this news I rushed there, saw and identified the dead body of my son. I demand action against those persons who battered my son.

The statement of Avadh Lal Urav read: Upon hearing that Shiva Kumar Yadav, Asarfi Yadav, Bechu Yadav, Ram Dev Yadav, Ram Ashish Yadav and Siltu Yadav had severely beaten Batoran Tatma and Ram Lal Urav, we proceeded to the site of the crime and made arrangements for their treatment. Batoran Tatma died of the same injuries the next day, i.e. 21st Jestha, 2060 while I was attending to him.

The statement of Bijay Kumar Lama read: On the evening of 20th Jestha, 2060, Raj Kumar Yadav, resident of Chandralal Pur-6, Siraha and Ram Briksha Sah, resident of Aasopur Balakawa-2, and three other persons ate some snacks and drank alcohol at my hotel. They left at 9.30 pm and I could not tell who went where. The persons now in custody of this Office were also there that night.

The statements of Ram Dev Yadav, Ram Briksha Sah, Ram Chandra Yadav and Raj Kumar Yadav read: On the night of 20th Jestha, 2060, we, four persons altogether, ate some snacks at Sandhya hotel located in Gol Bazar Chowk, Ashopur, Siraha and came out of the hotel. Though we saw Shiva Kumar Yadav, we did not talk. We went to our houses. We do not know where he might have gone.

Further, the statement of Rostam Miya read: On the night of 20th Jestha, 2060, Batoran Tatma, Ram Lal Urav and I were sleeping in Avadh Lal Urav's mango orchard situated at Asopur Balkawa VDC-2, Siraha as we were guarding it. At midnight, Shiva Kumar Yadav entered the orchard and called Batoran Tatma three or four times. However, Tatma did not wake up. My sleep was disrupted, so I woke up. Batoran did not wake up even after further calls. Enraged, Shiva Kumar Yadav flung a pack of mangoes on Batoran Tatma. Then, Batoran, in his sleep, moved his hands which accidentally struck Shiva Kumar Yadav. Angered, Shiva Kumar Yadav started beating Batoran and afterwards, left in the Eastward direction. Soon he returned with other persons. Afraid, I fled the scene. When I returned with Mohammed Ishrafil, they were heading eastwards after having

severely beaten Batoran Tatma and Ram Lal Urav. Shiva Kumar also fled the scene upon seeing us. Batoran Tatma succumbed to the same injuries on 21st Jestha, 2060.

Lastly, the statement of contractor Mohammed Nasim read: Batoran Tatma and others were brought from India to guard the mango orchards. What I heard is that Batoran Tatma succumbed to the injuries on 21stJestha, 2060 sustained during the severe beating by Shiva Kumar Yadav and his men.

The crime status report that included statements from Ram Chandra Urav and others read: When we arrived at the orchard after hearing clamour, on midnight of 20th Jestha, 2060, what we saw is that Ram Lal Urav was gravely wounded and Batoran Tatma lay unconscious. When probed, the complainant told us that Shiva Kumar Yadav and others battered them seriously. Then we, with the help of villagers, took them for treatment. After returning from treatment, Batoran Tatma died on the same orchard due to the injuries. I firmly believe that the defendants mentioned in First Information Report (FIR) were responsible for the beating and the subsequent death.

The charge sheet read: Since Batoran Tatma died due to the injuries following the brutal beating of Shiva Kumar Yadav and his men, and as such, since the defendants Shiva Kumar Yadav, Asarfi Yadav, Bechu Yadav, Siltu Yadav, Ram Dev Yadav and Ram Ashish Yadav committed a crime in contravention to Section1 of Chapter On Homicide of the Country Code (Muluki Ain), they therefore should be punished as pursuant to Section13 (3) of the same Chapter.

The statement of defendant Shiva Kumar Yadav in Court read: On the night of 20th Jestha, 2060, I was at my house. I did not beat up Batoran nor do I know who did. Since the complainant belongs to a different ideology and is my rival, he has given a false incriminating statement against me.

The statement of defendant Ram Dev Yadav made in Court on 23rd Bhadra, 2060 read: I never met with the deceased on the night of 20th Jestha, 2060. On that day, I was at Sitapur of Siraha to buy a buffalo. I went to Sitapur on the morning of 20th Jestha, 2060 and returned only on the night of Jestha 22nd, 2060. Since I was away from my house on

the night of the incident, I could not have beaten Batoran Tatma. I learnt of his death from the villagers upon my return. They said that he died at night and he was suffering from a heart and kidney ailment. They have falsely accused me for vengeance. I plead innocence to the offences that I have been charged for.

The statement of defendant Ram Ashish Yadav in Court read: On the night of 20th Jestha, 2060 I was at my house. I did not beat up Batoran nor know who did. I learnt of his death from the villagers upon my arrival at my father-in-law's house on 26th Jestha, 2060. The persons who gave statements in course of investigation believed the complainant's version of the incident and recorded false accusations against me. Since I was at home, I am unaware as to whether or not a brawl ensued in the mango orchard between Batoran Tatma and Shiva Kumar Yadav. Since I have not done any offence as stipulated in the charge sheet, I need not be sentenced. I plead innocence and seek acquittal.

The statement of defendant Asarfi Yadav in Court read: On the night of 20th Jestha, 2060, I was at Asanpur. I went to Asanpur on 15th Jestha, 2060 and returned only on 23rd Jestha. Since I was at my father in law's house at that time, I could not have beaten Batoran Tatma. I knew of his death from the villagers upon my return on 23rd Jestha when they said that he died at night as he was a patient of heart and kidney. I have not beaten the deceased. The complainant has tried to frame me in a murder case due our vengeance. Since I have not committed the stipulated offence, I plead innocence and seek acquittal.

The statement of defendant Bechu Yadav in Court read: On 19th Jestha, 2060, I went to my father in-law's house in Kalyan Pur to participate in a religious ritual of my brother in law's son. The ceremony was on 20th Jestha, 2060. I returned on 22nd Jestha, 2060. It was only then that I heard of the death of Batoran Tatma. Since I was not in my village at that time, I could not have beaten Batoran Tatma. I do not know who might have beaten him. I simply heard from the villagers that he succumbed to his kidney ailments. I have been falsely incriminated due to political rivalries I have in the village. Since I have not committed the offence, I plead innocence.

The alternative address of defendant Siltu Yadav could not be disclosed and as such the Court's notice could not be served in his case.

The witnesses of Shiva Kumar Yadav, including Bhula Yadav and Pradip Kumar Sah also corroborated his same statement before the Court. The statements of Pradip Yadav, Fulwa yadav and Jayram Yadav, witnesses of Ram Ashish Yadav, Asarfi Yadav and Bechu Yadav respectively also corroborated the statements of the defendants. All of their statements are recorded in the case file.

The verdict of District Court, Siraha dated 1st Ashar, 2061 read: Since defendant Shiva Kumar Yadav could not control his immediate anger and hit Batoran Tatma to death with fists and torch and since there is no past vengeance, no deceptive attack and no use of lethal weapon is disclosed, defendant Shiva Kumar Yadav is sentenced to 10 years of imprisonment as per Section 14 of the Chapter On Homicide Chapter of the Country Code (Muluki Ain). Since the charge as per Section 13(3) of Homicide Chapter of the Muluki Ain could not be substantiated, the other defendants, viz. Asarfi Yadav, Bechu Yadav, Ram Dev Yadav and Ram Ashish Yadav are acquitted. The fact that they did beat Batoran Tatma and he died due to the inflicted injuries could not be proved. In case of the fugitive defendant Siltu Yadav, his case is deferred as per Rule 19(a)(4) of District Court Rules, 1996.

Challenging this decision, defendant Shiva Kumar Yadav filed an appeal before Appellate Court, Rajbiraj which read: The doctor has specified in the Wound Examination Form that the wound is a simple one. It has been proved that the deceased died due to his own internal ailments and the accusation made by the FIR has not been corroborated from anywhere. As such, the decision of the Siraha District Court, which sentenced me to 10 years of imprisonment, is flawed. Hence, I request for the abrogation of such decision and acquittal from the charges espoused in the charge sheet.

Challenging the same decision, an appeal was filed on behalf of plaintiff Government of Nepal before Appellate Court, Rajbiraj which read: Multiple wounds are clearly shown in the Wound Examination Form. The autopsy report has also confirmed that the deceased died due to kidney failure arising from severe beating. It has been

substantiated from the case file that the victim died due to the blows of defendants. However, the District Court, Siraha decided to sentence defendant Shiva Kumar Yadav to 10 years of imprisonment and acquitted other defendants. As this decision is legally flawed, it is sought that the decision be abrogated and the defendants be punished as per the charge espoused in the charge sheet.

The Appellate Court, Rajbiraj on 2nd Chaitra, 2061 issued an order which read: On the basis of application filed by Ram Lal Urav on 22nd Jestha, 2060, by defendant Shiva Kumar on 21st Jestha, 2060 and by Ram Lal Urav and the deceased Batoran Tatma on the same date and on the basis of statement given by the defendant before the authorized official, and referring to the nature of incident, time and injuries seen on the victim's body, the decision to sentence defendant Shiva Kumar Yadav to 10 years of imprisonment as per Section14 of the Homicide chapter of the Muluki Ain and acquitting other defendants may be altered. Hence the Court orders to summon other defendants for discussion and then duly submit the file before the Bench.

The Appellate Court, Rajbiraj on 12th Ashar, 2062 issued a verdict which read: The medical test to injuries did not reveal that the causative factor of death is the wounds inflicted on the deceased. Defendant Shiva Kumar and other defendants were engaged in exchange of blows with the complainant and the deceased. As a result, it seems that the victim died due to disruption of his kidney. Hence, it is an accident. Therefore, the verdict of District Court, Siraha dated 1st Ashar, 2061 stands overturned. As such, the defendant Shiva Kumar shall now be found guilty under Section 5 of the Chapter On Homicide and be subject to two years of imprisonment as per Section 6(4) of the same Chapter. Under the same chapter, other defendants, viz. Asarfi Yadav, Bechu Yadav, Ram Dev Yadav and Ram Ashish Yadav have been imposed a fine of Rs. 500 each.

Challenging the same decision, an appeal was filed on behalf of plaintiff Government of Nepal before this Court which read: The complainant and the deceased have categorically taken the names of six persons including Shiva Kumar and others in their application request the injury test. The sequence of events has been elaborated

in the FIR. That matter is also affirmed by the statement on the spot of Shiva Kumar. All these confirm that the death of deceased is a case of homicide. Still, the Appellate Court, Rajbiraj established their offences under Section. 5 of the Chapter On Homicide, as such, Shiva Kumar was handed down two years of imprisonment as per Section6(4) of the same chapter. Under the same chapter, other defendants, viz. Asarfi Yadav, Bechu Yadav, Ram Dev Yadav and Ram Ashish Yadav had been imposed a fine of Rs. 500 each. Hence, as this decision is legally flawed, it is sought that the decision be abrogated and the defendants be punished as per the charge espoused in the charge sheet.

The verdict of the Siraha District Court, which stated, since the plea that the death of the deceased was a result of homicide could not be substantiated, and since his death is attributed to his own internal ailments, the defendant Shiva Kumar Yadav was handed down a sentence of ten years of imprisonment as per Section14 of the Chapter On Homicide the Country Code (Muluki Ain) and the acquittal of other defendants, was subsequently overturned by Appellate Court, Rajbiraj. The latter court established the defendant's offences under Section5 of the Homicide Chapter and, as such, Shiva Kumar was sentenced to two years of imprisonment as per Section6(4) of the same Chapter. Under the same Chapter, other defendants, viz. Asarfi Yadav, Bechu Yadav, Ram Dev Yadav and Ram Ashish Yadav had been imposed a fine of Rs. 500 each. The verdict of Appellate Court, Rajbiraj establishing this case as an instance of accident is not found to be appropriate. Likewise, the plea of maximum punishment as espoused in the charge-sheet does not hold ground.

The Division Bench of Supreme Court on its order dated 20th Magh, 2064 held: Even No. 205 of The Chapter on Court Management of Country Code (Muluki Ain) does not allow for the exemption of punishment when defendants have been sentenced and they have not filed an appeal against the conviction. It can only be considered if one of the defendants lodges appeal against sentencing. As there is no such appeal, no consideration arises on part of the defendants. This tendency has taken the place of a judicial principle and custom. Hence, as the procedure adopted in this case and the opinion

expressed amounts to contradiction of that judicial principle and custom, it is desirable that a uniform standard shall have to be maintained with a certain set of principles. In this backdrop, owing to the lack of appeal filed against the prior sentencing, if the sentencing is allowed to sustain, that shall be tantamount to the denial of justice. However, to address such malady, the prevailing principle and custom do interfere resulting in an espousal of a complex legal question. The decision on that question shall be better done by the Full Bench. Hence, this Bench orders for the writing off of this case from the registry of Division Bench and for its submission before Full Bench as per Rule 3(1)(d) of the Supreme Court Rules, 1992.

Upon the case duly submitted before the bench, Mr. Thok Praad Shiwakoti, learned Joint Attorney representing the Appellant/ Plaintiff, Government of Nepal argued that it seems the Division Bench has dispensed justice as if by assuming extraordinary jurisdiction. The Court cannot dispense justice by digressing out of the prevailing legal provisions. In the wake of evolution of a principle after interpretation of No. 205 of the chapter on Court Procedure by the Full Bench, the Division Bench cannot interpret to the contrary. He pleads that from the appeal filed by the plaintiff side, justice cannot be dispensed on equal terms as if the defendant has lodged an appeal.

On contemplating towards the facts of case, the charges made in the charge-sheet maintains that: On account of the autopsy report, statement of defendant Shiva Kumar Yadav, and the statements of persons in the crime scene, the deceased Batoran Yadav died as a result of fatal beating of the defendants. Hence, since defendants Shiva Kumar Yadav, Asarfi Yadav, Bechu Yadav, Ram Dev Yadav and Ram Ashish Yadav, have committed a crime in contravention to Section 1 of the Homicide Chapter of the Country Code (Muluki Ain), they need to be punished pursuant to Section 13(3) of the same chapter. It is found from the report of 21st Jestha, 2060 that the deceased, the complainant and the defendant had their injuries medically tested through separate applications following the incidence of battery inside the mango orchard on 20th Jestha, 2060. On the application that the deceased and the complainant submitted seeking the medical test of their wounds. Batoran Tatma's report states that

there are visible blue marks on the upper and lower part of his left eye. He returned from basic treatment of his wounds and died the next day on the same orchard where the incident occurred. The FIR has included this fact and the autopsy report has attributed his death to the following reason: *Death due to Ch. Lung disease ruptured left kidney e Haemopen fonium.*

One of the defendants, in his statement to the investigation officer has conceded that he hit the deceased with a torch light and other defendants have claimed innocence. All the defendants have pleaded not guilty before the Court. The original Court has sentenced Shiva Kumar Yadav to 10 years of imprisonment pursuant to No. 14 of the Chapter On Homicide of the Country Code(Muluki Ain) and acquitted the other defendants. The Appellate Court, Rajbiraj, in turn sentenced the defendants on the conviction of accidental homicide. This verdict was appealed by the plaintiff, Government of Nepal. Acting on that appeal, the Division Bench of this Court, concluded that the verdict of Appellate Court, Rajbiraj dated 12th Ashar, 2062 which convicted the defendants pursuant to No.5 of the Homicide chapter and, as such, Shiva Kumar was sentenced to two years of imprisonment and other defendants, viz. Asarfi Yadav, Bechu Yadav, Ram Dev Yadav and Ram Ashish Yadav had imposed a fine of Rs. 500 each pursuant to No. 6(4) of the same Chapter; that verdict is not found to be appropriate. It further observed that in the absence of appeal filed against the sentence, if the sentence is allowed to sustain, that shall be tantamount to the denial of justice. However, to address such malady, prevailing principle and custom interfere resulting in an espousal of a complex legal question. The decision on that question is best decided by the Full Bench. As such this case is submitted before the Full Bench as per Rule 3(1)(d) of the Supreme Court Rules, 1992. In fact, in this case, it has become essential for this Bench to analyze the context and limits of No. 205 of the Chapter on Court Magement particularly regarding the question. In case, none of the convicted defendants file an appeal against such conviction, and in a situation where the plaintiff files an appeal, whether justice can be dispensed by treating the appeal of plaintiff as if it were the appeal of the defendant as well.

In the aforementioned context, upon considering the provision enshrined in No.205 of the Chapter on Court Management reads: Out of the convicted defendants, in case one of them files an appeal successfully leading to the abrogation of conviction, then such abrogation of conviction shall also be deemed to apply to other convicted defendants who did not file an appeal. The direct intent of that legal provision is that the non-appealing defendant should also be treated in an equal footing with that of the appealing one and justice shall have to be delivered accordingly. The incidence of non-appeal by all of the convicted defendants infers that they have consented to the sentence and verdict. The law has determined the processes by which to correct the mistakes within a decision. Thought must be given to the possible consequence of disturbing the set standards of justice and creating judicial anarchy if courts take on a proactive role and start reviewing the decisions of lower courts despite the absence of appeal on the decisions by the affected party. This is also a matter of worth contemplating.

The provision enshrined in No. 205 of the Chapter on Court Management that: Out of the convicted defendants, in case one of them files an appeal successfully leading to the abrogation of conviction, then such abrogation of conviction shall also be deemed to have happened even in case of fellow non-appealing convicted defendant. This provision implies that if a complaint from one of the litigants which forms one party to the case standing on equal terms, results in the dispensation of justice, then that privilege shall also have to be extended to the other non-appealing litigant which forms one party to the case. Equal treatment has to be meted out to all the litigants of the like case. Among the parties standing on equal terms, there should not be such an eventuality that one of the same parties is absolved of charge and punishment while the other is subject to punishment. However, for this to happen, the precursor is that at least one of the defendants has to file a complaint or an appeal. Only in the light of the complaint or an appeal, justice can be delivered in their cases. This being the clear intent of law, justice cannot be done to defendants by simply relying on the appeal of the plaintiff side.

In this case, the District Court, Siraha had assigned Shiva Kumar Yadav 10 years of imprisonment as per No. 14 of the Chapter on Homicide of the Country Code (Muluki Ain) and acquitted other defendants. This verdict was subsequently overturned by Appellate Court, Rajbiraj which established their offences under No. 5 of the Homicide Chapter and, as such, Shiva Kumar was sentenced to two years of imprisonment as per No. 6(4) of the same Chapter. Under the same Chapter, other defendants, viz. Asarfi Yadav, Bechu Yadav, Ram Dev Yadav and Ram Ashish Yadav had been imposed a fine of Rs. 500 each. However, the defendants have not moved this Court in process of appeal or otherwise. An appeal has been filed on behalf of the plaintiff, Government of Nepal asking that the defendants be punished as per the charge espoused in the charge sheet. It has also indicated that the decision of the Appellate court is legally flawed. However, as none of the defendants have appealed to the Court, the Division Bench has concluded that, while deliberating on the appeal application, it must speak on behalf of the non-appealing defendants as well, lest, undeserved punishment is sustained forever, which in effect will amount to denial of justice. However, it is also worth contemplating that the decision of the Division Bench itself has agreed that exempting the defendants from their punishment, when none of them have appeal, is something not provided for unequivocally through No. 205 of the chapter on Court Management. The existing judicial system does not permit one to implicate different meanings to and address matters not included in the law. Nor does it permit one to implement the demands of one party in the reverse and henceforth provide remedy to the other party through this reversal.

The Full Bench of this Court has interpreted the statutory provisions of No. 205 of the Chapter on Court Management and its scope before. In the armed robbery case of the (then) His Majesty's Government Vs Chun Gun Jolaha, it has observed that: No. 205 of the Chapter on Court Management underlies the legal provision that: In case, when there are more than one convicted defendants in the same case, if some of them appeal against the conviction and some do not and resultantly the Court hearing the appeal overturns the verdict of the lower Court and if the subsequent verdict leads to anomaly for the non-appealing defendants, then in such a situation, the Court hearing

the appeal shall also have to decide regarding the non-appealing defendants. The decision of lower Court should be overruled as such. The case reference is Ne.Ka.Pa 2051, Issue no.3, Decision No. 4874, page No. 138. In light of this clear interpretation, interpreting so as to exempt these defendants from consideration pertaining to the criminal charges on grounds that they did not appeal; only the plaintiff appealed, shall misconstrue the legal provision of No. 205 of the Chapter on Court Management. When justice has been dispensed at different levels of courts in a given case under ordinary jurisdiction of the court, existing legal provisions cannot be made useless. They can also not be interpreted to make their parameters extremely broad or narrow. The ascertained and fixed standards of justice cannot be tampered with in the name of dispensing full justice as argued under writ jurisdiction. It is the goal and duty of the judiciary to be able to use the law by giving it different meaning and applying it in a different context than that used and interpreted by a fixed legal mechanism.

In so far as the issue of different rulings of this Court has been raised by the Division Bench, in the cases of (then) His Majesty's Government Vs Lhakpa Sherpa (Homicide - Ne.Ka.Pa 2056, Vol. No.6, Decision No. 6742, Page no. 453) and (then) His Majesty's Government Vs Durga Dhimal (Human Trafficking - Ne.Ka.Pa 2054, Issue No.6, Decision No. 6395, Page No. 332), there is no consonance among the facts of these cases. In both the aforementioned cases, one or some of the defendants had filed an appeal against the conviction while one or some of the defendants had not. In the first case, the decision is done and justice is delivered similarly for both the appealing and non-appealing party. In the second case, the decision was made and dealt with the appealing party only. However, both the cases are non-applicable in this case in the sense that none of the defendants convicted by the Appellate Court appealed the decision. The situation in this case is that its further deliberation has to rely solely on the appeal of the plaintiff. Hence, diverse decisions have been taken in diverse cases and circumstances. As such, the previous decisions of this Court may not serve as a basis to determine the present case.

On the basis of analysis done above, the situation is such that in this case none of the defendants convicted have lodged an appeal in this Court and the case has been submitted to the bench only in the light of appeal by the plaintiff. Hence, this bench has come to a conclusion that: As no appeal has been filed from any of the defendants, the legal provision of No. 205 of the Chapter on Court Management, which is applicable only when any of the losing defendants makes an appeal to the upper Court, cannot be applied in the case of dispensing justice to the non-appealing defendants as well. Therefore, the context and scope of legal provisions of No. 205 on the Chapter on Court Management and those raised by the Division Bench have been well resolved and settled. As such, it is found befitting for the Division Bench itself to delve into all of the factual questions of this case and to dispense justice regarding the appropriateness of the verdict of Appellate Court, Rajbiraj dated 20th Magh, 2064. Hence, it is directed that this case be duly submitted to the Division Bench after writing it off the registry of Full Bench.

We concur with the above decision.

Justice Girish Chandra Lal

Justice Bharat Raj Upreti

Done on this day of 26th Chaitra, 2066 (8th April, 2010).

Translated by Dharma Poudel

Because of globalizing the justice the judgments delivered by the court of one country are required to be given reorganization by another country on certain issues such as marriage, contracts, investments etc.

Supreme Court, Full Bench

Hon'ble Justice Balaram K.C

Hon'ble Justice Bharat Raj Uprety

Hon'ble Justice Kamal Narayan Das

Review Leave No. 065-NF-0032

Subject: Review of Case

Case: Partition Property.

Petitioner/Defendant: Dr. Pushker Raj Pandey, a resident of Eda city of Oklohama State of the United States of America having permanent residential home at Kathmandu District, Kathmandu Metropolitan, Ward No. 33 & others

Vs.

Defendant/Plaintiff: Sabina Pandey, a resident of Kathmandu District, Kathmandu Metropolitancity, Ward No. 4

- **The issue of recognition of judgment of the court of one country by the court of another country is an important legal question. Every nation is considered sovereign within its territory due to the sovereignty. Within ones territory, the law of that particular country prevails over every individual and property and the country accepts Exclusive Jurisdiction.No country enforces the law of another country other than its own. Such Exclusive Jurisdiction, though, would have been possible in the**

past, However, not possible in today's world of mutual interdependency. Therefore, the nations today cannot ignore foreign laws and judgments of foreign courts in the name of Territorial Sovereignty. The judgments not against public policy should be enforced through necessary procedures recognizing them also on the basis of Reciprocity, Comity.

- **This Court cannot raise the question as to whether the Fair Trial and Due Process was followed in the divorce case by the American Court. The court of one country should not review the decision of the court of another sovereign country in the manner of appeal or examining the justice.**
- **The opportunity of effective presence of defendant in the proceeding of case is necessary in order to get the recognition of foreign judgments. Any judgment where the party to case is unable to present before the court due to various external factors, the judgment is not considered as fair trial and such judgment do not get authenticity.**
- **Expensive judicial proceeding, unfamiliar procedure and proceeding where ones evidence and witnesses cannot be presented in order to establish the plea is not deemed to be Fair Trial; and any judgment without Fair Trial cannot be recognized and given authenticity.**
- **Today's world is dependant with one another, and since Nepal is also unable to stay in isolation due to the effect of globalization, judgments of the court of one country should be recognized and enforced by other countries in disputes related to marriage, contracts, investments etc.**

Decision

Balaram K.C J; The brief fact and ruling of the given case; where the leave of review petition is granted to the petition requested with plea pursuant to clause (a) and (b) of sub-section 2 of Section 11 of

Judicial Administration Act, 1991 on the judgment of Division Bench of this Court dated 18-03-2008 delivered through the leave of repetition pursuant to clause (a) and (b) of sub-section 1 of Section 12 of Judicial Administration Act, 1991 against the judgment of Appellate Court Patan; is as follows:

Application of Plaintiff Sabina Pandey: Me, applicant, was married to defendant Dr. Pushker Raj Pandey in Kathmandu on 13-12-1996 as per rituals and customs of our family, and thus, my married life had begun. Then after, along with the advice of defendant husband, I went to New York of the United States of America and we both started to live there as husband and wife. Later, after my husband got the job of a doctor in Indian Health Family Hospital in Oklohama along with my assistance, we went to the same place and started to live there. My husband had asked to move to San Francisco city to appear in the examination of M.D., and during that period I was sent by him to Washington D.C. at my brother's residence until he will be back from the examination, saying that staying alone would be unsafe for me. My husband, who had promised to call me back after two weeks after the completion of examination didn't respond me even after his arrival to Oklohama. Defendants, who are educated and with sound background, taking me to the foreign land, left without response and adequate food, having *malafide* intention and inhuman behavior; and after my arrival to Nepal due to the uncomfortable situation in abroad, when I reached to my husband's home, I was discarded by defendants, and therefore, me, with the one and only way to sustain myself, is hereby submitting this application pursuant to No. 4 of Chapter On Husband and Wife of National Code(Muluki Ain) to provide and enable to posses the partition of half of the property from my husband's property, dividing from among family members I know, namely defendants Father in-Law, Mother in-Law, Brother in Law Sagar Raj Pandey and husband Dr. Pushker Raj Pandey.

Rejoinder of Defendant Pushker Raj Pandey: The details submitted by plaintiff stating that I and my family did not nurture and ousted her from our home, by my parents and other members of family, is false. I never left opponent plaintiff without food and cloth making her alone. Opponent herself had went to her brother's residence on 14th August,

1997 and she had also have return ticket of 27 August, which I bought for her; therefore, her version saying that I did not call her and she came alone buying ticket, is false. I and my family members did not ousted opponent plaintiff without food and cloth as claimed by her, and since opponent plaintiff had left our home with her own will and there is no condition applicable of No. 4 of Chapter On Husband and Wife, the application plea is subject to be quashed. I would like to further submit that I have already filed a case for divorce decree in District Court in and for Pentotoc County of Oklohama state of United States of America against opponent prior to this case requesting that I and opponent are not able to unite together, which is at present *sub judice* along with the rejoinder from opponent.

Rejoinder of Defendant Ambika Devi Pandey *et.al*: We, no one have ousted opponent without food and cloth. The fact expressed by opponent that we did not let her stay in our house of Kathmandu while she had been there, is also false. Moreover, the fact expressed by opponent in Para 3 of her application that while we were in America we ordered our domestic helper not to let her stay in the house when she comes to our house, is also all fictitious. Since there is no ground of No. 4 of Chapter On Husband and Wife, it is hereby requested to quash the application plea.

Verdict of Kathmandu District Court dated 05-03-2002: It is seen that the District Court in and for Pentotoc County of Oklohama State of United States has issued the divorce decree applicable in between plaintiff and defendant Pushker Raj Regmi dated 13 Dec. 1998. Hence, due to the lack of legal provision to provide partition property to a divorcee wife from husband, the application plea submitted by the plaintiff is not appropriate, and thus, the application plea is not sustained.

Appeal of plaintiff before Appellate Court Patan: The verdict of the Trial Court to quash the application plea being based on the judgment without jurisdiction and not being final, delivered by American Court is erroneous and against the principle of law and justice, hence, it is hereby requested to repeal the verdict of District Court and to sustain the application plea of plaintiff.

Order of Appellate Court to summon defendant for discussion dated 08-08-2003: Here, it is the condition that any marital relationship in between Nepali citizens solemnized in Nepal is subject to be terminated only in the manner as prescribed by the provision of Chapter of Husband and Wife, the judgment rendered by the court of first instance Kathmandu District Court denying to provide partition property as per the plaintiff's application plea being based on the verdict of foreign court based on the laws of foreign nation may be subject to alter. Hence, let the defendant be summoned to appear for discussion and the case be submitted for hearing pursuant to rules.

Verdict of Appellate Court Patan dated 20-01-2004: Since it is seen that District Court in and for Pentotoc County of Oklohama State of America has already issued the divorce decree applicable in between plaintiff and defendant Pushker Raj Pandey and the verdict has already been final, the plaintiff could not be the partition member of defendants, the verdict of court of first instance Kathmandu District Court dated 05-03-2002 to quash the plaintiff plea is appropriate on the same ground. Hence, the verdict of Kathmandu District Court is hereby approved.

Repeat Petition of Plaintiff Sabina Pandey before this Court: The verdict of Appellate Court Patan is against the legal provision of Marriage Registration Act, 1971 and Section 4 of Personal Incident Registration Act, 1976. Since marital relationship in between a man and woman solemnized in Nepal pursuant to Chapter of Husband and Wife of National Code(Muluki Ain) of Nepal based on Hindu Law is subject to be terminated only in the manner set by the law of same country, the judgment delivered by Appellate Court Patan being based on the appeal plea of defendant mentioning that property shall not be partitioned as marriage has already been terminated through the divorce decree of American Law, is erroneous in the process of law and justice; it is hereby requested to conduct the hearing by repeating the judgment and reverse the judgment and sustain the application plea of plaintiff.

Order of this Court to grant leave dated 30-03-2005: Since the legal questions of whether or not the divorce decree in between these parties shall be deemed to have been completed through the divorce

decree pursuant to the legal provision of Oklohama State of America?; and whether or not the legal procedure of No. 1 and 1a. of Chapter On Husband and Wife shall be deemed to have been completed?, Are aroused in the given case, the verdict of Appellate Court Patan to approve the verdict quashing the plaintiff's application plea is seen to be erroneous against No. 1, 1a. of Chapter On Husband and Wife and No. 1 of Partition and legal principle established in NKP 2029, Dec. No. 708, p. 366. It is therefore, the leave to repeat the case has been granted hereby, pursuant to Clause (a) and (b) of Section 12(1) of Judicial Administration Act, 1991.

Judgment of Division Bench of this Court dated 18-03-2008: The judgment rendered by District Court and Appellate Court denying providing partition property to plaintiff from defendant by doing erroneous interpretation of law, being based only on the verdict of Oklohama Court of America ordering the divorce in between plaintiff and defendant Pushker Raj Pandey is not legitimate, and hence, hereby reversed. Since defendant Pushker Raj Pandey and plaintiff Sabina Pandey retain the relationship of husband and wife and are partition member of the same joint family, and all defendants are also partition member of the same joint family, it is hereby ordered to send the given case file to Appellate Court Patan, giving date to both parties, for adjudication, by asking the property details of defendant applicable from the date of partition, along with other required inquiry, if any.

Review Petition of Defendant before this Court: Supreme Court, while delivering the judgment, has only analyzed in the issue of the judgment rendered by American court, however, the certificate of divorce pursuant to Birth, Death and Other Personal Incident (Registration) Act, 1976 has not be accepted, hence, the judgment is subject to review pursuant to clause (a) of sub-Section 1 of Section No.12 of Judicial Administration Act, 1991 recognizing the same evidence. The compulsion to conform to this legal provision has also been clarified by the judgment of Full Bench of Supreme Court. Since the judgment rendered by Division Bench of Supreme Court dated 18-03-2008 stating that the divorce decree of American Court do not get recognition, the provision of divorce is in Nepali law and such decree

should also be considered as the public policy, is against the principle established by this Court in NKP 2048, Dec. No. 4350, p. 450; it is hereby requested that the judgment be reviewed on the same ground.

Order of this Court dated 19-12-2008: Here, it is seen that both party plaintiff and defendant are Nepali citizens and they were married within Nepal. Moreover, it is revealed from the case file that this plaintiff had undergone court procedure in the divorce case filed by defendant Pushker Raj Pandey against her in District Court in and for Pentotoc County of Oklohama State of America through her lawyer, during her residency in America. The influence of Private International Law has to be considered with importance in the context where the interdependency in between nations and frequent practice of migration and involvement in profession in other nations of the world has aroused as an effect of globalization. In the given case, since both plaintiff and defendant were seen to be living in America prior to the commencement of this partition property case, the legal issues of lawful verdict delivered by American court through the divorce process initiated therein, and the marital status of plaintiff and defendant created by that verdict, including the associated question of right to property of divorcee women pursuant to Nepali law, has to be settled. In the same context, the provision expressed in section 4(2) of Birth, Death and Other Personal Incident (Registration) Act, 1976 – "if any personal incident occur outside Nepal, any person responsible to inform such incident pursuant to sub-Section (1) shall inform such incident within sixty days from the day of arrival to Nepal" and the divorce defined as personal incident (Section 2(a) of *ibid* Act) should also be interpreted. In the context of above factual and legal question and the principle established by this court expressing that liberal and broad interpretation of law is appropriate and justifiable than narrow and restricted interpretation (NKP 2048, Dec. No. 4350, p.450), the judgment of Division Bench of this Court dated 18-03-2008 is subject to review; hence, the Leave of Review has been granted hereby, pursuant to clause (a) and (b) of sub-Section (1) of Section 11 of Judicial Administration Act, 1991.

In the given case submitted before this Bench after being enlisted in the Cause List pursuant to rules, learned Senior Advocates namely;

Shyam Prasad Kharel, Pawan Kumar Ojha and Harihar Dahal, and learned Advocates namely; Amber Prasad Pant, Prakash Raut and Semant Dahal argued following essence before this Bench on behalf of Petitioner/Defendant:

- Generally, the judgment rendered in one country gets recognition in other countries, which is also necessary for the Sanctity of Judgment.
- Prior to the recognition of judgment of one country by another country, the competency of deciding court and the compliance of natural justice is observed. Since this plaintiff is summoned by American court through the notice and the judgment of American court was also issued with representation of plaintiff, this judgment is not against the principle of natural justice.
- Either Citizenship or Domicile, any one is adequate to establish the connection of a person with Legal System. Since defendant Pushker Raj Pandey is Domicile of America his relation is established with their Legal System. The judgment of American court should also be recognized on the same ground.
- The judgment of Division Bench of this court against international norms to recognize the judgment of competent court of abroad should be reversed.

Similarly, Learned Senior Advocates namely; Shambhu Thapa and learned Advocates Ishwori Prasad Bhattarai and Purna Prasad Rajbansi argued following essence on behalf of Opponent/Plaintiff:

- The facts like, the case in America was registered only after the arrival of plaintiff in Nepal, plaintiff got the information of case filed in America only after the registration of partition property case by plaintiff, and although plaintiff had defended the case filed in America she had no capacity to represent the case meaningfully before American court, are considerable in given case.
- Since the case of partition property was *sub judice* in Nepal plaintiff did not realized to appeal the case against the judgment of

American Court. Hence, it shall not be deemed that the plaintiff was satisfied with the judgment of American Court.

- The situation of surrender by the party is also considered as a basis while recognizing foreign judgment, however, in the given case, party has not surrendered to the judgment of American Court and has denied, hence, that judgment should not be given recognition.

In the given case, where the date of today was issued for the delivery of judgment, after hearing the argument plea of the learned counselors of both parties and studying the entire case file, it is seen that plaintiff Sabina Pandey had filed a partition property case against husband Pushker Raj Pandey stating that husband Pandey had gone to San Francisco city of America for the examination of M.D., and husband Pushker Raj Pandey after completion of exam did not return to receive her when she was living at her brother's residence during his examination. The defendant husband even did not came to meet, neither gave any expenses and due to the inability to sustain there, returned to Nepal and went to home of husband, where defendants father in-law and mother in-law had also gone to America with defendant husband and domestic helper did not let stay in the home; then after, where plaintiff had requested partition of half of the property from her husband dividing property into four parts from defendants pursuant to No. 1, 2, 3, 4, 20, 21, 22 of Chapter On Partition of National Code(Muluki Ain), the court of first instance Kathmandu District Court denied to provide partition property to divorcee wife on the ground of lack of legal provision to provide such property, which was approved by Appellate Court Patan. The Division Bench of this court, while being submitted the case before it, after the leave of repetition was granted on the petition of plaintiff, following basis was considered:

a. The divorce decree issued by Oklohama is not eligible to be recognized and implemented *ipso facto* in Nepal, which has been delivered on different basis than the law of Nepal, where the divorce case was filed against Nepali citizen residing in

Nepal under different condition as that of the law of Nepal and the law of Oklohama state of America.

b. In condition where plaintiff has rejected to consent with divorce although her representation is seen in American court, the case of marriage including divorce has been categorized as the criminal case by Nepali law (No. 9 of Court Management) and the Act itself has determined grounds and process for divorce, the recognition and implementation of any such judgment delivered beyond such provision without complying this provision in Nepal would be against the law and Public Policy of Nepal.

c. The divorce on the basis of so called divorce decree issued against this plaintiff and defendant Pushker Raj Pandey by the court of Oklohama state has not even been registered in Nepal as personal incident pursuant to Birth, Death and Other Personal Incident (Registration) Act, 1976. It is therefore, on the ground that the so called divorce decree issued by Oklohama state is Non-Existent, marital relationship in between this plaintiff and defendant is prevailing.

d. The verdict of Appellate Court Patan dated 20-01-2004 approving the verdict of Kathmandu District Court to quash application plea of plaintiff denying partition property from defendant on the basis of judgment of American court is erroneous and hence, reversed.

The defendant, while submitting the petition of Review challenging the judgment of Division Bench of this court to provide partition property from defendant to plaintiff reversing the judgment of Appellate Court Patan dated 20-01-2004, has expressed following plea:

a. Supreme Court, while delivering the judgment, has only analyzed the issue of judgment rendered by American court, however, the certificate of divorce pursuant to Birth, Death and Other Personal Incident (Registration) Act, 1976 has not been accepted, hence, the judgment is subject to review recognizing same evidence.

b. Since this court has established the principle that any Act should not be interpreted making it inactive, the judgment making inactive to Birth, Death and Other Personal Incident (Registration) Act, is erroneous.

c. Since defendant Pushker Raj Pandey is residing in America and opponent plaintiff is living in dependant visa with opponent husband and the reasons for divorce has aroused in America itself, and there is provision for divorce in Nepali law and the judgment has to be considered as public policy too, the judgment of the Court denying to recognize the divorce decree of America is against the principle established by this Court, the judgment dated 18-03-2008 has to be reviewed.

The Leave of Review has been granted on the following grounds by the Full Bench of this Court pursuant to clause (a) and (b) of sub-Section (1) of Section 11 of Judicial Administration Act, 1991 in the review petition filed by defendant, and has been submitted before this Bench:

a. The influence of Private International Law has to be considered with importance in the context where the interdependency in between nations and frequent practice of migration and involvement in profession in other nations of the world has aroused as an effect of globalization.

b. In the given case, both plaintiff and defendant were seen to be living in America and prior to the commencement of this partition property case, the lawful verdict delivered by the American court through the divorce process initiated therein, and the marital status of plaintiff and defendant created by that verdict, including the associated question of right to property of divorcee women pursuant to Nepali law has also to be settled.

c. In the same context, the provision expressed in Section 4(2) of Birth, Death and Other Personal Incident (Registration) Act, 1976 – "if any personal incident occur outside Nepal, any person responsible to inform such incident pursuant to sub-

Section (1) shall inform such incident within sixty days from the day of arrival to Nepal" and the divorce defined as personal incident (Section 2(a) of *ibid* Act) should also be interpreted.

d. In the context of the principle established by this court expressing that liberal and broad interpretation of law is appropriate and justifiable than narrow and restricted interpretation (NKP 2048, Dec. No. 4350, p.450) the judgment of Division Bench of this Court dated 18-03-2008 is subject to review.

After the study of entire above fact, it is seen that there is no dispute in the matter that petitioner/defendant Pushker Raj Pandey and opponent/plaintiff Sabina Pandey were married in Nepal as per Hindu rituals on 13-12-1996. The fact that husband Pushker Raj Pandey and wife Sabina Pandey had gone to America on 12 December, 1997 is also revealed from the case file. Moreover, it is indisputably seen that both of them had stayed together until 30 December 1997 after their arrival to America. Defendant Pushker Raj Pandey is seen to be living in Oklohama state of America, and it is revealed from the case file that husband had moved to America with H-1 Visa and wife had moved with Spouse Visa.

After consideration of above fact, mainly following two major questions are to be settled in the given case:

1. Whether or not the case of divorce settled in American court should be given 'Recognition' by this court?

2. Whether or not plaintiff is entitled to receive partition property as per the application plea?

The subject matter of Private International Law is pertinently associated in first question. There is not even any dispute in the fact that plaintiff and defendant both are Nepali citizens and both were married in Nepal as per Nepali custom and rituals. In other words, there is concurrence of both parties that *Lex Loci Celebrationis* in the marriage between both plaintiff and defendant is the law of Nepal. The

defendant of partition property case husband Pushker Raj Pandey, not only moved to American court but also was living there, and moreover, the question that whether or not the judgment of divorce decree delivered by American Court accepting the jurisdiction in the divorce case filed by the husband in American court against wife who had returned to Nepal, should be given Recognition, has also aroused.

The question of Recognition of judgment of one country by another country is an important legal question. Every nation is considered sovereign within its territory due to the sovereignty. Within ones territory, the law of that particular country prevails over every individual and property, and the country accepts Exclusive Jurisdiction. However, such Exclusive Jurisdiction, though, would have been possible in the past, is not possible in today's world of mutual interdependency. Therefore, today's nations cannot ignore foreign laws and judgments of foreign courts in the name of Territorial Sovereignty. The judgments not against the public policy should be enforced through necessary procedures recognizing them on the basis of Reciprocity, Comity.

In the matter of Recognition of judgment of one country by other country, Public Policy and own jurisprudence is developed on case by case basis. It is observed through various dimensions. Some countries recognize and implement judgments of other countries and some countries do not. Some countries, raising the issue of *Res Judicata* or *Issue Estoppel* also takes the plea that the issue of dispute has already got the *Finality* and the same issue cannot be raised in other court when the issue has been settled by another court. Similarly, the courts of some countries, through the Recognition of foreign judgment, are considering the judgment of other country saying that the issue of dispute has been settled and final. These matters always depend on the development of Private International Law of each country.

The matter of conditions for Recognition of foreign judgment is the issue to be interpreted by the court at the time of lack of bilateral agreement or law. It is seen that, the recognition and enforcement of

judgment rendered by the court of one country by other country is decided on the basis of Reciprocity, Comity and Public Policy. Various bases are determined on that purpose. Major of them are as follows:

a. There should be jurisdiction of foreign court
b. The judgment should not be fraud
c. The judgment should not be against public policy
d. The judgment should not be against principle of natural justice
e. The judgment should be final
f. The court should be independent and impartial, etc.

In order to recognize the judgment of the court of one country by the court of another country, one of the bases is considered that the opponent defendant should be Domicile of such country. However, though the defendant is not Domicile, the judgment of foreign court could get Recognition and be enforced if the defendant has accepted and surrendered on the jurisdiction and Merit of the court of such country. For this, the court of other country should have informed the defendant through the lawful notice in the name of such defendant.

The court of another country obtaining the jurisdiction should be independent. The court of such country should have ensured the procedure of Fair Trial or Due Process pursuant to the law of initiating the proceeding of case.

The judgment of court of other country should not be Fraud and should not be against Public Policy of the recognizing country. In such different situations, judgments rendered by the court of one country which are not against the principle of natural justice could be given Recognition.

In the context of given case, there is no dispute in the matter that plaintiff and defendant were married within Nepal as per the law of Nepal. It is seen that defendant of given case Pushker Raj Pandey had gone to America in H-1 Visa and plaintiff Sabina Pandey, being wife of him had went there along with him in Spouse Visa. Although the letter sent by plaintiff to defendant shows that after the completion of study of husband there was plan to settle permanently in California

state from Oklohama state, and thus plaintiff had intention to make America as her Domicile, the Domicile of plaintiff cannot be said America where plaintiff is seen to have been arrived to Nepal due to dispute aroused in relation with her husband.

Moreover, it is seen that plaintiff Sabina is not Domicile of America, the relation with husband Pushker was deteriorated though she had moved to America as Dependant of her husband, she is unemployed in America, plaintiff did not have any possibility to achieve the privilege of Spouse Visa due to worse relationship with husband; and plaintiff, while submitting her rejoinder before District Court in and for Pentotoc County of Oklohama State of America has challenged the jurisdiction and the merit of case from the very beginning. In addition, plaintiff, while submitting her rejoinder before American court, has also mentioned that plaintiff had filed partition property case before Nepalese court, which is *sub judice* in Nepal, and hence, jurisdiction of American court is not attractive to her.

The *Lex Domicili* and *Lex Fori* for Pushker Raj Pandey, who is plaintiff of divorce case and defendant of given partition property case, may be applicable of America since he was working and has filed case in America. However, there is no dispute that *Lex Loci Celebrationis* for marriage and *Lex Loci* applicable for plaintiff is law of Nepal since the plaintiff of given case is not the Domicile of America. She has been challenging the jurisdiction of American court from the very beginning and property claimed by plaintiff is also within Nepal and the marriage in between plaintiff Sabina Pandey and defendant Pushker Raj Pandey was also solemnized pursuant to law and customs of Nepal.

This Court cannot raise the question as whether Fair Trial and Due Process was followed in divorce case by American Court. The court of one country should not review the decision of the court of another sovereign country in the manner of appeal or examining justice. This court does not enter into the Merit of the judgment of divorce case rendered by American court.

Since there was disagreement in between plaintiff and defendant husband of this case and plaintiff was back to Nepal after her husband did not financially supported her in America, plaintiff seems unable to appear before American court in person for the defense of divorce

case. Plaintiff has also the same plea. It is true that the case could be even defended through Lawyers; however, Article 14(1) of International Covenant on Civil and Political Rights, 1966 has ensured the right to appear in trial of ones own case, which is also one of the chief features of Due Process Clause. If party to the case cannot take advantage of such right, in such situation, the proceeding of case is not said to be with Fair Trial or Due Process Clause, and the proceeding is deemed to have been as *Ex Parte*.

The principle of Fair Trial is an outcome of principle of Natural Justice. Fair Trial is also regarded as Corollary of Due Process. The recognized principle of Fair Trial is attractive in both civil and criminal cases. The proceeding of both criminal and civil cases should be initiated in a manner justifiable to both parties. Both party of case, whatsoever, the capacity in case may be, either plaintiff or defendant, should be ensured of right, privilege, opportunity, facility to express or furnishing one's witnesses, in similar manner or capacity in simple and easy way. Following conditions should be present, to be or considered Fair Hearing:

a. Right to access to a court
b. Right to equality of arms
c. Right to hearing by a competent tribunal
d. Right to hearing by an independent and impartial tribunal
e. Reasonable opportunity of presenting the parties case
f. Reasonable opportunity of an accused to defend himself

No privileges or rights seems to be available to plaintiff of this case, Sabina Pandey, in the divorce case proceeded in American court in between plaintiff and defendant of given case. The party of case should be ensured of reasonable and adequate privilege including fundamental matters like easy access to court, right to be present and express in the proceeding of trial, furnishing evidences and one's witnesses without any restriction. This court cannot and should not raise the question in the independency, competency and impartiality of American Judiciary and the procedure and Due Process Clause in

the proceeding of American court. However, in the situation, where the facility of Spouse Visa of Nepali citizen plaintiff by virtue of her husband was not continued, and due to the impossibility of plaintiff to enter into the American court and testifying witnesses before American court due to complex visa process this plaintiff was unable to take advantage of easy access to court and testifying witnesses in American court as a basis of Fair Trial; and due to hard immigration provision and reason that this plaintiff was lacking financial sources and was dependant with her husband, effective representation of plaintiff was not possible; hence, it cannot be accepted that there was a condition of taking advantage of Fair Trial in the proceeding of divorce case filed against this plaintiff by her husband in American court.

The opportunity of effective presence of defendant in the trial of case is necessary for the Recognition of judgment from foreign court. Any judgment where the possibility of presence is impossible due to various external factors in the proceeding of case is not considered as Fair Trial and such judgment are not entitled for Recognition. Financially expensive and scarcity of time for defense also affects it along with the lack of effective presence.

In *Joyce v. Joyce (1979) Fam Div 93,* British Court has interpreted as following: "Respondents financial resources and time to defend or be represented in the foreign proceedings and The opportunity is not be limited to the mere taking part in the proceedings, it must be an effective opportunity to place views before the court".

In fact, the expensive court proceedings, unfamiliar procedure and the proceeding where ones plea cannot be established due to reasons that witness cannot be testified, cannot be considered as Fair Trial; and hence, such judgment without Fair Trial cannot be given Recognition.

The presence or effective representation of plaintiff in American court is seen impossible due to various reasons, like, plaintiff did not have her Domicile in America, the *Lex Loci Celebrationis* of marriage of plaintiff and defendant is under the law of Nepal, the property of defendant is within Nepal, plaintiff has been challenging the jurisdiction of American court in divorce case from the very beginning,

the entrance of plaintiff to America was not easy, and the complexity of visa process to America. Although defendant has access to *Lex Domicili* and *Lex Fori* of the law of Oklohama state of America, the entry to America is not easy to plaintiff and witnesses of plaintiff; hence although the adjudicating American court is independent, competent and impartial and follows Due Process in the procedure there is no effective access to the court as she is neither Domicile of America nor there is easy access for testifying her witnesses before the court; and since plaintiff has not also seen to be accepting the jurisdiction of American court *Forum Prorogatum* or An implied consent of parties by acts conclusively establishing such consent or By Conduct, denying the jurisdiction of this court to Nepali citizen plaintiff Sabina Pandey will be depriving her from the right to easy Access to Justice. Doing so will be also against Public Policy. In fact, the main thesis of court is "*Nulli vendemus nulli Negabimus Justiciam*", which means court does not sell justice and does not deny justice. It will be denial of justice from this court and against Public Policy of entitling wife of partition property from husband if plaintiff is deprived from partition property from her husband on the ground that the divorce decree has been issued from American court. Therefore, due to the impossibility of easy entrance of plaintiff and her witnesses to America the divorce decree issued in divorce case proceeded in between Pushker Raj Pandey and Sabina Pandey by District Court in and for Pentotoc County of Oklohama State of America cannot be given Recognition by this court for the purpose of deciding in dispute of partition property.

In the same context, in the Certiorari and Mandamus case of *Mariya Victoria Subirana Sotriguez v. Department of Immigration, Writ No. 066-WO-0540 of the Year 2010/11*, where the issue of Private International Law that whether or not the divorcee wife whose marriage and divorce has been completed in abroad can claim the partition property in the court of Nepal was raised, this court has established the principle that party can defend the case in person in the court of Nepal for the purpose of Fair Trial. In that case, petitioner was Spanish citizen and opponent was Nepali citizen, petitioner and opponent, both were married in Spain pursuant to Spanish law and later, were divorced in Spain in mutual consent pursuant to Spanish

law. In this case, the order of mandamus was issued to provide visa to Spanish petitioner until the case is finally disposed since petitioner has surrendered before the jurisdiction of Nepalese court filing partition property case against defendant Kami Sherpa pursuant to law of Nepal, although petitioner was Spanish citizen and *Lex Domicili* of petitioner was Spain, *Lex Fori* of divorce case is the law of Spain, and *Lex Loci Celebrationis* is also Spain. However, in whatever manner the order of mandamus was issued in the case of *Mariya Victoria Subirana Sotriguez v. Department of Immigration* to provide easy access to the proceeding in Nepal on the grounds of Article 14 of ICCPR and Fair Trial and principle of Natural Justice if such party surrenders before law of Nepal requesting the plea pursuant to Nepalese law; similar privilege may not be available to plaintiff from Department of Immigration of America. The questions like, "when the entry into any country is impossible, how the entry into the court of such country is possible? And if the access to court is not possible, how could the Fair Trial is ensured? And when the entry of one party of case is not definite and easy, how could the judgment is delivered against another party only on the basis of case filed by one party are apparently aroused. Hence, establishing the principle and own Public Policy has been developed expressing that this court only gives Recognition to judgment of the court of other countries only when parties of the case surrenders and accepts jurisdiction of foreign country without condition, including that application for enforcement of such judgment or other subsequent cases as a Corollary of such case may also be filed in this court.

The Doctrine of Comity is also considerable in terms of Recognition of divorce decree of the court of other country. In federal country, where every state has its own different laws, the divorce decree issued by the court of one state may be recognized and implemented by other state. However, the judgment of foreign country is not *ipso facto* recognized and implemented. In countries with such federal states, unless they have made laws for the implementation of divorce decree of foreign countries, they do not recognize and implement divorce decree issued by the court of foreign countries. But, when the country has become party to International Agreement on Mutual Recognition of Divorce Judgments, the nation party to such Agreement recognizes

and implements divorce decree issued by the court of member states. Moreover, the enforcement of foreign judgment is not mandatory only on the ground of Doctrine of Comity. Under this doctrine, the Recognition is given on the ground of Courtesy. Since there is no Understanding and Agreement in between Government of Nepal and Government of America to give Recognition to judgment rendered by one country by another on the basis of Comity and Reciprocity, the divorce decree issued by American court could not be given Recognition hereby.

The study of case from *R v. Lolley* to the case of *Indyka v. Indyka (1967) 2 AER 69*, regarding the issue of Recognition of divorce decree of the court of one country by another, reveals that there is no uniformity in the recognition and implementation of divorce decree of foreign courts. In the case of Lolley, the standard was developed that the foreign court cannot issue divorce decree in marriage solemnized in Britain; however, in the case of Indyka, new jurisprudence has been developed in the matter of Recognition of divorce decree issued by foreign courts. In this case, both husband and wife were Czech citizens and marriage was solemnized in Czechoslovakia. Husband had acquired the Domicile of Britain in 1946; however, her wife did not leave her country Czechoslovakia. Since she had not left Czechoslovakia, her Domicile was not Britain only because she was wife of her British Domicile husband. Wife took divorce decree from the Czech court in 1949; the second marriage of husband in Britain in 1949 was later divorced. Husband filed a case before British court to invalidate the divorce decree issued by Czech court with first Czech wife. In this case, the House of Lords of Britain has recognized the judgment of Czech court ruling that Czech court can have jurisdiction over the issue, although husband had filed the case challenging the jurisdiction of Czech raising the issue that both parties were Domicile of Britain.

In the matter of recognition of foreign judgment on divorce, Indian Supreme Court in the case of *Y Narshimha Rao & Others v. Y Venkta Lakshmi & Others*, has established the principle expressing that question of Domicile and surrender before foreign jurisdiction is important. In this case, interpreting section 13 of CPC of India,

principle has been established that the recognition of divorce decree of foreign court will be as per the law of marriage of parties. It states:

The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The exceptions to this rule may be as follows:

i. Where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which the parties are married;
ii. Where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;
iii. Where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

The above judgment also shows that the recognition of divorce decree from foreign courts requires condition that such divorce should also have been completed pursuant to the law of country where the marriage was solemnized, and Domicile and Submission are considered as Exception to that. The interpretation in above case of *Rao* shows that foreign judgments could be recognized if Domicile and Submission to foreign jurisdiction exists in the case.

On this ground too, the judgment of American court cannot be recognized here since plaintiff of this case and defendant of divorce case Sabina Pandey has been denying the jurisdiction of American court from the very beginning and she is not even Domicile of America.

Since divorce decree issued against these plaintiff and defendant by the American court cannot be recognized in given situation on above grounds, there is no dispute in the fact that plaintiff Sabina Pandey and defendants are member of partition property of the same joint

family and our existing law has ensured right to partition property as inviolable right and since there is no dispute in the fact that the property has not been partitioned in between plaintiff and defendant, plaintiff is entitled to the partition property from defendants.

In given case, while granting the Leave of Review on the petition submitted by plaintiff against the judgment of Division Bench of this court, clause (a) and (b) of sub-Section (1) of Section 11 of Judicial Administration Act, 1991 has been considered as the main basis. Clause (a) of sub-Section (1) of Section 11 of Judicial Administration Act has indicated the condition where any new evidence came into notice of Review Petitioner only after the final disposal of case. In given case, the registration of divorce decree issued by District Court in and for Pentotoc County of Oklohama State of America against plaintiff and defendant pursuant to Birth, Death and Other Personal Incident (Registration) Act has been considered as basis of evidence by this court. In other words, the divorce decree issued by District Court in and for Pentotoc County of Oklohama State of America against plaintiff and defendant has been said as the evidence of Section 11(1) (a) of Judicial Administration Act, 1991. The evidences for partition property are the confirmation that whether the person is partition member or not, whether the property of joint family claimed to be partition is parental and subject to partition or not, whether the disputed property is women's share property or dowry or exclusive property or not, whether the lawful partition and registration has been completed in between members of partition or not, and whether the partition through the practice has been completed or not although the lawful partition has not been completed, etc. The divorce decree issued by foreign court, which was filed by defendant of the given case before American court in capacity of plaintiff and remains with defendant himself, cannot be considered as the evidence came into notice after the disposal of case, for the objective and purpose of clause (a) of sub-Section (1) of Section 11 of Judicial Administration Act, only on the ground that defendant has registered personal incident of divorce decree issued by American court. The judgment of District Court in and for Pentotoc County of Oklohama State of America cannot be considered as evidence in the context of given case, moreover, the judgment did not came into notice of defendant

only after the final disposal of partition property, rather the judgment was also discussed in Division Bench, where Bench had decided not to recognize the judgment stating that the judgment was against Public Policy; hence, only on the basis of registration, judgment cannot be regarded as new evidence.

Similarly, it is seen that the Leave of Review was granted on the ground of clause (b) of sub-Section (1) of Section 11 of Judicial Administration Act, 1991 where order has been issued stating the context of judicial principle established by this court expressing that it is appropriate and justifiable to do liberal and broad interpretation rather than narrow and restricted interpretation (NKP 2048, Dec. No. 4350, p.450). But, the principle established in N.K.P. 2048, Dec. No. 4350, p.450 is not relevant and pertinent in given dispute.

Since this Bench has reached the conclusion that divorce decree issued by American court against these plaintiff and defendant cannot be recognized, plaintiff Sabina Pandey of given case is therefore, seen to be entitled of right to partition property pursuant to Chapter On Partition Property and Chapter On Husband and Wife of National Code(Muluki Ain). The previous provision of Chapter On Husband and Wife of National Code had no provision to provide partition property to a divorcee wife on the ground of termination of status of wife after divorce. But, that situation does not prevail in given case since this court has not recognized the divorce decree of American court. Hence, on the basis of modern jurisprudence, the judgment of Division Bench of this court sending case file back to Appellate Court Patan, giving date to both parties, for adjudication by asking property details of defendant from the date of partition, along with any other required inquiry, is not seen to be made any modification.

Private International Law is the subject to be developed by every country on the basis of above terms without being against Public Policy. Public Policy is not codified in any law. Public Policy is determined considering various elements including issue of case, Reciprocity, bases related with Due Process or Fair Trial followed by the court of foreign judgment in order to sustain judicial independence of such country, Domicile of the party to the cases, situation of easy

access provided to respective party to the case by the country where the case has been proceeded, legal provision of the country where the property is located, mutual Comity expressed by the courts of each other nations, etc. Today's world is dependant with one another and Nepal is also unable to stay in isolation due to the effect of globalization. The judgments of the court rendered by accepting the jurisdiction of one country should be recognized and enforced by other countries in disputes related to marriage, contracts, investments etc. Hence, in such disputes, due to the urgency of immediate adjudication, the situation may arise that the judgments delivered by foreign courts should be recognized and enforced in Nepal and vice versa. Although Public Policy is developed by court itself in every individual case, present circumstance demands the necessity of law related to Recognition and Enforcement of Foreign Judgment. It is therefore, this order has been hereby issued, in the name of Ministry of Law and Justice to enact and enforce Foreign Judgment Recognition and Enforcement Act by constituting one study committee comprising of experts of Private International Law. Let this order be sent to the Ministry of Law and Justice through the Office of the Attorney General, and also the Judgment Enforcement Directorate of this court also be notified with a copy of this judgment for the pursuit of monitoring of implementation of this judgment.

Let the case file be transferred pursuant to rules, removing the record of suit, along with the grounds of judgment delivered by the Division Bench dated 18-03-2008.

We concur with the above decision.

Justice Bharat Raj Uprety

Justice Kamal Narayan Das

Done on this Day of the 19th Falgun, 2067 (3rd March, 2011A.D).

Translated by Saroj Raj Regmi

The right to information cannot be violated when law provides mandatory provision in regard to the performance of any act. The mandatory provision should be exercised not according to the discretion but in accordance with the law.

Supreme Court, Special Bench

Hon'ble Justice Tap Bahadur Magar

Hon'ble Justice Tahir Ali Ansari

Hon'ble Justice Krishna Prasad Upadhyaya

Writ No. 0977 of the year 2066

Subject: Certiorai & others.

Petitioner: Pushpkamal Dahal Prachand, a resident of Kathmandu district, Kathmandu Metropolis, Ward No 16 and Chairperson of Unified Nepal Communist Party (Maoist), the leader of Opposition in the Legislature Parliament and a member of the Constitutional Council

Vs.

Respondents: Constitutional Council, Prime Minister of Nepal and the Office of the Council of Ministers and Others

- **While staking a claim about not getting a notice which someone is entitled to get as per the law, it is not proper to dub the subsequent claim for notice by the member who was not present in the previous meeting as contrary to the doctrine of acquiescence.**
- **The act of giving notice means that such notice is required to be served in accordance with the procedure established by the Act. If no procedure has been laid**

down, it must be established that the concerned person has received that notice. A notice served without complying with the procedure does not have any meaning or significance. Although the Act requires to give the notice at least forty eight hours in advance, the notice may be given even much earlier, that is to say, even much earlier than forty eight hours. Even though the notice has been given or sent less than forty eight hours in advance, such a notice cannot be treated as a lawful notice.

- **Where an apparent error of law seems to be present at the initial stage itself, there can be no element of legitimacy in a decision made by any institution.**
- **If any law provides for a distinct and mandatory provision in regard to the performance of any act, that procedure must compulsorily be complied with in toto. There can be a possibility of the exercise of discretion only where the law does not provide for a specific or mandatory procedure. It is indispensable and desirable that a mandatory provision should be exercised not according to discretion but in accordance with law.**
- **As any act or proceeding conducted without complying with the mandatory procedure prescribed by law cannot be deemed as completed in the eyes of law, such an act cannot acquire legitimacy. Any decision made and any proceedings undertaken without complying with the mandatory procedures are voidable in the eyes of law on account of being arbitrary.**
- **The absence of any member in an earlier meeting should not be interpreted to mean that such a person has isolated himself from the future decision making process. Besides, it is neither just nor lawful or reasonable from any angle to presume that such a person has also decided to accept any meeting to be held in future and the decision to be made by such a meeting, or to waive**

his right to attend the subsequent meetings and to participate in the decision making process.

- **The ways and means of protection of rights are interlinked with the former. Issuing writs falls within the discretionary right of the court. The court exercises this discretion carefully and conscientiously. However, if the petitioner shows before the court the presence of any legal error in any work performed or decision made by any body or any procedural error tending to affect that decision, the court cannot refuse to issue the writ of Certiorari for quashing such a decision.**

Decision

Tap Bahadur Magar, J : The brief facts of the case and the order issued on this petition filed under the extra-ordinary jurisdiction of this court as per Articles 132 and 107(2) of the Interim Constitution of Nepal, 2063 are as follows:

The petitioner is the Chairman of Unified Nepal Communist Party (Maoist), the leader of his Parliamentary Party and the leader of Opposition in the Legislature Parliament and also a member of the Constitutional Council. The petitioner came to know through the news transmitted by the leading TV channels of the country and published in the daily newspapers and the Gorakhapatra, a leading government daily, of Baisakh 11, 2067 about the decision made by the meeting of the Constitutional Council held on April 23, 2010 recommending for the appointment of respondent Baburam Acharya to the post of Chief Commissioner of the Commission for the Investigation of Abuse of Authority (CIAA) and respondents Biseshwarman Shrestha, Dron Raj Regmi and Him Bahadur Gurung to the post of Commissioners of the the same Commission, respondent Neel Kanth Upreti to the post of the Chief Commissioner of the Election Commission and respondents Bhola Shah and Mrs. Bhushan Shrestha to the post of Commissioners of the same Commission, respondent Bhanu prasad Acharya to the post of Auditor General, respondent Uday Nepali Shrestha to the post

of Chairman of Public Service Commission and respondent Ram Swaroop Sinha to the post of member of the same Commission, and also forwarding the names of the respondents thus recommended to the Parliamentary Hearing Special Committee as per Article 155 of the Interim Constitution of Nepal, 2063 for the sake of parliamentary hearing for their appointment. Whereas by virtue of being a member of the Constitutional Council the petitioner was entitled to attend the meeting of the Constitutional Council and participate in the decision making process following receipt of notice about the meeting of the Constitutional Council, he came to know about such recommendations through the communication media. Thus it had caused infringement to the petitioner's right to information granted by Article 27 of the Interim Constitution, and the impugned decision of the respondents was also contrary to the legal provision made by the Constitutional Council (Functions, Duties, Powers & Procedures) Act, 2066.

Article 149 of the Interim Constitution has made a provision for the Constitutional Council. Section 3 of the Constitutional Council (Functions, Duties, Powers & Procedures) Act, 2066 provided for the functions, duties and powers of the Council; Sec. 4 provided for preparing records; Sec. 5 provided for the procedures to be followed while making recommendation for appointment; Sec. 6 provided for the procedure regarding the meeting of the Council, and Sec. 7 provided for forwarding the names for the parliamentary hearing. Likewise, Sec.6(1) of the Act provided that the meeting of the Council shall be held on the date, time and place specified by the Chairperson as per the need; Clause (2) of Sec. 6 stipulated that a notice carrying information about the date, time and place of the meeting and the agenda for discussion shall be sent to the members at least 48 hours prior to the holding of the meeting; Clause (3) provided that the quorum shall be deemed to have been constituted if the Chairperson and at least five other members wore present; Clause (4) provided that the meeting shall be presided over by the Chairperson and Clause (5) provided that every matter submitted for consideration in the meeting shall be decided on the basis of unanimity; Clause (6) provided that if unanimity could not be reached as per Clause (5) another meeting shall be called to arrive at a decision about the

matter in a unanimous way in that meeting and if that meeting also failed to arrive at a decision by consensus, the decision shall be made by the majority of all the members of the Council. That provision was also in consonance with Art. 43 of the Interim Constitution of Nepal, 2063.

The petitioner contended that although the respondents were required to send a notice about holding the meeting of the Constitutional Council specifying the date, time and place of the meeting and including the agenda for discussion at least 48 hours in advance, in contravention of the constitutional and legal provisions, and without complying with the above mentioned legal procedure and provision and without giving any notice to the petitioner, the respondents recommended the other respondents for appointment and also made a decision about forwarding their names to the Parliamentary Hearing Special Committee for parliamentary hearing. Because the petitioner came to know all that about the decision only through the communication media, he challenged the aforesaid decision made by the respondents as being contrary to the Comprehensive Peace Agreement and the Preamble, Art. 43, Art. 149 (3), and Art. 155 of the Constitution and also Sections 3, 5, 6 and 7 of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066.

Arguing that ineligible persons had been recommended for appointment to the aforesaid posts, the petitioner prayed for the voidance of the impugned decision made by the respondent Constitutional Council on April 23, 2010 and all the acts including the letters written on the basis of that decision, and also for the issuance of an order including the writ of Mandamus directing the respondents not to send or cause to send the names of those recommended for appointment to the parliamentary Hearing Special Committee of the Legislature Parliament for parliamentary hearing and also not to start or cause to start the process of parliamentary hearing. The petitioner further prayed for the issuance of an interim order in the name of the respondents as per Rule 41(1) of the Supreme Court Rules, 2049 directing them not to execute the aforesaid decision made by the respondents in order to maintain the status quo.

Hearing the writ petition, the apex court passed an order on April 26, 2010 to respondents No. 1 to 9 to be present in the Court along with their written replies within fifteen days excluding the period consumed 'en route' through the office of Attorney General and to other respondents to file the written reply on their own or through their representatives or legal practitioners explaining what had happened in the case and why the order prayed for by the petitioner ought not to be issued. They were also asked to accompany their replies with the relevant proof and evidences, if there were any in their possession, which showed any justifiable grounds and reasons for non-issuance of the writ.

In regard to the claim for issuance of an interim order the apex court deemed it appropriate to make a hearing also in the presence of the respondents and ordered to issue a notice to the Office of the Attorney General in case of the respondents No. 1 to 9 to appear in the court on April 29, 2010 for arguments regarding whether or not an interim order should be issued.

Further observing that the petitioner had pleaded that the impugned decision had been made by the Constitutional Council on April 23, 2010 without complying with the procedures laid down by Sections 3, 5, 6 and 7 of the Constitutional Council (Functions, Duties, Powers & Procedures) Act, 2066, the apex court also ordered to arrange for producing the relevant correspondence in this regard along with the case file and also the Minute Book of the meeting of April 23, 2010 through the Office of Attorney General for inspection by the bench on the day of hearing so as to return after the observance.

Hearing the writ petition, the Supreme Court observed that Clause (1) (e) of Article 149 of the Interim Constitution of Nepal, 2063 provided that the leader of Opposition in the Legislature Parliament shall also be a member of the Constitutional Council; sub-Section (2) of Section 6 of the Constitutional Council (Functions, Duties, Powers & Procedures) Act, 2066 stipulated that a notice specifying the date, time and place along with the agenda must be given to the members at least 48 hours prior to holding the meeting. The above mentioned provision contained in sub-section (2) of Sec. 6 was a mandatory

provision. The file received from the Office of the Constitutional Council as a proof showed that as per the above-mentioned provision a sealed envelop carrying an urgent letter had been delivered to the Office of the Parliamentary Party of the Unified Communist Party (Maoist) on April 9, 2010. That could not be treated as otherwise. However, the letter, which should have been delivered to the member of the Constitutional Council at least 48 hours prior to holding the meeting as per Section 6, sub-Section (2) of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066, was delivered in case of the petitioner on April 22, 2010 and the meeting of the Constitutional Council held very next day on April 23, 2010 had recommended the respondents for appointment to various constitutional bodies. Thus it was clear that there existed a procedural error regarding sub-Section (2) of Section 6. Concerning the plea made by the defense counsels that as the recommendation made by the Constitutional Council was to be followed also by parliamentary hearing, no interim order should be issued, such a plea could not be accepted in view of the fact that the parliamentary hearing was meant for only testing the eligibility of the candidates recommended for appointment, and the procedural matters relating to the appointment did not fall under the ambit of parliamentary hearing.

Observing that no notice seemed to have been given at least 48 hours in advance as per the procedure prescribed by the law, the apex court issued an interim order on April 29, 2010 as per Rule 41 (1) of the Supreme Court Rules, 2049 in the name of the respondents directing them not to implement or cause to implement the recommendations made by the Constitutional Council on April 23, 2010 for the appointment to various constitutional bodies until the final disposal of the present petition and not to start or cause to start the process of parliamentary hearing as per sec. 7 of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066. Besides, also considering the gravity of the matter raised in the petition, the apex court ordered to schedule the case for full hearing as per the Rules within seven days after filing of the written replies or expiry of the stipulated time period.

Responding to the writ petition, a member of the Constitutional Council Hon'ble Chief Justice Ram Prasad Shrestha contended in his written reply that he had received a letter dated April 21, 2010 with Dispatch No. 75 on the same date along with the agenda with a request from the Office of Constitutional Council to be present at the meeting of the Constitutional Council scheduled for sitting at 4 p.m. on April 23, 2010. He had turned up at the Office of the Prime Minister and the Council of Ministers, Singndarbar on the appointed date and time as per the above- mentioned letter denoting the date, time and place for the meeting to be held and the agenda thereof. According to the provision made by Section 6 sub-Section (1) of the relevant Act that a meeting of the Council shall be held on the date, time and place specified by the Chairperson as per the necessity and as per the provision made by sub- Section (3) that the meeting of the Council could be held if the Chairperson and at least five other members were present, the meeting of the Constitutional Council was held accordingly, and after having discussions about the matters mentioned in the agenda, a decision was made recommending various persons to the posts of Chairperson and members of the Public Service Commission, Chief Commissioner and Commissioners of the Commission for Investigation of Abuse of Authority, Auditor General and Chief Election Commissioner and Election Commissioners. Hon'ble Chief Justice further contended that he had attended that meeting with the natural belief that the letter issued by the Secretary to the Council on April 21, 2010 for the meeting to be held on April 23, 2010 would have been dispatched, as had been done to him also to other members of the Constitutional Council including member Pushpa Kamal Dahal Prachand. Hence, as the decision had been made to recommend for the appointment of various officials to various constitutional bodies in accordance with the procedures laid down in sub-Sections (3), (4) and (5) of Section 6 of the relevant Act, he prayed for not issuing the writ in his case.

Filing the written reply on behalf of the Constitutional Council and on his own, Prime Minister and Chairperson of the Constitutional Council Madhav Kumar Nepal contended that Art. 149 of the Interim Constitution was a provision of special nature which provided that the

Prime Minister shall be the Chairperson of the Constitutional Council and three other members of the Council of Ministers shall also remain as members of the Council. Because the present Constitution having the aforesaid provision was promulgated with the consent and signature also of the writ petitioner and the leader of Opposition Pushpa Kamal Dahal Prachand, and since the main reason for his continued absence lay in his refusal to accept the presence of the Prime Minister and the Chairperson of the Council and his deliberate continuous absence from the meetings of the Constitutional Council, it was not proper to say that he could not attend the meeting on account of failure to receive the notice as mentioned in the writ petition. The respondent also acquainted the court with the actuality of the long pending vacancies for the posts of various officials in several constitutional bodies due to the petitioner's attitude, motivated by party interest, of refusing to accept the structure of the Constitutional Council constituted in accordance with the Constitution despite the acceptance of the Constitution by him and performance of his duties as the Chairperson of the Council (in the past).

The respondent Prime Minister and the Chairperson of the Constitutional Council further stated that the petitioner had been repeatedly given notice to attend the meetings enclosing the agenda of the meeting as per the procedure prescribed by the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066. When the petitioner did not turn up for the meetings in spite of written notices delivered to him enclosing the agenda on various dates like 2066/4/12, 2066/8/17, 2066/8/22, 2066/9/20, 2066/10/12 and 2066/12/3, the Secretary to the Constitutional Council, as per the instruction of the Chairperson, again wrote to the writ petitioner specifying the agenda for the meeting and requesting him to attend the meeting to be held on April 23, 2010. Although that letter was duly delivered at the Office of his Parliamentary Party at Singhdurbar, he again did not turn up for that meeting on the appointed date. So because the quorum had been constituted as reqired by Section 6(3) of the Constitutional Council (Functions, Duties, Powers and Procedures) Act 2066, even in his absence the names of the officials for the vacant constitutional bodies were recommended unanimously

and a decision was made to send them for parliamentary hearing as per Section 6(5) of the aforesaid Act. Hence, the contention of the petitioner regarding getting knowledge about the decision of the Council only through public communication media was misleading, fallacious and contrary to the facts.

The respondent Prime Minister and Chairperson of the Constitutional Council further contended that the State Management Committee of the Legislature Parliament had directed the Constitutional Council and the present government through the letters dated Shrawan 11, 2066 and Falgun 18, 2066 to pay full attention, giving high priority, to fulfill the posts lying vacant in the constitutional bodies and fulfill those posts as soon as possible. Besides, the written directive issued by the State Management Committee on Falgun 18, 2066 had also clearly directed the Prime Minister who was also ex-officio Chairperson of the Constitutional Council to make recommendations for appointment to all the posts lying vacant in the constitutional bodies within one month and to inform that Committee accordingly. After receiving that directive that decision had been made in course of complying with the parliamentary directive in spite of continued absence of the petitioner despite repeated requests for his presence. Thus as the decision had been made according to the procedure established by law and the names recommended by the decision had been already forwarded for parliamentary hearing and the Parliamentary Hearing Special Committee had already started the necessary process in that regard, there was no constitutional and legal error in that procedure. That the petitioner had got the information about the meeting of the Constitutional Council scheduled for April 23, 2010 was corroborated by the receipt of the delivery of that notice to the Office of his Parliamentary Party. Thus the petitioner's contention about getting information about that meeting only through newspapers and other media sources seemed to be motivated by the intention of misleading the Court. Hence, the respondent pleaded that as there was no substance in the petitioner's claim, the writ petition deserved to be rejected.

Secretary to the Constitutional Council Madhav Prasad Ghimire, in his written reply, contended that he had been also performing the duties relating to the Constitutional Council in the capacity of Secretary to the Constitutional Council as Clause (4) of Article 149 of the Interim Constitution of Nepal, 2063 had designated the Chief Secretary to be the ex-officio Secretary to the Constitutional Council. In accordance with the provision made about the functions, duties and powers of the Secretary in Section 10 of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066 he had called the meeting of the Constitutional Council on April 23, 2010 as per the directive of the Chairperson of the Constitutional Council and Rt.Hon'ble Prime Minister. So far as the contention of the petitioner about not sending the notice as per Sec. 6(2) of the Act was concerned, the information about the date, time, place and agenda of the meeting had been sent to all the members of the Council including the petitioner through letters as per sub-Section (1) of Section 6 of the Act. A receipt of the delivery of that notice to the Office of the Parliamentary Party of the petitioner had received to the office of the Constitutional Council. In addition to that, as was the practice, the Office of the Constitutional Council had given notice about the meeting also through telephone.

The respondent Secretary to the Constitutional Council stated that the decision had been made with recommendations for appointment to the posts lying vacant in the constitutional bodies by the meeting of the Constitutional Council as the quorum for the meeting so called as per Section 6(3) was constituted by the presence of all other members except the petitioner. In the capacity of the Secretary to the Council he had recorded the decision of the Council made on that date and forwarded it to the Parliamentary Hearing Special Committee of the Legislature Parliament for the sake of implementation. He also argued that as the petition did not clarify which activities and what type of conduct of the Secretary to the Council had violated the above mentioned legal provisions, the writ petition must be rejected.

Likewise, Deputy prime Minister and Minister of Physical Planning and Construction and a member of the Constitutional Council Deputy Prime Minister Bijay Kumar Gachhadar and Foreign Minister and a

member of the Constitutional Council Sujata Koirala and Defense Minister and a member of the Constitutional Council Bidya Devi Bhandari, in their separate written replies, stated that as per the constitutional provision enshrined in Article 149 of the Interim Constitution of Nepal, 2063 the Prime Minister also happened to be the Chairperson of the Constitutional Council and three other members of the Council of Ministers also happened to be members of the Council. Thus the respondents used to attend the meetings of the Council in the capacity of being its member. They had received information from the Office of the Prime Minister and the Council of Ministers on April 21, 2010 that the meeting of the Constitutional Council had been called for April 23, 2010. at 2 p.m. As they had been requested for giving time for the meeting to be held at the given time on the given date, they had given their consent for the meeting to be held on the appointed date and time, and the meeting had been held accordingly. The petitioner had repeatedly refused to acknowledge the presence of the Prime Minister and the Chairperson of the Constitutional Council and had remained continuously absent from the meetings of the Constitutional Council. As the writ petitioner deliberately remained absent from the meeting, it was not proper to say that he had not received the notice.

The respondents further stated that the petitioner was every time invited for the meeting giving him the notice about the meeting along with its agenda complying with the procedure laid down by the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066. Although the petitioner was given written notice along with the agenda of the meeting to be held on 2066/4/9, 2066/4/12, 2066/8/17, 2066/8/22, 2066/9/20, 2066/10/12 and 2066/12/3, he did not turn up for participation in any of those meetings. Thereafter a notice was sent to the petitioner on April 8, 2010 by the Secretary to the Constitutional Council along with the agenda of the meeting to be held on April 23, 2010 requesting for his attendance as per the instruction of the Chairperson, and that the notice was delivered to the office of his Parliamentary Party at Singhdarbar was evident from the receipt of the same carrying the stamp of that office. As he remained absent from the meeting even on that date, the meeting was held as

the quorum was constituted as per Section 6(3) of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066 and the recommendations were made unanimously for appointment of officials to the vacancies lying in various constitutional bodies as per section 6(5) of the same Act. And as the Parliamentary Hearing Special Committee had already started the necessary process in that regard and there was no constitutional or legal error in that process, the respondent prayed for the rejection of the writ petition.

In his written reply, the Chairperson of the Legislature Parliament and a member of the Parliamentary Hearing Special Committee Subhash Chandra Newang contended that in spite of endeavors made by the Constitutional Council for fulfillment of the vacant posts of the officials of the constitutional bodies it happened to take some time. Whereas on the one hand the State Management Committee of the Legislature Parliament had issued a directive to the Chairperson of the Constitutional Council and the Prime Minister through a letter dated 18, Falagun 2066 for giving information after having made the recommendations for the said appointments, on the other, the decision was made by the Constitutional Council on April 23, 2010 in a situation where though some of the members of the Council did not use to turn up for attending the meetings (in the past). The decision made by the Constitutional Council on April 23, 2010 was not a separate or personal decision of any member alone but a decision of the Constitutional Council made collectively by all the members. As no particular member of the Constitutional Council was personally or privately liable for such a decision, the petitioner's claim for the issuance of an order against any member of the Council under the extra-ordinary jurisdiction of the apex Court could not be sustained and, hence, it deserved to be rejected.

The Chairperson of the Parliamentary Hearing Special Committee of the Legislature Parliament Kul Bahadur Gurung, in his written reply, contended that as the Constitutional Council had written to the Parliamentary Hearing Special Committee for the sake of parliamentary hearing, a notice was published for the knowledge of the public as per the Parliamentary Hearing Special Committee

Internal Procedures, 2065 framed by the Committee under Rule 119 sub-Rule (7) of the Constituent Assembly (Legislature Parliament Business Transaction) Rules, 2065 asking to give information within the prescribed time limit in case the recommended persons were considered unsuitable or objectionable for the proposed posts. Whereas the time limit for giving such information was still due till April 30, 2010, the show cause notice of the apex court was delivered on April 27, 2010. As it was still sub-judice whether or not an interim order would be issued as prayed for by the petitioner, the process of parliamentary hearing was postponed for the time being and to be dealt with later as decided by the court. Hence, the respondent prayed for the rejection of the writ petition in his context as there was no scope for the issuance of any order by the apex court exercising its extra-ordinary jurisdiction.

Submitting his written reply respondent Babu Ram Acharya contended that he had completed his M.Sc. (1977) from Tribhuvan University and another M.Sc. in Geographic Information systems (GLS) in 1987 from I.T.C. of Netherland. Besides, he had also graduation-in-law from Tribhuvan University, post-graduate diploma in Geo-Information from Netherland and diploma in Geodatic Engineering from Chekoslovakia. Also, he had obtained the qualification of Fellow of the Royal Institutions of Chartered Surveyors (FRICS) from the United Kingdom. As regards his government service, he had put in more than 30 years of service in the capacity of an officer of gazetted Third Class, Second Class and First Class of Engineering service of civil service from 1977 to 2007. As to his work experience, he had rendered his services with deeper commitment in the areas of policy making, plan formulation, implementation, monitoring and evaluation and educational promotion in the fields of Information Technology, Geo-information Technology, Geodacy, Topography including land use, land administration and management. Besides, he had also worked in various land reform commissions, international border committees, electoral area determination commission, and the academic committees relating to Geomatic Engineering. In addition to that, from Ashwin 2064 (2007) onwards he had also worked in the capacity of Secretary to Nepal Government, Ministry of Land Reform and Management, Office of

Prime Minister and Council of Ministers and Ministry of Labour and Transport. The Respondent, therefore, claimed that as he had all the qualifications specified by Art. 119 (5) of the Interim Constitution of Nepal, 2063, the Constitutional Council had decided on April 23, 2010 to recommend him for the post of the Chief Commissioner of the Commission for Investigation of Abuse of Authority. Hence, because there was no constitutional or legal error in that decision as no fact, evidence or law could prove the petitioner's claim that an unqualified person had been recommended for the post, the respondent prayed for rejection of the writ petition.

Likewise, respondent Dron Raj Regmi, in his written reply, stated that he graduated in Law in 1982 from Tribhuvan University, Nepal Law Campus. The same year he got through the examination conducted by Nepal Public Service Commission for the post of Law Officer of Nepal Judicial Service and, having been appointed as a public prosecutor, he had served in Myagdi, Lamjung and Dhanusha districts. After being promoted in 1988 to gazetted second class he had served in Surkhet and the Supreme Court in the capacity of senior bench officer. Also, he had worked in Butwal and Hetauda as a government attorney and, after having been promoted to gazetted first class in 1994, he had served as appellate government attorney at Nepalgunj, Kanchanpur and Patan. He had also served the Office of Attorney General following his appointment to the post of Acting Deputy Attorney General (gazetted Special Class) in 2001. Subsequently, he was promoted to the post of Deputy Attorney General (of Secretary level) of the Judicial Service of Nepal in 2003. After serving the same office in that capacity, he got statutory retirement as a result of expiry of his five year term. Ever since, he was engaged in the profession of Advocate.

The respondent further contended that during his tenure in the service he had been involved in the investigation and fact finding of various incidents and had presented the reports before the Government of Nepal in the capacity of the Chairperson and/ or member of the investigation commissions set up at different times by the Government of Nepal. He possessed more than twenty five years of experience of

the Judicial Service. As he was equipped with all the qualifications mentioned in Clause (5) of Art. 119 of the Interim Constitution of Nepal, 2063, there was no legal or constitutional error in the recommendation made by the Constitutional Council in regard to his appointment to the post of Commissioner of the Commission for Investigation of Abuse of Authority. The respondent, thus, pleaded for rejection of the writ petition because the petitioner's plea about the recommendation of an unqualified person could not be substantiated by any fact, proof or law.

Another respondent Uday Nepali Shrestha, in his written reply, stated that he had done his M.A., M.B.A. and Graduate-in-Law from Tribhuvan University. Also, after completing his Post Graduation in International Law he entered in the service of Nepal

Government in 1977 and served in various posts and retired from the government service in 2003 from the post of Secretary (Gazetted Special Class). After his retirement, he had also served for three years as Vice Chairperson (equivalent to Chief Judge of Appellate Court) of the Law Reform Commission. Currently, on basis of his experience, qualifications and competence was also doing social service through his affiliation with various INGOs and international organizations.

The respondent further contended that he was a person who had been honored with various decorations and award of certificates of appreciation conferred by the nation in recognition of his good works done in the sphere of Justice, Law and Administration in course of representations made by him on behalf of the Government in national and international meetings, conferences, dialogues etc in the Government service. Therefore, as the respondent was a Nepali citizen who had fulfilled all the qualifications mentioned in Clause (6) of Art. 125 of the Interims. Constitution of Nepal, 2063, there was no factual, evidentiary and legal substance in the contention of the petitioner that an unqualified person had been recommended for appointment to the post of the Chairman Public Service Commission by the decision made by the Constitutional Council on April 23, 2010. Hence, he prayed for rejection of the writ petition.

Another respondent Neel Kanth Upreti, submitting his written reply, stated that he was a person who had completed his Master degree in Economics from Tribhuvan University and later on did his post graduate in Computer Science (1988-1990) from Staffordshire University of England. Earlier, he had served an organization under the ownership of Nepal Government after completing his Post Graduate in Public Administration from Tribhuvan University and had worked in the capacity of First Class Officer. After returning to the country in 1990 following the completion of his higher studies, the then government had assigned him the duty to serve during the first general election held after the restoration of democracy. And in the election for the Constituent Assembly held in the year 2064 (2007) he had performed his duties successfully in the capacity of Election Commissioner. Besides, he had been also serving as the Acting Chief Election Commissioner continuously for ten months. Since 1990 continuously for 19 years he had worked as a Management and Implementation expert and also as a policy and decision maker in the six elections held in Nepal and three elections held abroad. In course of his work in the electoral sector for last 19 years he had also conducted supervision of election and study and research about the electoral system of eleven countries. Thus he had gained national and international experience in regard to election management and conducting election.

The respondent further contended that he had rendered his services to the nation for thirty eight years including nineteen years of service in Nepal Government and in the institutions under the ownership of Nepal Government and in a constitutional body like the Election commission. During the same period he had also served for about two years in Afghanistan in the capacity of a senior election expert on behalf of the United Nations. He therefore, tended to present himself as a competent person to provide leadership to the Election Commission of Nepal by virtue of being a personality recognized at both national and international level. As he fulfilled all the qualifications mentioned in Clause (5) of Art. 128 of the Interim Constitution of Nepal, 2063 there was no factual, evidentiary and legal substance in the petitioner's contention that an unqualified person had

been recommended by the decision made by the Constitutional Council on April 23, 2010 for appointment to the post of Chief Election Commissioner. Hence, he prayed for rejection of the writ petition.

Respondent Him Bahadur Gurung, in his written reply, contended that he had graduated from Trichandra campus. Having been appointed to the post of Police Inspector through open competition conducted by Public Service Commission in 1977 he had worked as an instructor for three years in the Police Academy after undergoing a 10 month training at the same Academy. After having been promoted to the post of Deputy Superintendent of Police in 1986 he served for two years at District Police Office Nawalparasi, and also at District Police Office Bhairahwa and Sarlahi. Besides, he had served for three years at Nepalgunj Police Training Centre. Thereafter, after his promotion to the post of Superintend of Police in 1991 he served at District Police Office of Kaski, Morang and Parsa. During his one year stay at the Interrogation Section set up at Hanumandhoka he had successfully investigated various heinous crimes committed within the Kathmandu valley. After his promotion to the post of Senior Superintendent of Police he had served at the Zonal Police Office of Bagmati, Koshi and Narayani in the capacity of chief of the office and during his tenure of that post he had also acted as the Chief of the Financial Administration Bureau of the Police Head Quarter and after his promotion to the post of Deputy Inspector General of Police he had served as the Regional Chief at Mid- Western Regional Police Office, Nepalgunj, Central Regional Police Office, Hetauda and Eastern Regional Police Office, Biratnagar. During his tenure ranging from Police Inspector to Deputy Inspector General of Police he had acquired high level training from India, the Philippines and America. Subsequently, he retired from the police service after 28 years. Thus he had been recommended by the Constitutional Council through its decision made on April 23, 2010 for appointment to the post of Commissioner of the Commission for Investigation of Abuse of Authority as he fulfilled all the qualifications required by Clause (5) of Art. 119 of the Interim Constitution of Nepal, 2063. Therefore, as the petitioner's contention about the recommendation made for an

unqualified person did not have factual, evidentiary and legal substance, it deserved to be rejected.

Respondent Ram Swaroop Sinha, in his written reply, stated that he had graduated in the subject of Education from Tribhuvan University, Kirtipur Campus in 1974 and the same year he had joined the Civil Service of Nepal Government through the open competition conducted by Public Service Commission. In course of his job he was promoted to the post of Gazetted Second Class of the Civil Service of Nepal Government in 1989 and that of Gazetted First Class in 2003 and to the post of Secretary (Special Class) in 2009 and served at the Ministry of Education. Subsequently, he got his statutory retirement in the month of Chaitra in 2009 after attainment of 58 years of age. He had served more than 18 districts of Nepal and under the Ministry of Education while working in the various posts of the Civil Service. He had obtained Post Graduate degrees in Sociology, Political Science and Education and the degree of PhD. He had also acquired dozens of training from some reputed institutions including Harvard University of America. Besides, he had also made study visits of nearly thirty foreign countries.

The respondent further stated that he had performed his duties with commitment and sincerity during his tenure in the Government service. There was no legal and constitutional error in the recommendation of the Constitutional Council made through its decision of April 23, 2010 to appoint him to the post of member of Public Service Commission because he had acquired thirty five years of experience in the Government service and fulfilled all the qualifications mentioned in Clause (b) of Art. 125 of the Interim Constitution of Nepal, 2063. Therefore, as the petitioner's contention about alleged recommendation made for an ineligible person could not be substantiated by any fact, evidence and law, the respondent prayed for rejection of the writ petition.

In his written reply, respondent Bhanu Prasad Acharya contended that he was a person who had completed his M.Com from Trbhuvan University in 1970 and Graduation-in-Law in 1975 from Tribhuvan University. Having passed the written examination of Nepal Civil

Service conducted by Public Service Commission in 1975 he was posted as an Accounts Officer (Gazetted Third Class) under the Office of Auditor General ……. He got through the internal competitive examination conducted by Public Service Commission for Gazetted Second Class in 1982 and served under the Ministry of Finance and the Ministry of Water Resources. Again after getting through the internal competitive examination of Public Service Commission held for Gazetted First Class he served under the Ministry of Forest and the Ministry of Industry. In 2000 the Government had designated him as acting for the Gazetted Special Class post of Audit Controller. After his promotion to the post of Gazetted Special Class of Nepal Civil Service he had served the Ministry of Industry, Commerce and Supply in the capacity of Secretary. He was subsequently transferred to the post of Secretary to the Ministry of Finance by the Government in 2002. Thus discharging his duties with responsibility at different levels of Civil Service and at different places he completed his tenure in 2005 and got statutory retirement.

The respondent further contended that he had performed his responsibilities with commitment and sincerity while working in the Government Service. He had not only participated in some national and international meetings and conferences, but had also he organized such meetings, and actively participated in the completion of especially bilateral and multilateral cooperation treaties. As he possessed nearly thirty one years of continued work experience of Government Service relating to the areas of fiscal policy, administration, Accounts etc he fulfilled all the qualification requirements mentioned in Clause (5) of Art. 122 of the Interim Constitution of Nepal, 2063, and thus there was no constitutional or legal error in the decision made by the Constitutional Council on April 23, 2010 relating to the recommendation made in his favor for appointment to the post of Auditor General. Therefore, as the petitioner's allegation that the recommendation had been made for an unqualified person could not be substantiated by any factual, legal or evidentiary proof, he prayed for rejection of the writ petition.

Another respondent Mrs. Bhushan Shrestha, responding to the writ petition, stated in her written reply that she had been working since 1983 in the teaching profession in the Central Department of Education, Kirtipur under the faculty of Education of Tribhuvan University and currently she was engaged in teaching in the capacity of Reader. She had completed her Post Graduate in History in first division in 1982 from Tribhuvan University. During her service period in Tribhuvan University she had acted as the departmental head of Central Department of Education, Kirtipur from 2003 to 2007, as vice-Chairperson of Nepal Professors' Association from 2001 to 2004 and also as a member of the Academic Council and Senate of Tribhuvan University. Even at present as the Chairperson of the Committee relating to the subject of Education she had been undertaking activities such as curriculum development and improvement and all the activities relating to examination. Besides, she had been also working as an expert in the Committees relating to subjects like Social Study and History at Curriculum Development Centre, Sanothimi of Nepal government. Thus because she possessed more than twenty seven years of experience in the Education sector and as she was a person who fulfilled all the qualification requirements mentioned in Clause (5) of Art. 128 of the Interim Constitution of Nepal, there was no legal or constitutional error inherent in the Constitutional Council's decision made on April 23, 2010 recommending her for appointment to the post of Election Commissioner. Therefore, as the petitioner's contention that an unqualified person had been recommended did not have any factual, legal or evidentiary substance, the respondent prayed for rejection of the writ petition.

Respondent Bishweshwarman Shreshta, in his written reply, stated that since 1971 he had been engaged in teaching and research at Shankar Dev Campus. He had also served as the Administrative Chief, Registrar, of Tribhuvan University, a member of the Academic council and a member of Management Faculty Board. Besides, he had also worked as the Chief Editor of an excellent journal of Management called "Management Dynamics." The respondent pleaded that he fulfilled the entire requirement mentioned in Clause (5) of Art. 119 of the Interim Constitution of Nepal, 2063 and, hence,

the Constitutional Council had made the decision on April 23, 2010 recommending him for appointment to the post of Commissioner for the Commission for Investigation of Abuse of Authority. Thus as there was no legal or constitutional flaw in the disputed recommendation and as there was no factual, evidentiary or legal substance in the allegation of the petitioner that an unqualified person had been recommended for appointment, the petitioner prayed for rejection of the writ petition.

In the writ petition scheduled for hearing as per the Rules, on behalf of the petitioners, twenty five legal practitioners including Senior Advocate Krishan Parsad Bhandari, and Advocates Sushil Kumar Pant, Satish Krishna Kharel, Borna Bahadur Karki, Tulsi Bhatta, Raman Kumar Shrestha, Bal Mukund Shrestha, Ram Narayan Bidari, Tara Bahadur Sitaula, Shyamji Pradhan, Kapil Chand Pokharel, Neel Kanth Bhattarai, Harindra Prasad Rai, Deen Mani Pokharel, Som Raj Timsina, Ramesh Raj Sharma Sigdel, Krishan Subedi, Gun Raj Ghimire, Rabin Subedi, Ram Bahadur Thapa, Chandeshwar Shrestha, Prem Singh Dhami, Hari Ram Lawaju, Bhoj Raj Ghimire and Sanu Suwal made their submissions before the Bench.

The gist of the submissions made by the legal counsels who appeared on behalf of the writ petitioner was as follows: As the Comprehensive Peace Treaty was a document of political consensus requiring the participation of both the parties to the treaty in the State governance as dictated by the Interim Constitution of Nepal, 2063, it was required that all the activities ought to be conducted on the basis of consensus as per the Preamble and Art. 43 of the Constitution. Ignoring this basic spirit of the Constitution making recommendation by the Constitutional Council merely on the basis of fulfillment of quorum without the presence of the leader of Opposition in the Legislature Parliament was contrary to the intent and spirit of the Constitution. The intent of including the leader of Opposition as a member of the Constitutional Council by the Fifth Amendment to the Interim Constitution of Nepal, 2063 was the basis of seeking political consensus and, hence, the presence of the leader of Opposition in the meeting of the Constitutional Council was a must. Except the leader of Opposition the

Chief Justice was the only impartial official. Other members of the Constitutional Council were pro government officials. Unanimity did not mean unanimity among the members present; it was rather unanimity to be reached among all members of the Constitutional Council. Whereas Section 6(2) of the Constitutional Council (Functions, Duties, Powers & Procedures) Act, 2066 had made a mandatory provision about sending a notice to the members specifying the date, time and place of the meeting of the Council to be held along with its agenda at least forty eight hours in advance, the disputed decision regarding the recommendation was made on April 23, 2010 without giving such notice to the leader of Opposition, thereby isolating him, and therefore, it was contrary to the Constitution and law. As the petitioner had not been given information about the meeting along with its agenda and in spite of having knowledge about the office of the leader of Opposition and the employees working in that Office the letter had been sent to the Office of the Parliamentary Party only on April 22 for the meeting of April 23. Giving such a notice violating the minimum forty eight hours time limit could not be treated as a notice given in accordance with law. It had infringed the Constitutional Council member's legal right to get information about the meeting of the Constitutional Council forty eight hours in advance. As a result of that act there was no scope for activating the other provisions contained in Section 6 of the Constitutional Council (Functions, Duties, Powers & Procedures) Act, 2066. Thus as the decision about the recommendation of ineligible persons for appointment to the posts of various constitutional bodies made unilaterally without complying with the due process of law was illegal, it must be quashed by issuing the writ petition as prayed for by the petitioner.

Appearing on behalf of the respondents including the Prime Minister and the Office of the Council of Ministers and other government bodies and officials, Deputy Attorney General Pushpa Raj Koirala and Prem Raja Karki, Joint Government Attorneys Kiran Poudyal and Krishna Prasad Poudyal and Deputy Government Attorney Dharma Raj Poudyal, argued that the Interim Constitution of Nepal, 2063 had made both political consensus and majority system the basis of

conducting the governance of the State. The jurisdiction of the apex court could not be invoked for enforcing political consensus. Also, in view of the fact of the long pending vacancies of the posts of officials in various constitutional bodies the State Management Committee of the Constituent Assembly Legislature Parliament had issued a directive to the Government of Nepal and the Constitutional Council through the Prime Minister in the meeting held on Falgun 18, 2066 to push forward the process of appointment of the officials of the constitutional bodies within one month. There was no disputing the fact that for the appointment of the officials of the constitutional bodies' ten meetings had been repeatedly held from Shrawan 9, 2066 to Baisakh 10, 2067. The petitioner can not say any thing contrary regarding the fact that except the meeting held for recommending the appointment of the Chief Justice on Chaitra 3, 2066 the minute of all other meetings was related to the recommendation to be made for appointment of the officials of the constitutional bodies. The petitioner did not have any objection to all other meetings of the Constitutional Council; he had challenged only the latest meeting held on Baisakh 10, 2067 (April 23, 2010). It was contrary to the doctrine of acquiescence to give his tacit consent to the decision made in a meeting of similar nature despite being absent from that meeting but to challenge the other.

Section 6 of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066 provided that the quorum for a meeting of the Constitutional Council shall be deemed to have been constituted if the Chairperson and at least five members were present in the meeting. As the law provided that if a unanimous decision was made on the basis that the quorum was formed it shall be deemed legitimate, the decision made unanimously by the meeting of the Constitutional Council held on April 23, 2010 and attended by six of the seven officials including the Chairperson except the petitioner was lawful. In accordance with the established constitutional customs and practices relating to the meeting of the Constitutional Council the main personalities of all three organs of the State were members of the Council and in view of their busy schedules they were also informed about the meeting and its agenda through telephone and also through

a letter dated April 21, 2010. In such a situation there was no substance in the petitioner's plea that no notice was given to him. Besides, as the above mentioned letter dated April 21, 2010 had reached the Office of the Parliamentary Party of the petitioner on April 22, 2010, now getting trapped in the technicality of giving the notice breaching the requirement of the time limit of 48 hours, it shall be contrary to pragmatic justice to say that the petitioner did not get any notice at all. Hence, as there was no substance for issuance of the order prayed for, the learned government counsels pleaded and submitted a memo also in writing with arguments along the same line, for rejecting the writ petition.

On behalf of respondents Deputy Prime Minister Bijaya Kumar Gachhadar and Ram Swaroop Sinha learned Senior Advocate Mahadev Yadav, on behalf of respondents Bijaya Kumar Gachhdar, Dron Raj Regmi and Neel Kanth Upreti learned Senior Advocate Badri Bahadur Karki, on behalf of respondents Bijaya Kumar Gachhadar and Babu Ram Acharya learned Senior Advocate Harihar Dahal and learned Advocate Upendra Keshari Neupane, on behalf of respondents Bijaya Kumar Gachhadar and Bhanu Acharya learned Senior Advocate Yagya Murti Banjade, on behalf of respondents Defense Minister Bidya Devi Bhandari and Neel Kanth Upreti learned Advocate Hari Krishna Karki, on behalf of Bidya Devi Bhandari learned Advocates Hari Prasad Upreti and Teeka Ram Bhattarai, on behalf of respondents Neel Kanth Upreti and Dron Raj Regmi learned Advocate Madhav Kumar Basnet and on behalf of respondent Him Bahadur Gurung learned Advocate Surendra Kumar Mahto presented their oral arguments.

The gist of the submissions made by the learned defense counsels appearing on behalf of the respondents as mentioned above was as follows : The Office of the Parliamentary Party of the Unified Maoists had received, on April 22, 2010, the letter dated April 21, 2010 addressed to the petitioner carrying the notice about the meeting of the Constitutional Council. This showed that the petitioner had received the information about the meeting of the Constitutional Council to be held on April 23, 2010 twenty four hours in advance.

The petitioner did not seem to have entered the court with clean hands as he had pleaded not to have received any information at all about the proposed meeting of the Constitutional Council. Even earlier than that the notices issued to the petitioner used to be handed over to him through the Office of his Parliamentary Party. The right to information could not be invoked for allowing a responsible member of the Constitutional Council to evade from his responsibility towards the Constitutional Council. No fundamental right had accrued to the petitioner by virtue of his membership of the Constitutional Council and no infringement had been caused to any right of the petitioner by the decision of the Constitutional Council. Even though he had got the information 24 hours in advance, in stead of attending the meeting to present his viewpoint, by absenting himself from the meeting, the petitioner had waived his right by isolating himself from the decision making process.

On behalf of respondent Dron Raj Regmi, also submitting a memo also in writing with arguments, Advocate Madhav Kumar Basnet pleaded that a person, who did not attend the meeting of the Constitutional Council had no moral right to raise questions about the ineligibility of the persons who had been recommended for various constitutional bodies by the Constitutional Council. All the persons recommended for appointment to the constitutional bodies were constitutionally and legally eligible for such appointment. All of them were experienced, qualified and respected personalities of their fields. The petitioner had already got the notice. Even though the notice was not delivered forty eight hours in advance the petitioner had not made a claim that on account of that any substantive law had been infringed. A procedural issue could not impede a substantive objective intended to be acquired by the law. The decision made on April 23, 2010 was merely a recommendation. The acts of parliamentary hearing and appointment were yet to materialize. Even though there was an ordinary procedural error it was not sufficient to quash a decision made by a competent body in accordance with the law.

After hearing the submissions made and going through the a memo arguments submitted by the learned counsels of both the parties also

in writing and after studying the case file including the petition, the learned judges, on the day fixed for delivery of the judgment, framed the issues for resolution as mentioned below:

1) Whether or not the petitioner had been given notice about the meeting forty eight hours in advance as per Section 6(2) of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066;

2) Whether or not the recommendations made on April 23, 2010 for appointment of the officials of the constitutional bodies were lawful; and

3) Whether or not the writ should be issued as prayed for by the petitioner.

Addressing the first issue the Special Bench observed that first of all it was desirable and relevant to look at the constitutional and legal provisions relating to the formation, functions, duties and powers of the Constitutional Council in this regard. There was a provision for the Constitutional Council in Article 149 of the Interim Constitution of Nepal, 2063. Prior to the Fifth Amendment made to the Interim Constitution the provision relating to the Constitutional Council was as follows:

"1) There shall be a Constitutional Council for making recommendations for appointment of officials to constitutional bodies which shall consist of the following as a Chairperson and members:

a) Prime Minister - Chairperson

b) The Chief Justice - Member

c) The Speaker of the Legislature Parliament - Member

d) Three Ministers designated by the Prime Minister - Members

2) While making recommendation for appointment to the office of the Chief Justice in the event of vacancy to that Office the Minister for Justice shall be included as a member of the Constitutional Council.

3) The procedures relating to the appointment of the officials to the constitutional bodies and other functions, duties and powers and procedures of the Constitutional Council shall be as determined by law.

4) The Chief Secretary of the Government of Nepal shall act as the Secretary of the Constitutional Council."

The fifth amendment made to the Interim Constitution, 2063 on 2065/3/29 introduced an amendment to Article 149 (1)(d) and also added sub-Clause (e) which reads as follows:

"d) Three Ministers, so designated by the Prime Minister as to have representation of different political parties out of the political parties having representation in the Council of Ministers-Members.

Provided that in the event of representation of less than three political parties in the Council of Ministers nothing shall be deemed to bar the act of designating in such a manner as to have representation of less than three political parties.

e) Leader of Opposition party in the Legislature-Parliament-Member."

Thus through the fifth amendment made to the Interim Constitution of Nepal, 2063, introducing sub-Clause (e) to Article 149(1), the leader of the Opposition in the Legislature Parliament was made a member of

the Constitutional Council. That provision ensured the representation in the Constitutional Council of a major political party having representation in the Legislature Parliament. Whereas the government and the pro-government political parties were represented by the Prime Minister and the Ministers, the Chief Justice and the Speaker of the Legislature Parliament had been made members of the Constitutional Council in the capacity of independent officials, besides the leader of Opposition as a member of the Constitutional Council. Thus through this arrangement the Constitution has ensured the representation of all the three organs of the State as well as the major political parties being active in the Legislature Parliament in that high level Constitutional Council.

Article 149(3) of the Interim Constitution of Nepal, 2063 has made a constitutional provision that "The Procedure relating to the appointment of the officials of the constitutional organs shall be as determined by the law." Accordingly the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066 was made by the Legislature Parliament and brought into effect from Poush 22, 2066 with the purpose of regulating the activities and business of the Legislature Parliament. Therefore, notwithstanding in whatsoever way the business relating to the meeting of the Constitutional Council used to be conducted prior to the enforcement of that Act, there can be no two opinions in regard to conducting the business of the Constitutional Council in accordance with the process and procedure as prescribed by that law after it had come into effect.

In this context, a look at, besides other provisions of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066, Section 6 showed that the procedure relating to the meeting of the Constitutional Council is as mentioned below:

1) Meeting of the Council shall be held as per the need on a date, time and place designated by the Chairperson.

2) The Secretary shall, as directed by the Chairperson, send a notice to the members at least forty eight hours in advance specifying

the date, time and place of the meeting of the Council to be held along with the agenda for discussion.

Provided that if any member deems it necessary to have discussion about any issue not included in the agenda he may present a resolution in the meeting with the consent of the Chairperson.

3) The quorum of meeting of the Council shall be deemed to have been constituted if the Chairperson and at least five other members were present.

4) The Chairperson shall preside over the meeting of the Council.

5) Every subject presented in the Council shall be decided by unanimity.

6) If no unanimity could be reached as mentioned in Clause (5) no decision shall be taken in that regard.

7) The Chairperson shall again cause to call another meeting to arrive at a decision in regard to a subject which could not be decided as per sub-Section (6) and a decision shall be made with the consent of such meeting.

Notwithstanding that in case no decision could be reached with consent even in that meeting, the decision shall be made by the majority of the members of the Council.

8) The Secretary shall prepare and maintain a record of the decision made by the Council and have it signed by the Chairperson and the members.

9) Other procedures relating to meeting of the Council shall be determined by the Council itself as per needs.

Section 6(2) of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066 seems to have made a legal provision that a notice regarding the date, time and place for the meeting of the Council to be held shall be sent to the members at least forty eight hours in advance of meeting. That provision was a mandatory procedural provision which must be complied with. Where a specific procedure has been prescribed by the law any act conducted without complying with the said procedure shall not be deemed to have been performed according to the due process of law. As sub-Section (1) of Section 6 of the above mentioned Act has provided for holding meeting of the Council on the date, time and place designated by the Chairperson as per needs, the Chairperson was empowered to designate the date, time and place of the meeting taking into consideration the need, convenience and suitability. However, while convening meeting on the designated date, time and place the procedure mentioned in other sub-Sections of Section 6 must be complied with sub-Section (2) of Section 6 of the aforesaid Act has provided to mention compulsorily the following matters in the notice regarding holding a meeting of the Constitutional Council:

1) Date, time and place of holding meeting of the Council,

2) Agenda of the meeting.

A procedural provision seems to have been made for sending a notice mentioning the above-mentioned matters to the members at least 48 hours in advance of the sitting. It must be accepted that every word and provision of the Act was meaningful. The Constitutional Council was an extremely higher national level Constitutional body of higher national level. It was meant for making recommendations for appointment of the officials of very important constitutional organs. It was a constitutional provision that such officials shall be appointed in accordance with those recommendations unless such recommendations were unanimously rejected by the Parliamentary Special Hearing Committee. Therefore, it was essential that every

member of the Constitutional Council must have clear information about the agenda of the meeting before it was held. That mandatory provision seemed to have been made in order to provide an opportunity to every member to have knowledge about the agenda of the meeting and also about the prospective candidates to be appointed as officials so that they could form their impressions about the recommendations for appointment and make the recommendations after serious deliberations in the Council. That provision of the relevant Act did not give any freedom not to send the agenda of the meeting to be held next time if the business according to the agenda could not be completed in the earlier meeting. Instead, Section 6(2) of the Act was a mandatory provision which required sending a notice to every member at least forty eight hours in advance mentioning every matter as mandated by sub-Section (2) of that Section. Only because of one's failure to attend a meeting which had been duly informed about it could not be said that there was no need of giving notice about the meeting to be held subsequently. If any member claimed not to have received any notice which was due to him, such a claim by a member who was absent from the earlier meeting could not be treated as contrary to the doctrine of acquiescence.

So far the context of the present dispute was concerned, the Secretary to the Council i.e., the Chief Secretary of Nepal Government, could not say in his written reply that the petitioner was given a notice about the meeting scheduled to be held on April 23, 2010 forty eight hours in advance. The provision made in Section 6(2) of the Act about sending the notice forty eight hours in advance not only meant that the person liable to send such notice should have sent the notice from his Office forty eight hours in advance. It was also the objective and import of the Act that the concerned member of the Council should have received that notice forty eight hours in advance. No matter when a member received the notice, if the Act was interpreted to mean that it was suffice for the sender to have sent the notice mentioning the date and time forty eight hours earlier, it shall make a mockery of the aforesaid legal provision.

It was not simply a matter of issuing a notice. It was rather a matter of giving notice of the meeting to the person required to participate in the meeting. Giving a notice meant to give such notice according to the procedure established by law. If no procedure had been laid down, it must be established that the notice had been delivered to the concerned person. There was no meaning or significance of a notice delivered without following the procedure. Where the Act had stipulated for giving the notice forty eight hours in advance the notice may be given even earlier than the said forty eight hours. However, if the notice was given less than forty eight hours in advance, it could not be deemed as a notice given in accordance with the law. Therefore, no matter whatever procedure used to be adopted prior to the enforcement of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066 on Poush 22, 2066, thereafter it was a legal duty of the Secretary to the Constitutional Council to give notice about the meeting of the Council to every member at least forty eight hours in advance as per the mandatory provision made by the law. Likewise, it was a legal right of every member of the Council to get notice about the meeting of the Council forty eight hours in advance. It could not be contracted or ignored or rendered meaningless. It could not be found from any record or document enclosed in the case file that a notice had been given to the petitioner along with an agenda of the meeting to be held on April 23, 2010 forty eight hours in advance. The learned Counsels representing the respondents also could not make a plea that the petitioner had got lawful notice about the meeting forty eight hours in advance. From all that it could not be established that the petitioner had got the notice in accordance with Section 6(2) of the Act. In the totality of all that backdrop the Bench could not agree to the plea made by the Deputy Attorney General representing the government that it would not be pragmatic justice to interpret that the petitioner had not got the notice forty eight hours in advance by getting trapped in the technicality of not getting the notice forty eight hours in advance as stipulated by the relevant Act because the letter dated April 21, 2010 had reached the Office of the Parliamentary Party of the petitioner on April 22, 2010.

Dealing with the second question - whether or not the decision of April 23, 2010 relating to the recommendations made for the appointment of the officials of the Constitutional body was lawful, the apex court observed that it was already discussed in the context of the first question that the petitioner had not been given a notice as per Section 6(2) of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066. Although it appeared to be a procedural error, it was clear that a legal error had been committed due to failure of compliance with a mandatory legal provision. Thus where an apparent error of law appeared in the initial stage itself, there could be no element of legitimacy in the decision made by any authority.

Where the law had made a clear and mandatory provision in regard to performance of any act that procedure must be followed compulsorily in toto. There could be scope for exercise of discretion only if the law had not made any specific or mandatory provision. It was desirable and indispensable to apply a mandatory provision not by discretion but in accordance with law. Any act performed without following the procedure mandated by law could not be deemed to be completed at all and, hence, such an act might not get legitimacy. Any decision and act made without following the procedure mandated by law tended to be arbitrary and were voidable in the eyes of law.

Procedural 'ultra vires' existed in any act or decision made without complying with, by transgressing the limit or in contravention of the mandatory procedure mandated by law, and that such an act or decision could be subjected to judicial review was a basic and accepted principle of judicial review. The Indian Supreme Court has recognized that principle in the case of Babu Verghese Vs. Bar Council of Kerala (AIR 1999 SC 1281. Page 1288 SC):

> "It is the basic principle of law long settled that, if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all."

Any decision made in apparent contravention of the procedural law tended to be voidable. Such a voidable decision retained its legal authority only until it was challenged or a petition was filed praying for its voidance. That marked the difference between a decision which was voidable abinitio and a decision which was voidable. A voidable decision remained legally effective until it was voided, and its legitimacy ceased to exist from the date or time it was declared void.

The decision of the Constitutional Council seemed to have been made on the basis that the quorum had been constituted by the presence of the Chairperson and five other members as required by Section 6(3) of the aforesaid Act. However, there was a need of taking into consideration Section 6 of the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066 in its totality. That law had been made to materialize the spirit, philosophy and provision of the Constitution. Therefore, it was not suffice to follow any one Section or sub-Section of any Act in isolation of the spirit and philosophy of the Constitution. Rather it was required to accomplish one's official duty, remaining under the limits of all the provisions of the Act. Section 6(5) of that Act had also made a mandatory provision that every issue presented before the Constitutional Council shall be decided on the basis of unanimity. That provision was indicative of the method of consensus expected by the Interim Constitution of Nepal, 2063. Section 6(7) of the Act had stipulated for a next meeting to be called by the Chairperson if consensus or unanimity could not be reached as per Section 6(6). It was stipulated that even in that meeting the decision shall be made on the basis of consensus. Only if no consensus or unanimity about any issue could be reached even in the meeting thus called, the same sub-Section provided that a decision shall be made by a majority of all the members.

Thus whereas efforts should have been made in the first and second meetings for arriving at a unanimous decision, the decision of the Council made on April 23, 2010 did not show that discussions had been made in regard to the persons recommended for appointment to various constitutional bodies in the meeting held earlier than the meeting of April 23, 2010 but no consensus could be reached, and,

therefore, the next meeting had been called for April 23, 2010. That matter could not appear from the records of the Council or from the written replies submitted by the Chairperson, members and Secretary of the Constitutional Council. That showed that no attempts had been made to arrive at unanimity about the names recommended for appointment through the decision made on April 23, 2010. It was clear that the decision on recommending the names of those persons picked up for appointment as officials of various constitutional bodies was made in the very first meeting held on April 23, 2010 in the absence of the leader of Opposition in the Legislature Parliament. Such an act was clearly in contraventions of the provision made by the relevant law. Thus the decision made on April 23, 2010 in contravention of the spirit and philosophy of the Constitution as well as the provision made by the statute did not seem to be lawful.

The apex Court finally had to address the third question about whether or not the order prayed for by the petitioner ought to be issued. In that context, the following two points raised by the defense counsels needed to be resolved:

1. Whether or not the writ petitioner had waived his right by not attending the meeting in spite of the fact that he had got the notice twenty four hours in advance none-the-less.
2. Whether or not it was a fundamental right of the petitioner to attend a meeting of the Council and to participate in the decision on recommending for appointment of the officials for the constitutional bodies.

So far the first point was concerned, in course of deciding the first question it had been already held that any notice sent without complying with the mandatory procedure was not a lawful notice at all. It was mentioned in the written replies submitted by the respondents and the defense Counsels appearing on their behalf that since the notice had been delivered at least twenty four hours in advance, though not forty eight hours in advance, and the notice had been

received by the Office of his Parliamentary Party, though not by himself, it must be deemed to have been delivered to the petitioner himself. But because the notice had not been sent along with the agenda of the meeting forty eight hours in advance according to the procedure laid down by the statute, it was not necessary to resolve the dispute whether or not the notice had been sent in some other way and whether or not the petitioner had got that notice in some other way.

As regards the question of whether the petitioner had waived his right, waiving a right meant not exercising or utilizing one's right in spite of having knowledge about such a legal right. In that context what the Supreme Court of India had observed in the case of Associated Hotels India Vs. SB. Sardar Singh (AIR 1968, 56. 933) seemed to be relevant and worth mentioning in the present dispute:

> *"A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom waiver is claimed had full knowledge of his rights and facts enabling him to take effectual action for the enforcement of such right."*

Thus the doctrine of waiver could be attracted only if some one had not deliberately exercised one's right in spite of having knowledge about the right and the accompanying facts. It would not be proper to say that the petitioner had waived his right since he had remained active for his rights and entered the court seeking judicial remedy against deprivation of his right and also because he was a person who was a member of the Constitutional Council entrusted with the grave responsibility of making recommendations for appointment for the Chairpersons and members of the constitutional bodies which were empowered to perform significant functions of the state. Also, it had been contended that the petitioner had waived his right since he did not use to go to the earlier meetings of the Council in the past. In this context it could be said that there was nothing to preclude any member from taking verbal information about any meeting of the

Council. Besides, there seemed to be no legal obstacle in accepting the decision of any meeting of the Council in spite of being absent from such meeting. However, the absence of any member from any earlier meeting could not be misconstrued that he had isolated himself from the decision making process to be undertaken by the Council in the future. Also, it would no be just, lawful and reasonable to presume that such a member had stayed back accepting the decisions to be made by the meeting to be held in the future or that he had waived his right to attend subsequent meetings and participate in the decision making process.

As regards the second point raised by the respondents, the petitioner had entered the apex Court invoking Articles 12, 13 and 27 of the Interim Constitution of Nepal, 2063. Article 12 of the Constitution granted the right to freedom, whereas Article 13 granted the right to equality and Article 27 granted the right to information. Article 12 (2) (C) granted the right to form a political party. Under the right to form a political party also lie the activities like operating a political party and exercising legal rights and performing duties by virtue of being a political party or the officials of a political party. Similarly, under the right to equality enshrined in Article 13 are also included the matters such as equal protection of the laws and prohibition on discrimination in the application of general laws. Thus the right to equality implied that all citizens were equal in the eyes of law which also meant that every body should be treated equally. Likewise, the right to equality also denoted equal protection of the laws.

The petitioner is an ex-officio member of the Constitutional Council by virtue of being the leader of the Opposition. And as a member of the Council it was at once his official duty as well as right to perform his constitutional duty as stipulated by Article 149 of the Interim Constitution of Nepal, 2063.

The decision made by the Constitutional Council did not create any additional duty and right on the part of the petitioner. Nevertheless, it was his legal right to get notice about the meeting of the Constitutional Council in accordance with the law, to be able to participate in the meeting of the Council at par with other members and to be involved

in the decision making process of the Council. That right was embodied in Article 12 (2) (C) and Article 13 (1) and (2). It could not be violated directly or indirectly nor a situation leading to encroachment upon such right shall be allowed to be created, Hence, the apex Court refused to accept both the points raised by the respondents.

Finally, addressing the question - Whether the order prayed for by the petitioner be issued - the apex Court observed that there seemed to be no alternative way other than issuance of the writ of Certiorari to rectify the bad consequences arising out of the failure to duly notify the petitioner about the scheduled meeting of the Council in accordance with the law. It shall be relevant to quote from a British writer HWR Wade who had thus opined about the writ of Certiorari: "Certiorari issues to quash a decision which is ultra vires or vitiated by error on the face of record." (Administrative Law, Fifth edition, P.546)

Along with the rights were also connected the means for their protection. Issuing a writ falls under the discretionary right of the Court. The Court uses to exercise that discretion with caution and conscience. Nevertheless if a petitioner proved before the Court the existence of any legal error in any act or decision of any body or the presence of any serious procedural error adversely affecting that decision, it won't be proper for the Court to decline to issue an order of Certiorari for quashing such a decision. It is a judicial practice that the apex Court also used to issue such writs. As regards the context of the present writ petition, it has been already observed in course of deciding the issue No.2 that the decision relating to the recommendations made for appointment of the officials of various constitutional bodies by the meeting of the Constitutional Council convened on April 23, 2010 without giving notice as per the law to the petitioner who was the leader of the Opposition in the Legislature Parliament and a member of the Constitutional Council was contrary to the law. Hence, such a voidable decision and its legitimacy could not be allowed to exist.

The apex court, therefore, quashed the impugned decision made by the Constitutional Council in contravention of the law on April 23, 2010

as prayed for by the petitioner. The apex Court further issued an order under the writ of Mandamus in the name of the respondents Constitutional Council, and Office of the Prime Minister and the Council of Ministers to make a decision regarding recommendations for appointment for the vacancies of officials of the constitutional bodies at the earliest in accordance with the spirit and intent of the Interim Constitution of Nepal, 2066 and as per the provision and procedure stipulated by the Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2066. The apex Court also directed to send a copy of the order to the respondents through the Office of Attorney General for their knowledge, and to strike off the record of registration and hand over the case file as per the Rules.

We concur with the above decision.

Justice Tahir Ali Ansari
Justice Krishna Prasad Upadhyaya

Done on this day of 31th of Bhadra 2067 (Sept. 16, 2010)

Translated by Haribansha Tripathi

No agency or authority even including the Ministry shall have right to exercise the power vested in the government unless delegated by notification in Nepal Gazette.

Supreme Court, Full Bench
Hon'ble Justice Damodar Prasad Sharma
Hon'ble Justice Prakash Osti
Hon'ble Justice Bharat Bahadur Karki
Writ No: WF-0007, of the year 2067

Subject: Certiorari and others

Petitioner: Managing Chairperson Ghanendra Raj Shrestha authorized on behalf of Blue Moon Overseas Nepal Pvt. Ltd. situated at Dillibazar, Pipalbot, Kathmandu Metropolitan City, Ward No. 32, Kathmandu district.

Vs

Respondent: Ministry of Labour and Transport Management & others

- **Until and unless the Council of Ministers itself delegates its powers to any officials by notification in Nepal Gazette, the power vested in Government cannot be exercised by other agencies or officials except the Council of Ministers.**
- **In case it is not possible for the Council of Ministers itself to take the action of imposing fine and revoking license, then the power has to be delegated to any official as per Section 26 of the Foreign Employment Act by publishing a notice in the Nepal Gazette; and the delegated official has to exercise such power. Only in such a circumstance shall it be deemed that the decision to that effect was**

taken by the Government. In case of absence of such delegation, the power conferred by Section 24(1) of the Act cannot be exercised by the minister-level of Ministry of Labour and Transport Management.

- **Nepal Government (Division of Functions) Rules, 2057 is found to have been framed to classify the functions to be performed by various ministries. However, the power enshrined in Section 24(1) which forms the bone of contention in this dispute, has been specifically provided in the Act to be exercised by the Government and the Council of Ministers also has not delegated this authority as per the requirement of Section 26 of the Act. The authority to oversee matters of foreign employment is vested in the Ministry of Labour and Transport Management, pursuant to Clause 18(6) of the Schedule 2. However, that provision cannot be construed as having a status on par with the punitive provisions designated in Section 24(1) of the Foreign Employment Act, 2042 BS.**
- **The authority to oversee matters of foreign employment is vested in the Ministry of Labour and Transport Management, pursuant to Clause 18(6) of the Schedule 2. However, that provision cannot be construed as having a status on par with the punitive provisions designated in Section 24(1) of the Foreign Employment Act, 2042 BS.**
- **If it is understood that the classification of functions under the jurisdiction of Ministry of Labour and Transport Management as per these Division of Functions Rules are ipso facto symbolic of delegation of power vested in government, then there shall be no need and reason to provide for a separate arrangement as regards power delegation in Section 26 of the Act.**

Decision

Damodar Prasad Sharma, J; The brief facts and conclusion of the present writ petition filed in this court according to Articles 23 and 88(2) of the then Constitution of Kingdom of Nepal, 2047 and presented in this Bench after deffering of opinion between justices of Division Bench of this court is follows:

Upon its incorporation as per the Companies Act, 2053 BS, Blue Moon Overseas Nepal Pvt. Ltd. has been functioning after obtaining license as per Foreign Employment Act, 2042 BS from Department of Labour and Employment Promotion vide license No. 312/2059/060 dated 16th Shrawan, 2059 for conducting the business of foreign employment. As the Company was serving its functions without being contrary to the objectives stipulated in the approved Memorandum of Association (MoA), suddenly, the respondent No. 3 issued a letter of clarification on why maximum action cannot be taken against the Company as per Section 24(1) of the Foreign Employment Act, 2042 BS (amendments included) on 17th Mangshir, 2062. The proposed action was based on a news published in the Kantipur National Daily which quoted that a complaint was lodged in the Royal Nepalese Embassy in Qatar alleging the Company was sending manpower to Iraq and not to the permitted countries or companies and that it was committing illegal and irregular acts in doing so.

As regards the above letter, the Company has elaborately mentioned in its clarification of 2nd Paush, 2062 submitted before the respondent that the 10 workers sent to Kuwait via Jay Kali Overseas, viz. Kedar Ghimire, Dilli Ram Neupane, Shree Kanta Sharma, Som Narayan Shrestha, Magu Lawati, Lal Bahadur Dahal, Bikalpa Chhetri Dangi, Polendra Bisekh, Manu Raj Rai and Ghanshyam Rai have filed an application before the Department on 21st Mangshir, 2061 stating that out of insecurity fears in Kuwait after the Iraq incident, they have just complained to the Qatar-based Embassy, they were not sent to Iraq, and that they have recovered their investment amount from the Company in the presence of Department of Labour. I requested that the application filed at the Department should also be taken cognizance of. Moreover, 10 companies out of the 14 companies against which action was initiated on the basis of the letter of Qatar-

based Embassy, have been relieved to work again after imposing fine pursuant to Section 24(1) of the Foreign Employment Act, 2042 BS. The conditions here are identical as we have sent manpower to Kuwait as permitted and not to Iraq and the complainants have also retracted their complaints. As such, no conditions exist to punish the Company to the maximum. Hence, I pray to take decision as such.

A committee comprising of 4 officials namely Joint Secretary Mr. Uddhab Prasad Baskota, Director General Mr. Pratap Kumar Pathak, Director General Mr. Hari Prasad Nepal and Under-Secretary Mr. Prakash Mohan Joshi was constituted to examine and report on which punishment shall be appropriate to be awarded considering the charges against the 4 companies, including the present Company. In its opinion, the committee after examining the clarifications submitted by the companies, the initiation shown by them in resolving the problem, disposal of the complaints filed against them, quantum of punishment taken against other similarly erring companies and upon mulling over the negative impacts of seizure of license, it shall be appropriate to fine the erring companies rather than to take maximum punitive action. Similarly, acting on the opinion sought from the Office of the Attorney General (OAG), the Office has also opined that as it was not undoubtedly proved that the companies have sent manpower to Iraq on 31st Shrawan, 2062 and as per the principle of equality, same action as to be taken against the Company as in the case of other 10 companies.

On the above dispute, the respondent concluded that there is a different situation of the 4 companies including the petitioner's Company to that of other 10 companies. Hence, he decided on 17th Mangshir, 2062 to revoke the license of the petitioner's Company as per Section 24(1) of the Foreign Employment Act, 2042 BS and the information was relayed to me on 7th Paush, 2062. As there is no alternative route to legal redress, I have approached this Court with a writ petition.

While deciding against the petitioner to annul its license, a basis is taken that it sent Bikalpa Dangi and Dilli Ram Neupane to Tikrik, Iraq. However, the workers including these two have filed an application before the Department on 21st Mangshir, 2061 stating that out of

insecurity fears in Kuwait after the Iraq incident, they have just complained to the Qatar-based Embassy, they were not sent to Iraq, they went to Kuwait and also returned from the same venue and that they have recovered their investment amount from the Company in the presence of Department of Labour. In this light, the decision of annulling the license of the petitioner's Company on a false ground is totally contrary to Section 24(1) of the Foreign Employment Act, 2042 BS and deserves to be quashed.

As regards other companies such as Movira Overseas Pvt. Ltd. of the same standing, only fine and no other punitive action was taken. However, in a dispute of similar nature, this Company's license has been revoked. So this decision is partial and biased.

The decision to revoke the license of Company has been taken by applying Section 24(1) of the Foreign Employment Act, 2042 BS. However, no minimal ground exists for such action. Action has been taken on charge of sending manpower to Iraq. However, no decisive proof exists to prove that indeed they were sent to Iraq. In the letter dispatched from the Royal Nepalese Embassy at Qatar, it has been stated that the workers sent to Kuwait by petitioner's Company have since returned to Nepal and no problems are overdue. Moreover, the workers who have been alleged to be sent to Iraq have themselves reiterated that it is not true and that they have been reimbursed the investment amount. Hence, in such a scenario, the decision to annul the license of the petitioner's Company by applying Section 24(1) of the Foreign Employment Act, 2042 BS is totally unlawful and therefore deserves to be quashed.

Therefore, as the action and decision of the respondent have violated the fundamental rights conferred by the (then) Constitution of Kingdom of Nepal such as Right to Equality (Article 11(1) Right to Profession and Employment (Article 12(2)(e) and Right to Property (Article 17). Moreover, as this move is opposed to Section 24(1) of the Foreign Employment Act, 2042 BS, I pray for the decision of Minister dated 17th Mangshir, 2062 and the subsequent actions to be quashed through an order of certiorari and for reinstating my infringed rights. Besides, I also request for the issuance of an interim order in the name of respondents disallowing them to execute the decision.

To this petition, the Court on 14th Paush, 2062 issued an order as: What are the contents of this case? Why an order pursuant to the petitioner's demand should not be issued? The respondents shall be served a notice along with one copy of this writ petition allowing 15 days time excluding time taken for journey to furnish written reply via the Office of the Attorney General (OAG). Submit the case after the written replies are furnished or upon the expiry of time limit. The notice of cause list dated 24th Magh, 2062 shall be handed over to the Office of the Attorney General (OAG) for discussion about interim order and the case be duly submitted before the bench.

Similarly, an interim order issued by the Court on 24th Magh, 2062 in the name of respondents read: Here, a petition is filed seeking the revocation of a minister-level decision dated 17th Mangshir, 2062 which annulled the license of the petitioner. After the written reply is submitted and a decision is made to this effect, the case shall be cleared. While executing this decision as of now, that can curtail the Company's legal responsibility towards the workers sent to foreign employment leading to the infringement of rights of those concerned persons. As such, it is hereby ordered that the minister-level decision dated 17th Mangshir, 2062 which annulled the license of the petitioner should not be executed and status quo shall be maintained.

The written replies submitted by Ministry of Labour and Transport Management, State Minister of the same Ministry and the Department of Labour and Employment Promotion read: After workers lodged a complaint at the Qatar based Royal Nepalese Embassy stating that the Company instead of sending them to the Companies as per the contract, it was trying to sneak them into Iraq, Section Officer of the Department of Labour and Employment Promotion, Mr. Khamba Raj Thani was deputed as the Investigation Officer to investigate into the alleged charges. On the basis of his investigation and the evidence generated, it was found that the respondent Company had flouted the foreign employment laws and that can be corroborated through the following facts:

- The complainants claiming that they have to return to Nepal after they were being huddled to Iraq instead of Kuwait.

- In the statements and complaints against the financial transactions of Jay Kali Overseas also, it was stated that labour permit was made in the name of Blue Moon Overseas.
- Illegal nexus of business among the companies
- The workers having to return jobless from Kuwait itself.
- A complaint filed in the Qatar based Royal Nepalese Embassy clearly indicting the name of Company in forced entry into Iraq and request for rescue.
- The director having conceded to retrieve workers estranged in Kuwait, etc.

Section 24(1) of the Foreign Employment Act, 2042 BS provides that: In case the license holder flouts this Act or its subordinate rules or disobeys the orders or directives of (then) His Majesty's Government, the Government may impose a fine of Rs. 20 thousand to Rs. 100 thousand and to annul such license of the holder. Moreover, Section 4(2) of the same Act reads: The license holder can conduct foreign employment business only in the countries prescribed for foreign employment business. As such, the respondent Company has committed acts contrary to the Foreign Employment Act, 2042 BS and Foreign Employment Rules, 2056 BS. Therefore, the writ petition of the respondent should be quashed.

After hearing, Hon. Justice Mr. Ram Prasad Shrestha of the Division Bench opined that: Upon observing the legal provision enshrined in Section 24(1) of the Foreign Employment Act, 2042 BS, the Government of Nepal seems to be in a capacity to impose fine and annul the license of the erring company. It has been provided in Rule 3 of the then His Majesty's Government (Division of Functions) Rules, 2057 BS that the functioning of the government shall be executed by the Ministries enlisted in Schedule 1 and Rule 4 of the same regulation provides that the division of functions of the Ministries shall be as prescribed in Schedule 2.As per the Clause18(6) of the schedule 2, the then His Majesty's Government (Division of Functions) Rules, 2057 BS, the power to oversee the foreign employment issues is vested with the Ministry of Labour and Transport Management. In

this light, the minister-level decision to revoke the license of petitioner's Company cannot be construed as being made unlawfully or encroaching the jurisdiction. Hence, as the order as per the demand of the petitioner need not be issued, this petition stands quashed.

Likewise, after hearing, Hon. Justice Mr. Girish Chandra Lal of the Division Bench opined that: Pursuant to Section 26 of the Foreign Employment Act, 2042 BS, all or some of the powers conferred to (then) His Majesty's Government as per the Act may be delegated to any official after publishing a notice in Nepal Gazette. However, such type of notice does not seem to be published. As per the provisions of Rules 3, 4 and the related Schedules 1 and 2, as well as Schedule 2 (18-6) of the then His Majesty's Government (Division of Functions) Rules, 2057, the power to oversee the foreign employment issues is vested with the Ministry of Labour and Transport Management. Despite that provision, it cannot be construed that the Ministry is entitled to an extent as to revoke a license. The clear provisions of the Act shall have to be clearly delegated as per its provisions, in the absence of which, the arrangements encapsulated in the Schedules of the then His Majesty's Government (Division of Functions) Rules, 2057 cannot be interpreted as overriding to the statutory provisions of the Act. This shall be neither judicious nor consonant with the principles of statutory interpretation. As such, the use of power conferred to (then) His Majesty's Government shall have to be applied only through a decision by the Council of Ministers. In this light, the minister-level decision dated 17th Mangshir, 2062 which annulled the license of the petitioner is being quashed as per the request of petitioner as it was found to be unlawful. Similarly, a mandamus also has been issued in the name of respondents to decide again after examining the relevant matters.

In the present case duly submitted before the bench as per the cause list, learned Senior Adv. Mr. Harihar Dahal pleaded on behalf of the petitioner argued that: A decision at the minister-level cannot be reached when not being delegated by the Council of Ministers in the instance of delegation provisioned in the Act itself as per the division of functions. The then His Majesty's Government (Division of

Functions) Rules, 2057 have categorically divided the functions of various Ministries and this does not amount that there is no need to submit any matter to the Council of Ministers. Several issues which are not appropriate for repeated submission in the Council of Ministers may be decided at the minister-level. However, for such, the Council of Ministers should have expressly delegated power in this regard. The Act has indicated that the power to revoke the license of petitioner is vested in the Council of Ministers and without it being duly delegated downward; the power cannot be applied at the minister-level. Hence the minister-level decision to annul the license without having such power delegated is in itself flawed. Hence, the opinion of Hon. Justice Mr. Girish Chandra Lal to quash that decision and to send back the file to duly decide anew shall have to be sustained is appropriate.

Similarly, the essence of the arguments presented by learned Joint Attorney Mr. Mahesh Sarma Paudel representing the respondent Ministry of Labour and Transport Management et.al. was: It has been provided in Rule 3 of the then His Majesty's Government (Division of Functions) Rules, 2057 BS that the functioning of the government shall be executed by the Ministries enlisted in Schedule 1 and Rule 4 of the same regulation provides that the division of functions of the Ministries shall be as prescribed in Schedule 2. As such the authority to oversee matters of foreign employment is vested in the Ministry of Labour and Transport Management, pursuant to Clause 18(6) of the Schedule 2. In this light, a decision by the Minister shall have to be deemed as that one of the Council of Ministers and the tradition also is the same. The issue of delegation of power stipulated in Section 26 of the Foreign Employment Act, 2042 BS shall only apply while delegating authority to an official out of the concerned Ministry. The Performance of Function Rules themselves has expressly arranged that the power to make decisions on controversial issues shall rest with the Ministry of Labour and Transport Management. In that case, it shall be without reason for the Council of Ministers to delegate the same authority to the related Minister. Therefore, since there is no error in the minister-level decision dated 17th Mangshir, 2062 that imposed fine and annulled the license of the petitioner, it is requested

that the opinion of Hon. Justice Ram Prasad Shrestha dismissing the writ petition should sustain.

Upon listening to the arguments of legal counsels from both sides and after studying the papers enclosed in the case file, while contemplating towards the judgment, the following questions need to be resolved:

1. Whether the power to annul the license as per Section 24(1) of the erstwhile Foreign Employment Act, 2042 BS can be enforced by the minister level or not?
2. Whether, as per the writ plea, the minister-level decision dated 17th Mangshir, 2062 shall have to be quashed or not?

Prior to analyzing the aforementioned fundamental issues, it shall be worthwhile to glance towards the factual situation of the present dispute. Blue Moon Overseas Company had obtained license to supply manpower to the countries permitted by the then His Majesty's Government after gaining approval from the Department of Labour and Employment promotion. However, on charges of sending manpower to a non-permitted country Iraq, the Company's license was revoked as per Section 24(1) of the erstwhile Foreign Employment Act, 2042 BS. Hence, this writ petition is filed to rescind that decision. While deciding on that case through a Division Bench of this Court on 10th Falgun, 2066, Hon. Justice of Division Bench observed that Government of Nepal can impose fine on and revoke the license of the company which flouts the Act as per Section 24(1) of the Foreign Employment Act, 2042 BS. Moreover, it has been provided in Rule 3 of the then His Majesty's Government (Division of Functions) Rules, 2057 BS that the functioning of the government shall be executed by the Ministries enlisted in Schedule 1 and Rule 4 of the same regulation provides that the division of functions of the Ministries shall be as prescribed in Schedule 2. As such the authority to oversee matters of foreign employment is vested in the Ministry of Labour and Transport Management, pursuant to Clause 18(6) of the Schedule 2. As such, the authority to oversee matters of foreign employment and to take necessary action seems to have vested with the Ministry itself. Hence, since the disputed minister-level decision of 17th Mangshir, 2062 does not seem to be lacking jurisdiction, the writ petition stands quashed. Another Hon. Justice Mr. Girish Chandra Lal

held that until and unless the Council of Ministers has delegated power pursuant to Section 26 of the Foreign Employment Act, 2042 BS, the authority conferred by Section 24(1) of the Act cannot be enforced from the minister- level. Moreover, though it has been provided in the Rules 3, 4 and Clause 18(6) of the Schedule 2 relating to the same Rules that the management of foreign employment matters shall be undertaken by the Ministry of Labour and Transport Management, the authority to revoke the license conferred by Section 24(1) of the Act shall not rest with the said Ministry. Hence, since the disputed decision is found to be unlawful, it is quashed by an order of certiorari.

Considering the divergent opinions between the honourable justices of the Division Bench as regards the exercise of power conferred by Section 24(1) of the Act, it is deemed necessary and appropriate to scrutinize the aforementioned questions that have to be resolved in course of this dispute:

Now delving towards the first question to be decided, it shall be apt to quote the legal provision stipulated in Section 24(1) of the Foreign Employment Act, 2042 BS. It provides: In case the license holder flouts this Act or its subordinate rules or disobeys the orders or directives of (then) His Majesty's Government, the Government may impose a fine of Rs. 20 thousand to Rs. 100 thousand and to annul such license of the holder. As per this legal provision, it is clearly established that the power to impose a fine or to annul the license of a license holder is vested with the then His Majesty's Government. Now, for that purpose, it has to be specifically determined whether the term His Majesty's Government designates the whole Council of Ministers or it simply refers to the Ministry of Labour and Transport Management.

For the purpose of aforementioned legal arrangement, the respondent in its written reply has asserted that the term His Majesty's Government refers to the Ministry of Labour and Transport Management and for its corroboration, learned Joint Attorney in his argument has maintained: It has been provided in Rule 3 of the then His Majesty's Government (Division of Functions) Rules, 2057 BS that the functioning of the government shall be executed by the Ministries

enlisted in Schedule 1 and Rule 4 of the same regulation provides that the division of functions of the Ministries shall be as prescribed in Schedule 2. As such the authority to oversee matters of foreign employment is vested in the Ministry of Labour and Transport Management, pursuant to Clause 18(6) of the Schedule. As such, the authority to oversee matters of foreign employment and to take necessary action seems to have vested with the Ministry itself.

That plea necessitated to look at the definition of Government of Nepal (the then His Majesty's Government) rendered in the Interpretation of Statutes Act, 2010 BS. Section 2(i) of the Act has defined the term Government of Nepal (the then His Majesty's Government) as: His Majesty the King and council of Ministers who exercised the executive powers of the kingdom of Nepal pursuant to the Constitution of the Kingdom of Nepal 2047 (1990) and the Council of Ministers who exercised the executive power of Nepal pursuant to the Constitution of the Kingdom of Nepal, 2047, Declaration of the House of Representatives, 2063 and the prevailing laws for the acts done or to be done since 4th Jestha,2063. From that definition it is inferred that the term His Majesty's Government mentioned in the Act obviously refers to the Council of Ministers. As such, the power to annul a license of the holder as per Section 24(1) of the Foreign Employment Act, 2042 BS, shall have to be exercised by the then His Majesty's Government (Currently Government of Nepal, Council of Ministers). However, it may not be feasible and practical for the Council of Ministers to exercise that power by itself. In that condition, theoretically, it is a possible option to delegate the power inherent in the Council of Ministers to any of its subordinate body or official. For that very purpose in Section 26 of the Act, it has been separately laid down that: His Majesty's Government may delegate all or part of its powers conferred on it through the Foreign Employment Act, 2042 BS to any official by publishing a notice in the Nepal Gazette. Upon comprehending the language used in Section 26 of the Act, His Majesty's Government may delegate all or part of its powers to any official and may cause to perform its functions on foreign employment matters through the delegated official. However, the notice of such power delegation has to be mandatory published in the Nepal Gazette. From this provision, it can be deuced that until and unless

the Council of Ministers itself delegates its powers to any official by publishing a notice in the Nepal Gazette, the power vested in His Majesty's Government cannot be exercised by other agencies or officials except the Council of Ministers.

In this dispute, the chief plea of petition is that the annulment of license of the petitioner's company by a minister-level decision of Ministry of Labour and Transport Management by exercising the power conferred to His Majesty's Government without having it duly delegated is in itself flawed. It would be deserving and relevant to define the legal provision of Section 24(1) of the Foreign Employment Act, 2042 BS in harmony with the objective of Section 26 of the same Act. The legal provision espoused in Section 24(1) entails an objective to authorize His Majesty's Government for imposing fine and revoking license against the errant and non-compliant individual or company. The legal provision that action of that magnitude shall have to be taken only by His Majesty's Government itself concurs with the condition that such a decision to impose fine and revoke license can mark an end of commercial rights of the license holder. In case it is not possible for the Council of Ministers itself to take the action of imposing fine and revoking license, then the power has to be delegated to any official as per Section 26 of the Act by publishing a notice in the Nepal Gazette; and the delegated official has to exercise such power. Only in such a circumstance shall it be deemed that the decision to that effect was taken by His Majesty's Government. In case of absence of such delegation, the power conferred by Section 24(1) of the Act cannot be exercised by the minister-level of Ministry of Labour and Transport Management. Hence, as it cannot be seen that the power to annul license of the petitioner's company is ever delegated by the then His Majesty's Government to the Minister, Ministry of Labour and Transport Management, in such a circumstance, the decision of 17th Mangshir, 2062 revoking the license of the petitioner's company is found to be erroneous lacking on jurisdiction.

The plea raised by the learned Joint Attorney from the respondent side is: It has been provided in Rule 3 of the then His Majesty's Government (Division of Functions) Rules, 2057 BS that the

functioning of the government shall be executed by the Ministries enlisted in Schedule 1 and Rule 4 of the same regulation provides that the division of functions of the Ministries shall be as prescribed in Schedule 2. As such the authority to oversee matters of foreign employment is vested in the Ministry of Labour and Transport Management, pursuant to Clause 18(6) of the Schedule 2. As far as this plea is concerned, His Majesty's Government (Division of Functions) Rules, 2057 have been framed to classify the functions to be performed by various ministries. However, the power enshrined in Section 24(1) which forms the bone of contention in this dispute, has been specifically provided in the Act to be exercised by His Majesty's Government and the Council of Ministers also has not delegated this authority as per the requirement of Section 26 of the Act. The authority to oversee matters of foreign employment is vested in the Ministry of Labour and Transport Management, pursuant to Clause 18(6) of the Schedule. However, that provision cannot be construed as having a status on par with the punitive provisions designated in Section 24(1) of the Foreign Employment Act, 2042 BS. If it is understood that the classification of functions under the jurisdiction of Ministry of Labour and Transport Management as per these Division of Functions Rules are ipso facto symbolic of delegation of power vested in the then His Majesty's Government, then there shall be no need and reason to provide for a separate arrangement as regards power delegation in Section 26 of the Act. Hence, one cannot consent with the plea raised by the learned Joint Attorney from the respondent side that as the Division of Functions Rules have provided exclusively for the functional jurisdiction of the Ministry, there is no need to delegate power specifically according to Section 26 of the Act.

Therefore, from the aforementioned bases and reasons analyzed, until and unless the Council of Ministers has delegated power of imposing fine and annulling the license of the holder company, pursuant to Section 26 of the Foreign Employment Act, 2042 BS, by publishing a notice in the Nepal Gazette the authority conferred by Section 24(1) of the Act cannot be enforced from the minister- level of the Ministry of Labour and Transport Management.

Now, contemplating on the second question of whether the decision of Minister of Labour and Transport Management of 17th Mangshir, 2062 annulling the license of the petitioner has to be quashed or not, it is found in this dispute that a decision was taken on 17th Mangshir, 2062 at the minister level to impose fine on and annul license of the petitioner's company as per Section 24(1) of the Foreign Employment Act, 2042 BS. However, prior to doing so, no power was conferred from the then His Majesty's Government to the Minister of Labour and Transport Management as designated by Section 26 of the Act. Hence, in this circumstance, the action taken by the minister-level decision dismissing the license of the petitioner is not found to be lawful. Therefore, that decision is hereby quashed through an order of certiorari and a mandamus also has been issued in the name of respondents to decide anew after examining the relevant matters. As such, the opinion of honourable justice Mr. Girish Chandra Lal of the Division Bench is sustained as it is found to be appropriate. The notice of this decision shall be sent to the respondents via the Office of the Attorney General (OAG) including a copy of the same. This case file shall be duly handed over after writing off the registry.

We concur with above decision.

Justice Prakash Osti

Justice Dr. Bharat Bahadur Karki

Done on this day of 9th Ashadh, 2068B.S. (June 23rd, 2011)
Translated by Bishnu Prasad Upadhaya

An assault which is intended to kill one person but killed other unintended one, in this situation, the actors mens rea cannot be considered to have been ended, instead it is considered as a transfer of malice and created criminal liability.

Supreme Court, Division Bench

Hon'ble Justice Kedar Prashad Giri

Hon'ble Justice Kalyan Shrestha

Criminal Appeal No. 3375 of the year 2060

(Referral No. 494 of the year 2061)

Case: Homicide.

Appellant/plaintiff: Government of Nepal, by the First Information Report of Mankumari Thapa

Vs.

Respondent/ Defendant: Kanhaiya Raya Kurmi & others, resident of Morang District Biratnagar sub-Metropolis Ward No. 20, currently residing at Rupandehi District Butwal Municipality Ward No. 13

Applicant/ Defendant: Mohan Singh Karki on behalf of Krishna Karki Chetri, a resident of Rupandehi District Butwal Municipality Ward No. 13

Vs.

Respondent/ plaintiff: Nepal Government by the First Information Report of Mankumari Thapa

Appellant/plaintiff: Nepal Government by the First Information Report of Mankumari Thapa

Vs.

Respondent/ Defendant: Krishna Karki k.C, a resident of Rupandehi District Butwal Municipality Ward No. 13

- **If the accused is released only on the ground of some minor technical errors in of a case when the occurrence of crime established, the society would never free from feel fear of crime and the major quest of the criminal justice system to punish the criminal would also be curbed.**
- **To prove the criminal offence there should have been the presence of mens-rea element compulsorily. It is the basic principle of the criminal justice system. Although, there is no exact definition, scope and limitation of the mens-rea element in criminal law, however mens-rea element should be interpreted in course of its application in accordance with the recognized principle of criminal jurisprudence and as well as the need of our criminal law.**
- **No. 1 of the Chapter on Homicide of Country code (Muluki Ain) stipulates, except as otherwise provided in law, no one shall take (kill), and cause to take, or attempt to take the life of a person". This provision entirely prohibits killing any one illegally. According to this provision, to get immunity from criminal liability, the accused should prove the killing is legal.**
- **If any act which is recognized as illegal and such act is happened over the unwilling object (person or property), then there can't be said there is no mens-rea. There is only the legal assumption of transfer of malice. In this situation, for the purpose of law, the accused should be treated as that he has attacked intentionally.**
- **The assault which intended to harm anyone is illegal, and the same assault when transferred to unwilling object or person there also the accused criminality of offence comes into exist. So any act which makes harm to other also comes under the criminal act.**
- **To differentiate whether or not any act is illegal generally, it must be taken into a account whether the objective of**

the act a committed by the accused is consistent with law or not? If the motive is ulterior then gravity of such an illegal act will have to be determined as per the seriousness of the harm incurred there to.

- **In criminal law, there has to be ascertained an indifferent liability in different circumstances. In such a situation, if there is an illicit result then liability should be bared whatever the intention exist.**
- **It is quite obvious that every social being should maintain his behavior as guided by law. To get immunity from such liability he/she should prove his/her act agrees with law.**
- **If the nature of the act itself is illegal and it results wrong consequences then it can be considered that his ill motive and act takes expansion and transferred up to other person.**
- **Any act which is committed to the intended person could be a crime, the same act if happened to another unwilling person also shall be considered to be a crime. An assault which intended to kill one person but killed other unintended person, in this situation the actor's mens-rea cannot considered to have been ended instead it is considered only the transfer of malice and criminal liability of such intentional killing will be created.**

Decision

Kalyan Shrestha, J.: The brief fact of the case and verdict thereto and the appeal filed over the judgment of Applate Court Butwal made on 2060/03/04 by Nepal Government pursuant to Section 9(1)(b) of the Administration of Justice Act, 2048 and referral (SADHAK) related to Krishna K.C. registered in this court as well as application as appeal related to same offender pursuant to Section 10 (4) of the same Act are as follows:

It was 16th Ashwin 2055; my younger son Shuku Thapa aged 19, who went to his friend's home at 8:30 p.m. in the evening did not come back for long. He and the people who live in Butwal Municipality Ward No.11, Nagendra Thapa, Kanhaiyaa Raya Kurmi, Deepak Raya Kurmi and Krishna Bahadur Karki did debate with each other on certain issue and they four people killed my son by sharp weapon knife. That information was given by Nagendra Thapa alias Kale to us, and we immediately went there with my neighbor. At that time my son's dead body was lying on ground with an injury in the chest region between to nipples by sharp weapon knife. So informant requested for the appropriate action against defendants was the content of the First Information Report (FIR).

On the basis of the information, we went in crime scene and saw the blood in the road junction, and to the further south of it was a sickle with iron handle, a dead body of Shuku Thapa with the wet cloth on chest by blood, where the Nagendra Thapa, Kanhaiyaa Raya Kurmi, Dipak Raya Kurmi and Krishna Bdr. Karki attacked the deceased by the sharp weapon and killed. So Nagendra Thapa, Kanhaiyaa Raya Kurmi, Deepak Raya Kurmi and Krishna Bdr. Karki are arrested and presented. Such was the report of Deputy Police inspector Laxman Pun.

In Rupandehi district, Butwal Municipality Ward No.12, east lies Siddhartha highway Kalikanagar waiting place (terminal) and Shivalal Sris's house, in the west is Koshiram Okil's house and to the south a narrow (trail) to Shantipath, and the house of Bhim Narayan in the north. Within these four boundaries and in front of Shivalal Sris's house, beneath a tree found a fin shaped knife with wood handle measuring 10" long with a handle measuring 3 and ½" in length and 6" long from its joint was mentioned in the deed of seizure.

In Butwal Municipality Ward No. 13, on the way of Shanti Path there found 2 ft wide blood spots and those blood spots were washed by rain and blood stain are also seen in stone. About 10mtr. ahead from that point there found a 7" long, 1.75" wide seath of Khukuri and about 8 mtr. south from there found a 15" long sickle which have iron handle, is the deed of crime scene .

The dead body of Shuku Thapa found in north side of Purna Bahadur's house which situated 25 mtr. west than above mention crime scene and dead body's T-Shirt is cut out and in chest half inch wide and 1 inch long injury, injured by the knife was the deed of dead body examination.

In the east is pitch road, a way to Kalikanagar, in the west is unmetalled road, which heads to New Horizon, in north a concrete building of Chitra Bdr. Gurung and in south Chakrapani Upadhyaya's house, within these four boundaries found a Khukuri in a ditch is the deed of seizure.

Kanhaiya got a wound near to neck and Urmila Raya's had her three fingers of left hand had a cut wound was mentioned wound examination report.

The cause of death is due to total injury on heart by the weapon was mentioned in Shuku Thapa's post-Mortem report.

In the night of 2nd, October 02, 1998, I was in my house. At night about 8:30 P.m Krishna Karki(K.C) called me out and he slapped on my face. I asked him for the cause to hit me, at the same time Shuku Thapa came with Khukuri, Nagendra Thapa came with sickle on that place. Shuku Thapa tried to attack me by Khukuri with saying I blamed him for fan thief. At the same time he pushed me and I also pushed him. In altercation Krishna Karki attacked me by sharp knife but I pushed Shuku Thapa to avoid attack. On that act Shuku Thapa was injured by such knife and suddenly he died. This is the statement of defendant Kanhaiya Raya before the authorized official.

In that day and time Shuku Thapa said to me and Krishna Karki, lets go to beat Kanhaiya because he blamed me for fan thief. So I took sickle, Shuku Thapa took small Khukuri and Krishna Karki took knife and we together went to road side. Krishna Karki went to call Kanhaiya in his residence. On the way, Krishna Karki slapped to the Kanhaiya and Kanhaiya beat to Shuku Thapa. Then I stayed with capturing Dipak Raya, Kanhaiya Raya, Krishna Karki and Shuku Thapa have gone some far with fighting and pushing Shuku Thapa. Shuku attacked Kanhaiya by Khukuri, Kanhaiya pushing Shuku for

deceive from such attack and Krishna Karki attacked to Kanhaiya by sharp knife same as again he pushed Shuku in front of him and Shuku Thapa got injury by stabbing on chest and died by that cause. It is a statement of Nagendra Thapa Magar before the authorized official.

On that day and time I was in my home. Krishna Karki took out my younger brother in road side. After a moment I heard a sound of quarrel and I went there to see what the fact was. I saw Shuku Thapa beat my younger brother and Kanhaiya beat Shuku, I went near to them and I also slapped Shuku Thapa. At the same time Nagendra covered and threatened me by showing sickle to keep quite otherwise he kill me. So between me and Nagendra started fighting. Shuku Thapa took out the Khukuri and attacked to Kanhaiya but he caught Shuku's hand and he pushed him away. Same time Krishna Karki took out the sharp knife and attacked to the Kanhaiya again he pushed Shuku to same from that attack. The injury occurred to the Shuku by stabbing and he fell down then Krishna Karki ran away from there. In this situation I couldn't stop that incident even there was a possibility of killing somebody. I also beat him before. With the involvement of me and my act the death of Shuku Thapa is occurred. It is a statement of Dipak Raya before the authorized official.

In that date and time, Krishna Karki called my younger son Kanhaiya. They both went out. After some time I heard the sound of quarrel. I and my elder son Deepak went there, and I saw Nagendra, Krishna Karki and Shuku Thapa armed with sickle, knife and Khukuri respectively. Among them Shuku Thapa attacked Khukuri to my son Kanhaiya, he caught his hand and pushed him. I sought for help, Nagendra shows me sickle and warned to kill me and my son Shuku responds on that and scolds Nagendra to shut up, I and Krishna are enough for these two brothers. So Nagendra became angry and kicked to Shuku Thapa. Krishna Karki attacked to Kanhaiya by Knife but that extended to the Shuku Thapa and caused wound on chest; he felt down. Nagendra Thapa said me to carry the body of Shuku Thapa then I and my elder son held two legs and Nagendra and Krishna Karki held two hands and we brought him in light. I saw a whole on chest and bleeding over there, he didn't respond any act of ours like

calling and swinging so I knew he was died. Immediately Krishna Karki runs away from there and Nagendra also tried to ran away but he could not. Police officer arrested Nagendra, Kanhaiya and Deepak on the spot together with all description the eye witness Urmila Raya gave statement before the police.

In aforesaid date, time and place has happened quarrel and fight. Rascals warned us for not coming outside from house, so there was not sure identification, which were fighting. After death of Shuku Thapa police official's vehicle arrived there and we people also went there to see the incident. We saw Shuku Thapa's death body on the ground, having injury of stabbing on chest. Later we knew that Krishna Karki already ran away from there. This is the statement given by people; Shanti Gurung, Narayan Bhandari, Devi Pande and Dil Kumari individually on the incident site.

The prosecution, as stated in the charge sheet, dead Shuku Thapa and Kanhaiya were beating and pushing each other, Krishna Karki(K.C) tried stab knife to the Kanhaiya but wound occurred to the Shuku Thapa. So Krishna Karki is a charged under No. 13(1) of the Chapter on Homicide, defendant Kanhaiya and deceased did pushing and beating so there raised the angriness. So Kanhaiya is charged under No. 13(4) of the same chapter. As well as to the defendants Nagendra and Deepak, they didn't try to save the life of deceased and play role of a bettor. So upon them charged 17(3) of the same chapter. As well as to the defendants Nagendra and Deepak, they didn't try to save the life of deceased and play role of accomplice. So there are under No. 17(3) of the same chapter.

On 2055/6/16, I had gone to watch cinema at noon. Around 8:15 I return back to my home, but meal was not ready. I was lying on bed same time Krishna Karki came to my residence and took Kanhaiya outside to road. Krishna was beating my brother and I went to separate them, but there happened fighting between me and Nagendra. At same time Krishna beat I 3/4 blow. Deceased went to the Kanhaiya with something on his hand. But I could not see, what is in his hand whether Khukuri or knife. That weapon dropped over there. Next time again he came with sickle on his hand previously that

sickle was in the hand of Nagendra. Nagendra was moving round the sickle said, he cut all. Then I went to him for fighting. Kanhaiya pushed deceased away and he fell down. He went to call authorized official. I was in some distance from them so, I didn't see what and how the wound occurred and caused the death. It is a statement of Deepak Raya Kurmi in the court.

On 2055/6/16, I was in my village, defendant Kanhaiya and Shuku Thapa did fight on the issue of fan thief and deceased asked for help to me and Krishna and we went ahead. When we arrived there, there was happening fight between the Kanhaiya, Deepak and deceased. At the same time deceased fell down on ground. The death might be occurred due to attack of both brothers. Due to darkness I didn't see the actual occurrence. The thing found in the site of incident belongs to Dipak Raya's house. I don't know from where and how found those things were found; I didn't see by my eyes myself. I don't know what sort of things were written by authorized officer, I couldn't heard and see that statement, authorized officer forced me to sign over that statement. It is the statement of Nagendra Thapa Magar in the court.

On 2055/6/16, I was in my house. At 8:10 P.m defendant Krishna Karki came to my residence and called me out to talk something. After arriving outside, Krishna Karki beat me. I asked the cause for the beating me, whereas Shuku Thapa took out the Khukuri and had tried to attack me, but I missed that attack. My elder brother Dipak and Nagendra also did fight, my brother Dipak Raya fell down near to channel and I went to see him. Same time Shuku Thapa came to attack me by khukuri and that khukuri injured me under my chin and I pushed him from me. Deceased fell down on the ground. Then after, I don't know what happen? And who attack to whom also which wound caused to death. Whatever wrote on the statement on authorized officer, I don't know because without seeing and listening I was compelled to sign on that. It's a statement of the Kanhaiya Raya in the court.

On 2055/6/16, I was in Triveni. There is my uncle's house, so I went there for my disease treatment. After 5/6 days treatment I came back to my house. I know the defendants and deceased very well. I didn't

meet them on that day because before a day I went to my uncle's house in Triveni. This is a denial statement of the escaped defendant on 2055/9/10 with attending application.

As per the court order defendant witness statement is included in this file.

In this case, according to deed of examination of dead body and post-mortem report the cause of death is injury on heart. According to defendant Kanhaiya statement on authorized official, the death is occurred by the attack of the Krishna Karki (K.C) to the Kanhaiya but wound occurred to Shuku Thapa and died. Whereas in the court Kanhaiya denied the fact that attack of knife but accept the incident of pushing and felling down. The all file included evidence shows that the death of Shuku Thapa is occurred by the act of that defendant also. Thus the charge sheet charged for Kanhaiya under No. 13(4) of the Homicide Chapter but the court decided and convicts him as per No. 13(3) of the Chapter on Homicide. The file shows that, this defendant didn't go with mens-rea to kill, whereas the dead person himself went to defendant Kanhaiya's residence with the fighting intention because of angriness. Thus the court applied No. 188 of chapter on Court Management and opined i.e the legal punishment is heavy and punished him only 15 years imprisonment. In regard to the Krishna Karki (K.C), he denied the charged offence and that denial statement was supported by his witness statement. As well as defendant Deepak Raya and Nagendra Thapa also denied the charged offence in authorized official and the court. Also the prosecution side couldn't produce any witness and evidence to prove the offence of those defendants. Thus the Rupandehi District Court decided on 2057/4/30 to acquit Krishna Karki, Dipak Raya and Nagendra Thapa Magar.

When I stayed in my room, Krishna Karki came to my room and took me out and beat on the face. Deceased Shuku Thapa and Nagendra came with having Khukuri and sickle respectively. Shuku Thkapa attacked me by such Khukuri and injured me under chin, because I had blamed him as fan thief. I pushed him away at the same time Krishna Karki attacked to me by sharp weapon knife but it stabbed to the Shuku and due to that wound he died. Ditto Krishna Karki and

deceased Shuku Thapa called and took me out from my room with the intention to kill me. They attacked me by different weapon Khukuri and knife; I only did defense from that attack and push Shuku Thapa. I have seen in the file included evidences. But the trial court convicted me for the crime and punished. That decision is wrong and defective, so I beg to void the decision and absolve me from this case. Including these all description Kanhaiya Raya registered the appeal to the appellate court Butwal.

The arrested defendants of the occurrence Kanhaiya Raya, Deepak Raya and Nagendra Thapa Magar's statement clearly shows that, defendant Krishna Karki attacked to the Kanhaiya Raya but the wound happen to the deceased chest that caused the death of the Shuku Thapa. Krishna Karki attacked by knife and other defendants were attending there. This fact is supported by the statement of the people who were presented on the spot. In this situation the decision to release Deepak Raya, Krishna Karki and Nagendra Thapa Magar is incompatible. Punished only to the Kanhaiya Raya is even incompatible, instead of the No 13(1), No 13(3) imposed and punished him. Thus the decision of the Rupandehi District Court is wrong and should declare void and for all the defendants to punish as per the charge sheet, the prosecutor came to appeal in appellate court Butwal.

In this case, autopsy report shows the cause of death is injury on heart by stabbing. Defendant Krishna Karki attacked that knife to the Kanhaiya but wound occurred to the Shuku Thapa is proved by the statement of defendant Kanhaiya before authorized official. Similarly the statement of co-defendants Nagendra and Deepak gave similar statement before authorized official and gave certainty on the attack of knife is done by the Krishna Karki (K.C). Other evidences included in file are also revealing that along with the Kanhaiya, all other defendants were present in the occurrence. In this situation the acquittal decision to release Krishna Karki, Deepak Raya and Nagendra Thapa is wrong, so the appellate court Butwal issued the order to present the defendant in court on 2058/7/21, for further discussion.

In respect to decision of 2057/4/30 to punish defendent Krishna Karki and Kanhaya Raya is inconsistent to that extent. Thus the decision is reverse up to them i.e., the court decided in regards of the Krishna Karki K.C punished life imprisonment as per No. 13(3) and to the Kanhaiya Raya punished five years imprisonment as per No. 17(2) of Chapter on Homicide. The court used No. 188 of Chapter on Court Management and made opinion only 10 years for Krishna Karki, is sansactioned by Butwal appellate court on 2060/3/4.

Such decision of appellate court is unsatisfactory. There is no debate on the fact that the commission of the Kanhaiya caused the deceased death. Next defendant succeeded to stabbing knife due to Ditto's help to push, capture and beat to the deceased and by such stabbing the death is occurred is proved by the deed of examination of dead body and post-mortem report. The charge sheet complained No. 13(4) of Homicide Chapter to ditto defendant. Defendant accepted the fact which he pushed the deceased in authorized officer and court. Thus that act is not attracted to punish under No. 17(2).

Krishna Karki charged Upon No 13(1) due to his act of killing by using the sharp weapon knife. Appellate court changes the charge and punished as per the No 13(3). Both legal provisions attract indifferent situation. Defendant Krishna Karki attacked knife and its injury caused death of deceased Shuka Thapa, this fact is proved by report of authorised officer report, FIR, co-accused statement, and statement of eye withness is statement. Thus, he is liable for the 13(1) but the court applied 13(3) to the defendant is inconsistent with law and fact.

Acquittal defendant Nagendra Thapa and Deepak Raya Kurmi accepted that they were presented in the occurrence on the statement on authorised officer. They didn't try to save the life of deceased by shouting for help, thus they play role as an abettor is determined.

Thus, without evaluation of the evidence included in file, the decision which punished lesser than the charge sheet to the Krishna Karki and Kanhaiya Raya kumara and acquittal to the Nagendra and Deepak Raya is wrongful. The decision of Butwal appellate court on that extent should be void and punished as per the charge sheet accusation. This

is the appeal registered on behalf of Nepal Government in this court. Similarly in regard of Krishna Karki, an application for sanction of referral (SADHAK) is found submitted.

My son Krishna Karki had gone to India; there is no certainty to return back, that is why on behalf of my son I came to submit the application under the Section 10(4) of Justice Administration Act, of Justice, 2048. There is no eye witness who saw my son stabbed and that knife belongs to him. According to statement of Nagendra, due to darkness he didn't see who stabbed knife. So that such statement can't be taken as evidence against my son. In between the deceased, defendant Kanhaiya and his brother did the debate and pushing each other on the issue of the fan theft. In this aspect court didn't given attention. By the defendant Knhaiya's statement of court, the nature of incident has cleared. He hasn't say in such statement that Krishna Karki stabbed knife. The decision of appellate court is not based on evidence but based on the assumption. The quarrel has occurred by the issue of fan theft. There is no any concern of Krishna Karki. During the happening debate between those three persons, Kanhauya pushed and Shuku fell down. While seeing entire incident there is no involvement of Krishna Karki, so court could not convict him.

The appellate court decision rendered without evaluation of the evidence only on the basis of post mortem report, statement of Urmila. So this application is presented in the form of an appeal to be heared during refferal hearing & the decision which punished to the innocent Krishna Karki be declared void and released him from conviction. It is stated in application in the form of appeal submitted by father Mohan Singh Karki.

In this case presented to be hearing as per the rule, joint-Government Attorney Dilliraman Acharya submit his argument the death of Shuku Thapa is occurred due to attack of Krishna Karki by sharp weapon, knife. This fact is established without any doubt. In this situation, instead of charge sheet demand of No. 13 (1) of the Chapter on Homocide decided to punish as per No. 13(3) is inconsistent. Defendant Kanhaiya Raya accepted in the court statement that he touched on the body of deceased, and pushed him away. At that

moment Krishna Karki's attack occurred stabbing to deceased body. So, he should be punished as per the No 13(4) of the Chapter on HHHHomicide but decision rendered to punish under 17(2) of the Chapter on Homicide is wrong to that extent. In respect of acquittal of defendants Deepak Raya Kurmi and Nagendra Thapa Magar, they were attended in the occurrence is proved by their statement without doubt. They didn't try to save deceased, they stayed as an abettor, thus they should be punished according to charge sheet but court acquitted them, it is also wrong. Together with those arguments the Joint Government Attorney pleaded to charge all defendants according to initial accusation.

After giving consideration on the pleading of learned joint Government Attorney & studying the case file including appeal it seems to be decided whether the appellate court Butwal's decision is correct or not and whether the demand can be fulfilled or not according to appeal of Nepal government ?

In this case, allegation of killing Shuku Thapa by stabbing the knife, to the defendant Krishna Karki(K.C) is chased under No 13(1), Kanhaiya Raya under No. 13(4) and Nagendra and Deepak under No. 17(3) Chapter on Homicide on in initial charge sheet and on that charge sheet trial court decided and punished Kanhaiya Raya under No. 13(3) and other defendants acquitted from criminal liability. On that decision appellate court decided to sentence for life to defendant Krishna Karki under 13(3) and to the defendant Kanhaiya Raya 5 years of imprisonment under No. 17(2) of the Chapter on Homicide. The party unsatisfied with decision of the appellate court came to this court with appeal from prosecutor. On behalf of Krishna Karki(K.C) submitted an application as appeal under the Section 10(4) Justice Administration Act, 1992 and similarly regarding Krishna Karki referral is submitted as per No. 13(3) of the Chapter on Homicide. The major demand of appeal of Nepal Government is to make void the wrong decision of appellate court which decided life imprisonment as per the 13(3) instead charged 13(1) for the Krishna Karki. In regards to Kanhaiya Raya, demanding No. 13(4) but imposed only five years imprisonment pursuant to No. 17(2) and acquittal decision in case of

Deepak and Nagendra. Similarly, on behalf of Krishna Karki registered application similar to appeal to declare void the decision, stated that Krishnna Karrki who didn't involve in any act of crime. He should have been acquitted but appellate court convicted him for offence without any basis and evidence and thus, the decision is wrong and voidable.

In this case Krishna Karki (K.C) together with other four people killed my son Shuku Thapa by stabbing sharp weapon knife, is the FIR registered by deceased mother Manakumari. The deceased dead body examination deed shows, in between two nipples one and half inch wide and one inch length wound exists as well as blood from that wound, a fin shaped weapon with wood handle knife total length 10" with handle states the deed of seizure, the statement of eye witness Urmila Raya Kurmi, statement of defendants before authorized official and the cause of death is due to heart injury mentioned in post-mortem report is included in the case file. While analyzing of these evidences it is no doubt that dead Shuku Thapa is died by hurting with sharp knife.

Now, it is to consider which of the defendants were involved in what manner in killing the deceased by stabbing knife. Firstly, it demands a comprehensive discussion on submission of referral of the appellate court Butwal which convicted the Krishna Karki (K.C) as a perpetrator and punish him for the life imprisonment, in the form of appeal a petition claiming innocent by the culprits and the appeal of the prosecution to make void appellate court Butwal to is decision to release Nagendra Thapa Magar and Deepak Raya Kurmi, so to nulify well as make void the decision which imposed less punishment.

To settle those issues, court should give sight to the incident. About 15 to 20 days before the incident, there rose a issue of table fan stealing by Shuku Thapa, from the house of the late Junga Bdr. Thapa in Butwal Municipality ward No. 12 Kalika Nagar, Kanhaiya told this to Nagendra, the son of Late Jung Bdr. Thapa, that Shuku Thapa had steal that fan. Due to that reason Shuku Thapa had an envy to take revenge which turned to be an incident. These all facts can be seen in the statement of Kanhaiya Raya before authorized official and in trial court. On the basis of Kanhaiya's saying Nagendra blamed Shuku as

a fan thief. So Shuku Thapa requests for help to Krishna Karki (K.C) and Nagendra also to beat Kanhaiya. I agreed with him and on 055-5-16, at 8:30 P.m they went near to Kanhaiya's residence armed with, knife, Khukuri and sickle. Nagendra Thapa accepted this fact in statement given before the authorized official, whereas before the court he denied issue of weapons and accepted the major fact which, including with Krishna Karki they went to incident site for beat Kanhaiya, during fighting and pushing Shuku Thapa fell down and died over there. After arriving near to residence of Kanhaiya, deceased Shuku Thapa and Nagendra stay on side and Krishna Karki had gone to call Kanhaiya in his room. This fact is proved by the Nagendra's statement before authorized official as well as statement of defendants Deepak and Kanhaiya before authorized official and court. Supporting that fact eye witness Urmila Raya also has given writeen statement on spot. At the time, defendant was working in kitchen and his mother and elder brother lying on the bed for rest, Krishna Karki came there and called him on the pretext that, "there is something, come out" then both of them went out. With having doubt about why he took him out at night time, thus Kanhaiya's mother and elder brother followed them. This matter is shown by Urmila's statement on spot. After taking him out of home, defendant Krishna Karki beat a slap on the face of Kanhaiya, and he asked the cause of beating. At the same time, the deceased Shuku Thapa took out a small Khukuri and said, "You tried to send me in prison by blaming me as fan thief'. With that saying he tried to attack me. Even in the situation of defending, Kanhaiya got injury by that Khukuri in his neck under chin and he pushed him. During happening of such pushing "Krishna Karki took out a Knife and came to attack me and to avoid that attack I pushed Shuku Thapa before him, the knife caused hurt in the chest of Shuku Thapa." This statement of the Kanhaiya in authorized official is consistently supported by the statement of defendant Nagendra Thapa, Deepak Raya before authorized official and in court as well as the statement of eye witness Urmila.

The facts included in the file shows, in one side there is a armed group, in the side of the deceased Shuku Thapa with Krishna Karki and Nagendra Thapa. They went to fight with defendant Kanhaiya. In

other side with the doubt on calling in night time, Kanhaiya's mother and elder brother followed them. In this way the fighting occurred in between the deceased group and defendant Kanhaiya's family. During the defending the attack from the deceased's group Kanhaiya got small wound in neck under chin and his mother got wound in three fingers. This fact is shown by the wound examination case form.

In this way on the basis of previous envy deceased intended to fight with the Kanhaiya. So he requested to defendants Krishna Karki and Nagendra and they agreed to help him. They went to defendant Kanhaiya's residence with carrying Knife, Khukuri and Sickle on hand at night time. In that situation, Kanhaiya was cutting vegetable in kitchen; Krishna called him out and attacked haphazardly by weapon. At the same time Krishna Karki also attacked by the Knife with aiming to wound Kanhaiya but the wound occurred to the Shuku Thapa because Kanhaiya pushed him to prevent that attack or for self defense, and Shuku Thapa died. This fact is expressed in the statement of co-defendants Nagendra, Deepak and Kanhaiya before authorized official, as well as in eye witness Urmila Raya's statement during investigation. This is proved by the situational report and deed of dead body test, which found an injury by the sharp weapon, is in between two nipples and autopsy report determined the cause of death is injury to heart.

Defendant Krishna Karki has not arrested in occurrence but came to present in court within the time limit issued by the court. He denied the conviction and his involvement in incident, he took plea of alibi and said on that day he was in Triveni, he produced a witness to prove that alibi. Initially in authorized official all defendants accepted the attack of defendant Krishna Karki but in Court they denied the weapon using in incident and accept the involvement of defendant Krishna Karki. The other defendants' statement before shows that they didn't see clearly whose and what weapon caused injury to deceased body. Prosecutor side couldn't produce any witness before the court including the so-called eye witness Urmila Raya.

To consider on the alibi taken by the defendant Krishna Karki, defendant Nagendra Thapa, deceased Shuku Thapa and Krishna

Karki are previously known friends, and it is revealed the statement of Nagendra in court and authorized official. According to the Krishna Karki's statement clearly stated that they were known to each other and between them there was not any envy. Though he was not arrested at the occurrence however has acted as a perpetrator. This is exposed by his own group's defendant Nagendra Thapa's statement and defendants Deepak and Kanhaiya's statement during investigation and also by the eyewitness Urmila's document made during investigation as well as by the FIR. Deceased Shuku Thapa was present at the occurrence armed with weapon with the Nagendra and Krishna Karki's help. Deceased and Nagendra stayed in road near to Kanhaiya's residence and to call Kanhaiya defendant Krishna Karki went himself, this matter is clearly proved by the Nagendra's statement during investigation. "I and my elder son were taking rest in bed, defendant Krishna Karki came and called my younger son Kanhaiya to go out for a moment, at that moment he was working in kitchen" this fact is expressed in Urmila's document of investigation. Defendant Kanhaiya gave a statement during investigation i.e. "Krishna Karki took me out by holding me close and after reaching to road he hit me a slap" similarly defendant Deepak Raya's statement in investigation stated "Krishna Kari called my brother and told to go out for a moment." To support that description stated in the statement given by the defendant, defendants Nagendra, Kanhaiya and Deepak's statement before the court by saying along with them was also Krishna Karki the place of incident.

Such statement of co-accused during investigation and before court is consistently supported by the eyewitness document at the time of investigation which presents the clear and full picture of the incident. In this way, he did not defend on his own friends' accusation nor does he produce any reason to blame him for accusation by other defendants. Not only this, if the defendants Krishna Karki's presence in incident is denied then whole incident becomes an imaginary. In this situation, without any concrete base and evidence his plea of alibi cannot be proved. Thus at the time of incident Krishna Karki was presented, and concerning in this regard the statement before the authorized official of defendants Nagendra, Kanhaiya and Deepak as

well as the statement of Urmila Raya during investigation seems reliable.

In this case, question can be easily raised in regards of evidential importance of documents prepared during investigation, documents, reports and co-accused statement; and to convict only on the basis of such document as a murderer is justifiable or not? To settle this question, we have to look towards legal provision of Evidence Act, 2031, and prevailing criminal legal system practiced by us.

The final aim of the criminal law and justice administration is to punish the offender and make society feel free from the fear of crime. In a situation when the crime had proved without any doubt, if the offender make immune from crime due to some sort of small technical technicalities of the cases, the society never feel free from fear of crime. The major essence of the criminal justice system is to punish the criminal will lost its quest. In this case, the incident has happened in city area like Butwal at 8:30 P.M. Direct witness of the incident, Urmila Raya is still alive. To go to the incident place with full intention to commit the crime, and attack haphazardly by the offensive weapon that kills anyone. This type of general knowledge can acquire by a person of general understanding. Even knowing that thing, defendant Krishna Karki went to defendant Kanhaiya's residence having full preparation and malice. Defendant Krishna Karki was escaped at the time of investigation and came to present at court to give statement. He denied the entire incident and he took plea of alibi but his friend defendant Nagendra accepted his presence in the incident and he stabbed the knife to the deceased Shuku Thapa in statement before authorized officer and court. From the defense side defendant Kanhaiya Raya and Deepak Raya also mentioned same thing in their statement before authorized officer. No defendants plead that, the statement before the authorized official was given under the threat, fear and beating. In this situation those statement can be taken as relevant evidence for this case along with the basis of Section 3 sub-Section 2 Clause (a) (1),(2),(3) of Evidence Act, 2031 and other supportive evidences.

Similarly, the doctor's opinion in regards to cause of death of the deceased is injury to heart also relevant evidence in this case. In this concern both parties agreed on fact, so that fact also can be taken as relevant evidence according to Section 18 of the Evidence Act 2031. To consider on the co-accused accusation blame, defendant Krishna Karki didn't defend on that blame and can't produce any reason of envy for blaming him even court gave him a chance to defend. Other defendants accepted their own involvement in that incident and accusation made by them to Krishna Karki had not refuted by him. This also can be taken as admissible evidence.

Above mentioned circumstances clears that the sword targeted to one person injured to another of same group. Thus the question here comes to decide that, the willful attack upon one but, consequently gets injury to others in this situation whether the malice is transferred to the injured or not. The question here in this case is that, whether the defendant Krishna Karki is liable for punishment under the transferred of malice or not. It is well accepted principle that the presence of motive is the essential element to convict the criminal. Our legal system has not clearly mentioned in regard to the definition, expansion and limitation of motive. Even though malice should be interpreted based on requirement of our criminal law and it is the accepted principle of criminal jurisprudence. The separate provision relating to transfer of malice, its application and punishment is not clearly defined in our legal system comparing to the Indian Penal Code. Provision of No. 1 on Chapter of Homicide Country Code(Muluki Ain) stipulates" Except as otherwise provided in law, no one shall take the life (kill), cause to take the life, or attempt to take the life of, a person". In short, no one should be killed by any illegal means is the overall objective of the law. Getting immunity from above mentioned legal provision, defendant must prove that, the death of deceased is by legal means or by way of legal act only. Such situation is absence in this case having the defendant's act to hit Kanhaiya, but consequently hit to the deceased Suku Thapa and he died. Here the defendant's act was resulted into commission of crime. Here, the possibility of question to be raised is that, whether the defendant could be convicted or not in transfer of malice situation. For the settlement of

this question, we have to look into the legal provision of Evidence Act, 2031 and other criminal justice systems we are following.

Indian Penal Code 1860, Section 301 has provisioned about the transfer of malice in a form that, "if a person by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death is intended or knew himself to be likely to cause."

According to the above mentioned IPC provision, crime committed under the transfer of malice is equal to the intentional homicide. Supreme Court of India has developed a principle referring to Sec 301 of IPC in case of Jagpal Singh v. State of Punjab[1], stating that "…accused is punishable under the doctrine of transfer of malice under Section 301 of the code when aimed at one and killed another person." Indian Supreme Court has treated the crime committed under the transfer of malice is equivalent to the intentional homicide and punished under it too. This principle developed by the Indian Supreme Court could be persuasive in our judicial context too.

Expert of Criminal Law Glanville Williams has mentioned about the crime committed under the transfer of malice in his book of Criminal Law (2nd edition, p.72), stating that, "Malice in its legal sense means a wrongful act done intentionally, without just cause or excuse. 'Malice' in Law generally means intention or recklessness. Transferred intention (transfer of malice) occurs when an injury intended for one falls on another by accident. In other words if accused intends particular consequences he is guilty of crime intention even though his act takes effect upon an object (whether person or property) that was not intended. His 'Malice' is by a legal fiction transferred from the one object to the other. The accused is then treated for legal purpose as though he had intended to hit the object that he did hit, though in fact he not have the intent, nor even was reckless as to it." Looking this

[1] Jagpal Singh vs State of Panjab, (1991) cr. LJ 597 (SC)

statement of Glanville, any acts happened due to transfer of malice is labeled as crime of homicide.

Our Country Code (Muluki Ain) has not provisioned the separate provision mentioning transfer of malice in Chapter on Homicide as like the provision in Indian Penal code 1860 Sec 301, but it has differentiated the circumstances of crime of homicide with having intention or without having intention. For example, No. 5 and 6 of Chapter of Homicide has described the crime of accidental homicide and punishment upon the circumstances respectively and No. 14 has described about prevocational homicide. Similarly, No. 13 has described the various circumstances of the Homicide committed with envy under pre-plan. Chapter of Homicide No. 13 has not expressly mentioned mens-rea as essential elements to be a crime of homicide, but Supreme Court of Nepal has spoken many times that, there must be the existence of mens-rea to convict the offence under the No. 13 looking to the structure of law and nature of crime committed. Similarly fundamental principles of existing criminal jurisprudence enshrined in our judicial practice, thus we cannot go back from the application.

Objective of criminal law is to motivate people to fashion life according to law and protect them from illegal encroachment upon life, liberty and property. In this case accused has liability to uphold life and liberty of all people including the deceased too. Thus, he has no any authority to encroach life and liberty of any person. Accused have absolute liability without having any authority to encroach life and rights of deceased and others too except the provision laid down by law. The act of accused must be according to law intending to dead and other person too. If any of the wrongful illegal act committed by accused upon any one that results to certain legal consequences and accused is obliged to bear the liability.

In this case, an act of accused intending to human is seen illegal looking from its nature. That criminal act, if a hit other than the intended person comes under the illegal act and question of immunity does not come. Artificial classification of accused act, if consequence to the Kanhaiya is illegal and if it hit other than him is legal is not in our

legal system. Determination of any act whether legal or illegal is measured by the nature of the act committed. The issue of case is not related with the execution of certain punishment saying that intentionally injury was caused to the deceased, so that question of the injury as it caused is not relevant here. Injury and effect upon deceased is the determining factor of the gravity of crime committed. In another language, intended attack of defendant is illegal and if caused injury other than the projected person the criminality of the accused continuously flow on such act and comes under boundary of criminal act, where does not matter who is the victim. Any act whether legal or illegal is determined by examining whether the act is done under the legal object or not. If the act has been done with illegal motive examination is to be done from the injury that it is affected, in what form and the level of it. Otherwise situation arises that the consequences of same act is legal to one and illegal to other. In some instances of criminal law strict liability is imposed. Upon which the consequences arising out of act is sufficient and have to bear liability even if motive of the act is good. In black marketing and mixing in consumable goods good motive is not sufficient for immunity from liability. The standards of goods must be the same as it fixed. Absence of such standards increases the gravity of criminality.

Interpretation of transferred malice as crime is to control and deter the illegal and bad motive as well as arrange the situation to legally secure those person and things which gets the legal protection. Interpretation of criminal law directs to control and punish the bad motive and illegal act committed, which is universally accepted principles. If the determination of the criminal act directed in the sense that, whether the accuser's illegal act hits to the directed person or not, it gives immunity by saying that the affected person is not defined in an act of poisoning in water tank. Firing bullet in crowd even having the knowledge of existence of possibility of death, too gets immunity by saying the deceased was not pre-determined. In fact, gravity of criminality is increases by such illegal act. It is essential that the activity of all people living in society should be legal. Presence of legality should be shown to get immunity from the act committed. It is to be understood that, if the act itself is illegal and brings prohibited

consequences there will be the presence of illegal motive and act transferred up to the victim. In this case the act of accused to incur injury was illegal, thus accuse has to bear liability does not matter it hits to any others too. In fact, deceased also seen as the member of the same gang came to commit crime. Eventhough the importance of his life cannot be ignored. Defendant has to bear the liability, seen that the criminal act was oriented to consequence the death instead the legal and universally accepted principle that no one should be killed even if deceased also involved in criminal activity and member of the same criminal group, and his life should be protected.

The doctrine of transfer of malice is not new in our justice administration having already developed the various principles related with it in long span of time. In Tek Bahadur Reule's FIR, plaintiff Nepal Government against Nar Bahadur Reule and others case, this court has 2061-11-20, developed the principle that, " … it is presumed that the same part of same offence, if projected to one person but consequently hit to others and kills from that act. It is not presumed the end of malice by projecting to one and consequently hit to other and kills, but transfer of malice and liability arises of the homicide". "(Nepal Law Journal 2061 B.S, Number 11, Page 1486, Decision No. 7466)." In this case too defendant Krishna Kaki's hit was consequently injured to deceased Suku Thapa leaving the Kanhaiya due to act of Kanhaiya to save his life, so it cannot be assumed that defendant's malice is ended but transferred. Thus the petition demand as appeal cannot be upheld.

In appeal demand the issue has been raised that, the charge sheet has been lodged with demand of No. 13(1) of Chapter on Homicide of Country Code(Muluki Ain) and decision is incorrect with imposing punishment under 13(3) of same chapter. But appellant could not able to clear what sort of wrong regarding conviction within No. 13(3) . Thus the appeal demand cannot be agreed, and relevancy to reverse decision of Appellate Court decision does not seen.

Similarly the appeal demand from plaintiff has raised the issue that the punishment upon Kanhaiya Raya is incorrect having the decision with

No 17(2) instead of charge sheet demand of 13(4). To determine this demand, both legal provisions are to be seen:

No.13(4) of the Chapter on Homicide of Country Code (Muluki Ain) States that:-

> A person who instigates other to kill anybody else by any means or aperson who uses his or her hand and catches the victim and creates conducive environment, to other person to kill somebody else in a scene of crime shall be liable to the punishment of imprisonment for life.

No. 17 of Homicide Chapter States that,

> In cases where a person who is indulged in the crime of killing another person without being involved in instigating other or without using a weapon or even without touching the body of the victim commits any of the following acts, the person shall be punished as mentioned hereunder in cases where the victim is dead and shall be liable to half the punishment if the victim is not dead.

One who knowingly supplies weapons, bullets, gunpowder or poison to a person who demands weapons or poison to kill anybody else or one who remains present in the scene of crime where somebody is murdering anyone else shall be punished with imprisonment for a term of Ten years.

Except as otherwise provided in Section 1, if a person creates conducting environment to kill anyoneelse stopping the pathway or passage or restricting the victim to flee from the scene of crime shall be punished with imprisonment for a term of Five years.

Looking above mentioned both legal provisions, first provision, No. 13(4) of Homicide Chapter is applicable, if accused has instigated other to kill by any means or catches or creates environment to kill the deceased. The person who instigates to kill is indulged himself or

herself from motive to preparation stage, as a result that person bears as a main offender of homicide. In this case defendant Kanhaiya's involvement in instigating to kill deceased Suku is not seen in any form. The defendant Krishna has projected knife to stab to defendant Kanhaiya. The situation is not seen that, defendant Kanhaiya is gone there with intention, preparation and with weapons to fight there. Defendant Krishna Karki and deceased along with other members gone in Kanhaiya's own room while he was preparing meal for night and seen that they have stabbed to Kanhaiya removing from the room where he was living. In this case, defendant Krishna Kaki's stab was consequently injured deceased Suku Thapa, which was projected to Kanhaiya due to act of Kanhaiya to save his life. Here, act of Kanhaiya to push and fight while saving own life in nervousness situation could not be interpreted as an act done to kill the deceased. Thus the No. 13(4) is not applicable in this situation.

Kanhaiya has not appealed in this court in decision of imposing the punishment under No. 17(2) from Appellate Court. Looking the issue from referral, the punishment upon main perpetrator is not seen differentiated than the Appellate decision. In this situation defendant Kanhaiya has accepted the decision, thus the existence of situation to examine whether the punishment is right or not does not allow pursuant to No. 205 of Chapter on Court Management of Country Code (Muluki Ain) and pursuant to Sec. 10 of Administration of Justice Act, 2048B.S.

Looking the appellate demand that the decision acquitting to defendant Nagendra Thapa and Deepak Raya is wrongful in charge sheet demand of punishment under 17(3), the presence of Nagendra Thapa in instigation of deceased is found with the Khukuri according to statement made in front of government attorney. And this statement is supported from the statement of defendant Deepak Raya in front of government attorney as well statement in court and from the eye witness Urmila Raya's paper prepared during the time of investigation. Similarly his weapons ***Khukuri*** has been found, thus it proves the presence in place of commission of crime and fight with Kanhaiya and Deepak. Here, he also seen as the member of deceased's group but

not found indulged to kill the deceased. It is seen that, he is gone in instigation of deceased and fought too. Consequently, this group of deceased including this defendant failed to take the desired result, but due to transferred of malice, own group member Suku were dead by the act of Kanhaiya to save own life. With what motive and plan the defendant were there, that was not accomplished and involvement of this defendant to kill Suku is not seen. Hence, not having this defendant as an abettor the decision of acquitting is not seen wrong.

Charge of abettor upon another defendant Deepak Raya is also seen from the charge sheet. This defendant is brother of another defendant Kanhaiya. The relation of this defendant is not seen with the issue of this case. It is seen the situation that, the defendant and group were came with weapons at night and called to Kanhaiya by raising issue that Kanhaiya has blamed to deceased as a fan thief. Getting knowledge that somebody is calling own brother at night time suspiciously, this defendant and his mother Urmila gone together at place of commission of crime. At that place, it is seen that this defendant has fought with group of deceased to save brother's life. In this case too defendant Krishna Kaki's hit was consequently stab injury to deceased Suku Thapa missing the Kanhaiya due to act of Kanhaiya to save his life. At the time of commission of crime, defendant Nagendra and this defendant were fighting, thus the involvement as an abettor is not seen.

Based on above mentioned legal provision, precedent and interpretation of situation the decision of Appellate Court dated on 2060-3-4 and punishment of life imprisonment upon Krishna Karki pursuant to 13(3) of the Chapter on Homicide, and Kanhaiya Raya pursuant to 17(2) of same chapter is seen correct, as a result is confirmed referral. The appeal demand from plaintiff Nepal Government and of defendant Krishna Karki could not be materialized.

The Appellate Court has given opinion that punishment upon Krishna Karki under 13(3) of Homicide Chapter is seen too heavy, and imprisonment be reduced to the 10 years pursuant to No. 188 of the Chapter on Court Management of Country Code. Looking to this

opinion and interpretation from the situation of commission of crime the malice to kill deceased is not found. In fact this defendant himself gone with malice of deceased to hit Kanhaiya. This defendant's age is seen only 19 yrs, looking profession, being studying as an student and interpretation of the situation of commission of crime the life imprisonment seems too heavy Thus the opinion presented by Appellate Court to punish only 10 years is obeyed and in other matter, do as under.

Particular

Court decided, among the defendants Krishna Karki(K.C) to become liable for the life imprisonment under No 13(3) of the Chapter Homicide and pursuant to No 188 of the Chapter on Court Management of Country Code expressed opinion to 10 years imprisonment by appellate court Butwal is also upheld. So inform District Court Rupandehi for recovery execution of such imprisonment. Be handed over the file of the case to the record section according to rules.

I concur with the above decision.

Justice Kedar Prasad Giri

Done on the date of 2063 Falgun 27th (11th March, 2007)
Translated by Mahesh Sharma Paudyal

The State cannot create right over personal property of an individual except when it is used solely for public interest and provided just and reasonable compensation to the real owner.

Supreme Court, Division Bench

Hon'ble Justice Anup Raj Sharma

Hon'ble Justice Gauri Dhakal

Writ No. 3717 of the year 2057

Subject: Certiorari & others.

Petitioner: Padam Bahadur Bhandari, a resident of Fidim VDC-Ward No.-4, Panchthar district and others.

Vs.

Respondent: Ministry of Defence, Government of Nepal & others

- **Any person shall have the right to use, consume, purchase and sell and do other transactions of the land in his or her ownership as per the law. According to the jurisprudential notion of Eminent Domain, the state can do the operations of requisition, acquisition and creation of encumbrance over personal property.**
- **The requisition, acquisition and creation of encumbrance over personal property shall have to be solely for public interest and there is an established norm to provide ample compensation for the property while doing as above.**
- **The notice published by Ministry of Defence to annex the private lands of the petitioners inside the Titiribote firing range and the actions to possess those lands are being**

annulled through an order of certiorari as they contradict with Article 17 of the Constitution. An order of mandamus also has been issued in the name of the respondents to place the lands of the petitioners out of the firing range area and not to intervene in any manner in their unfettered enjoyment of the land.

Decision

Anup Raj Sharma, J.: The content of the writ petition filed in pursuant to Articles 23 and 88(2) of the then Constitution of Kingdom of Nepal and the decision thereof is as follows:

The lands of the plot Nos. 20 (Area: 12-9-1-1) and 21 (Area: 13-0-0-3) in the survey measurement at Phidim VDC-6(d) have been owned and used by our forefather late Karna Singh and grandfather Yadukarna which now have been divided into several plots through partition and inhabitated by us since then. Moreover, the land of plot No. 19 (Area: 14-14-1-0) has been bought through a deed of registration in 2037 BS and currently petitioner Lal Bahadur Bhandari has settled thereon. This way, the land which we are utilizing undisputedly is known to have declared as the practice and firing range by the army barracks vide a notification of Ministry of Defence dated 30th Jestha 2057, published in Nepal Gazette, part 3-Section 50, vol. 9. Moreover, the area of 110 meters from the perimeter of the declared zone was also forbidden for permanent dwelling, except for farming purposes, as per Rule 14(3) of Explosive Materials Rules 2020, by duly disclosing the four boundaries of the land. After the notice was so published, the Batuk Dal Gulma Fidim Barrack is found to have corresponded in writing to the District Administration Office (DAO) to restrict any type of transaction and to seal the land as unauthorized constructions were taking place inside the so declared Titiribote firing range. After such correspondence, the DAO warned us to leave our houses within 7 days failing which the police shall forcefully evict us. We denied vacating leading to the arrest of two of the petitioners Lal Bahadur Bhandari and Ganga Bahadur Bhandari on 29th, Magh 2057 and forcefully made sign a bond to evacuate and 90 within 7 days. Hence,

we have presented ourselves with this writ petition as our right of property and its use has been unlawfully infringed upon.

The lands which we have been enjoying as residence since ancient times have been declared as jungle area comprising the 879 Ropanis of Titiribote firing range. The land which was registered under our ownership should not have been encroached upon as forest area and annexed in the firing range as such. In the notice at Nepal Gazette, permanent dwelling has been forbidden within 110 meters from the firing range. On the other hand, our residential lands have been put under the firing range itself. The respondent Ministry of Defence has no right whatsoever to declare our private lands in its name. The lands could have been acquired for the army after paying proper compensation, but nothing of a sort has been done. Therefore, the act of the respondents is in contrast with the provisions of Land Acquisition Act, 2034 and the Rule 14(3) of Explosive Materials Rules, 2020 also has been misinterpreted in this case. The acts of the respondents including Ministry of Defense have violated the fundamental rights enshrined in Articles 11, 12 and 17 of the Constitution. Hence we request through this writ petition for the issuance of mandamus with an interim order directing for the unhindered enjoyment of the lands without intervention of any sort as well as the order of certiorari rendering null and void all the decisions, circulars and notices that affect us along with all the papers forcibly made to sign us.

In order to understand the course of this case and to ascertain whether an order as demanded by the petitioner needs to be issued or not, this Court ordered on 3rd Baisakh, 2058 to send notice for discussion to the respondents demanding written replies from them within 15 days about the issuance of an interim order.

The Court decided not to issue an interim order as the situation herein does not demand as such.

The written reply furnished by District Police Office (DPO), Panchthar reads: Mr. Lal Bahadur Bhandari and Mr. Ganga Bahadur Bhandari were simply produced before the DAO as per its letter dated 27th Magh, 2057. However, they were not compelled to sign any document

forcefully nor were they arrested. Hence, the writ petition which rests on imaginative and baseless details be quashed.

The written reply furnished by DAO, Panchthar reads: Upon coming to know that illegal construction of houses is being done inside the land of Titiribote Firing Range declared as per the notice published in the Nepal Gazette dated 30th Jestha, 2057, Mr. Lal Bahadur Bhandari and Mr.Ganga Bahadur Bhandari were simply called to report at the DAO and were ordered to stop the build of houses. Since, no intervention has been done in their current habitation. So, the writ petition needs to be quashed.

The separate written replies furnished by District Forest Office, Survey Office and Land Revenue Office, Panchthar, read: Since the acts of these offices have not cast a direct or indirect impact upon the respondents, therefore, the writ petition needs to be quashed.

Meanwhile, the separate written response furnished by the respondent Ministry of Defence and by the Operations Division, Army Headquarters and the Batuk Dal Contingent read: On the lands mentioned by the petitioners, the Nepalese Army has long been conducting military drills and firing. The land was declared to be appropriate for military drills and firing purposes and declared as such by a meeting chaired by the Chief District Officer (CDO) and attended by office heads and people's representatives. The disputed lands have not been seen to be registered in any person's name, and have been left unused for several years after mentioning as Pakho(dryland) in the respective papers. As houses and other structures were being built in such land, correspondence was done to postpone all such activities. If a forcible deed had been made, there are alternate legal means to redress that problem. Hence, the writ which is filed by concealing the actual facts needs to be quashed.

Acting upon the writ petition duly presented before the Bench, the learned deputy attorney Mr. Bharat Mani Khanal, representing the respondent Ministry of Defence as well, argued that the area wherein military drills have been conducting since years has been declared to be the firing range. As it seems that the lands of the petitioners have not been acquired permanently and since the land owners have given

consent at the moment, there is no situation requiring the issuance of order as demanded by them.

Upon studying the case file and documents and while listening to the arguments of learned deputy attorney, a decision was felt to be made about this writ petition, as regards whether an order as per the demands of the petitioner(s) has to be made or not.

Upon considering about the verdict, the main claim in this writ petition has been that: The lands of the plot Nos. 20, 21 and 19 owned and used by the forefather of us, the petitioners, which now have been divided into several plots and inhabitated by us since then. This way, the land which we are utilizing undisputedly was being declared as the practice and firing range by the army barracks vide the notice of Ministry of Defence published on the Nepal Gazette. Hence we request through this writ petition for the issuance of mandamus with an interim order directing for the unhindered enjoyment of the lands without intervention of any sort as well as the order rendering null and void all the decisions and actions that have evicted us of our homes and restricted the construction works as well. While looking through the written responses including that of the Ministry of Defence, the disputed lands have been used for several years by the Nepalese Army for military drills and firing purposes. It is also argued therein that since the lands were in the name of nobody and were left as uncultivated, they were declared as the military drills area. However, through the land ownership certificates attached with the writ file, it seems that the lands have been registered in the name of the petitioners and they were under habitation as well. From this, it has been established that the lands were in undisputed ownership of the petitioners and were being used for farming and residence. By going through the notice published in the Nepal Gazette dated Jestha, 2057 30th which declared the 897 Ropanis of so called forest land as the Titiribote firing range, the petition to this effect and the written replies of the respondents, the fact is cleared beyond doubt that the above mentioned lands were annexed under the firing range area.

Any person shall have the right to use, cultivate, purchase and sell and do other transactions of the land in his or her ownership as per the law. According to the jurisprudential notion of Eminent Domain, the

state can do the operations of requisition, acquisition and creation of encumbrance over personal property. The requisition, acquisition and creation of encumbrance over private property shall have to be solely for the fulfillment of public interest and there is an established norm to provide ample compensation for the property while doing as above. Article 17 of the then Constitution of Kingdom of Nepal has also accepted such norm. The Article has ensured that all the citizens, in accordance with law, shall have the right to earn property, use it and buy or sell it as well as providing the constitutional guarantee that the state shall only acquire or requisition or create an encumbrance over private property solely for public interest and upon doing so, ample compensation shall be awarded.

In the present writ petition, the lands under the ownership of petitioners, being used for farming and residential purposes have been declared as the Titiribote firing range area and annexed under the effective domain of military drills and firing territory. This has led to a situation of the petitioners not being able to reside in those lands, to use the lands as per their wishes and needs resulting in the violation of their servitude rights. Whereas compensation has to be provided while tampering with the servitude rights of private property, not a single mention about compensation is found anywhere. Therefore, the notice published by Ministry of Defense to annex the private lands of the petitioners inside the Titiribote firing range and the actions to possess those lands are being annulled through an order of certiorari as they are in conflict with Article 17 of the Constitution. An order of mandamus also has been issued in the name of the respondents to place the lands of the petitioners out of the firing range area and not to intervene in any manner in their unfettered enjoyment of the land. The photocopy of this order shall be sent to the cognizance of respondents through the Attorney General's Office (AGO) and the case file be duly handed over after writing it off from the registry.

I concur with the above decision.

Justice Gauri Dhakal

Done on the day of 17th Kartik, 2063 (3rd November, 2006.)

Translated by Gayarti Prasad Regmi

The practice of reaching a conclusion on the basis of presumption in place of established values standards and prevailing laws and the recognized principles of justice do not allow for any judicial decision.

Supreme Court, Division Bench

Hon'ble Chief Justice Ram Prasad Shrestha

Hon'ble Justice Prem Sharma

Writ No. 2898 of the year 2059

Subject : Certiorari & others.

Petitioner: Secretary Bhanu Prasad Acharya on behalf of Ministry of Finance, Government of Nepal.

Vs

Respondent: M/s Damodar Ropeways and Construction Company & others

- **It shall be contrary to the concept of contract to interpret as the contract being changed on account of behavior of any one party or any other circumstance, in the absence of amendment to the contract by the contracting parties.**
- **The employer of the contract should obtain the task or objective in accordance with the task or objective of the contract. In the absence of attainment of the said objective, it cannot be presumed substantially as the work has been completed.**
- **The issuance of work-completion certificate in a task importantly related to the fulfillment of the contract pertaining to the building of ropeway, should not be limited to the class of general administrative correspondence. The responsibility of issuing such**

certificate should be borne by the concerned body or person stipulated so by the document of contract and in the absence of such arrangement, should be borne by the authorized person of the company. The signature of any other person shall not be deemed as the basis of work-completion and doing so shall be contrary to the established procedures and standards of the functioning of the company.

- **The process of dispute settlement through arbitration is only an informal and alternative way within the judicial process. Simply on the basis of it being concluded outside the court, it should not be established as a process wherein presumption, suspicion and imaginary matters can be made as the bases to decision. Even in the process of arbitration, in order for reaching the decision regarding the facts in issue, the facts need to be proved, relevant evidence have to corroborate the facts and these should be in accordance to the document of contract. Only if the terms of contract are ambiguous or silent on an issue, it should be interpreted on the basis of prevailing laws, related values and norms. However, the tendency to reach to a conclusion on the basis of presumption, in place of established values, standards and prevailing laws, shall weaken the possibility of fair justice. Decision as such shall be relied on imaginative logic and discretion of the decision-maker instead of relying on facts and laws. The recognized principles of justice do not allow for any judicial decision to be subordinated by supposition.**
- **The contract related to guarantee of contract, in all circumstances, shall not be deemed to be as unconditional because contracts as such are made between any party of the first contract and other third party, specifying that in case any person does not fulfill its obligation created by a contract between any two**

sides, then obligation as such shall be fulfilled by the third party.

- **The agreement to guarantee, if it contains several clauses and if such Clauses enlist clearly the responsibilities of both sides, then, any one Clause or condition cannot be studied absolutely, in isolation. The terms of an agreement are relative and interrelated. This is a general principle of contractual jurisprudence and the commercial intent of guarantee can also be no different.**
- **The document of contract in itself is a whole and complete document, the Clauses of the contract bear individual significance and in the absence of one Clause the other shall also lose their relevance. This is a general principle of contract law and the commercial intent of guarantee. Interpreting this situation differently and hypothetically shall, in itself, be deemed to be as against the prevailing laws, faulty from the legal perspective, ambiguous, against the terms of agreement and being relied on wrong principle.**

Decision

Prem Sharma,J; The brief facts and conclusion of the present writ petition filed in this court according to Article 88(2) of the then Constitution of Kingdom of Nepal, 2047 are as follows:

Nepal Orind Magnesite Company Pvt. Ltd. incorporated under the then Company Act, 2021 (henceforth addressed as employer of the contract), concluded a contract agreement with Damodar Ropeways and Construction Company on 14th January, 1983, with a view to build a 10.5 km long Monocable Ropeway of 150 TPH capacity between Kharidhunga and Lamosanghu.

The respondent had the liability according to the contractual agreement and other documents, to build completely the ropeway as a turnkey project and to handover the employer company of the contract. As per the prevalent standards of turnkey projects, the

survey of the project, alignment, design, supply and transportation, civil construction, structural fabrication, erection, commission, installation, supply of all electromechanical appliances, safety gear related to the project, insurance until the handover of the project, performance guarantee until 12 months of handover of the project, and free supply of defect spare parts- all these liabilities were vested in the contractor as per the terms of agreement between them.

The contracting amount of the project was USD 40, 18, 577.60 and according to the agreement, there was a mandatory condition that the contractor shall complete the project within 25 months from the issuance of letter of intent on May 24th, 1982. Under the contractual agreement between the employer of the contract and receiver of the contract, it had been agreed upon that the petitioner Government of Nepal shall stand as a monetary guarantee for an amount worth USD 25, 83, 646. 60 out of the total contract amount. Agreement to this effect was accomplished between Government of Nepal and Contractor Company on 16th September, 1983.

It has been clearly laid down in Article 5 of the agreement of guarantee between Government of Nepal and Contractor Company that the government shall provide for monetary guarantee to the works completed according to the stipulated conditions and stipulated time-frame, as mentioned in the construction agreement between employer of the contract and receiver of the contract. Moreover, pursuant to Article 7 of the agreement on guarantee, it has been provided that the parties to the agreement shall resolve their differences or disputes mutually in a friendly manner and only in case of an agreement not reached as above, they will refer the dispute to arbitration. Hence, it is contrary to Section 21(2) (g) of the Arbitration Act, 2038 and Article 7 of the agreement on guarantee, that the dispute has been heard by arbitration without even attempting to resolve the contention through friendly means as well as it renders the hearing and decision by arbitration as immature.

The arbitration tribunal, in one hand has not accepted friendly settlement as a prerequisite and on the other hand has conceded that the phase of friendly settlement has already been fulfilled. This way,

the award of the tribunal, in itself, is self-contradictory. No written document has been exchanged formally between the petitioner and contractor company as to the friendly resolution to the said dispute. Hence, in this suit, there is no condition ripe for the arbitration to take on its jurisdiction. Therefore, the decision of the respondent is flawed and is in contravention to the precedent espoused in the case of petitioner MG Chaturvedi Vs His Majesty's Government.

In opposition to the provision laid down by Arbitration Act, 2038, the surety for enforcement of decision has not been sought. It has been implied that there is no evidence that the decision shall not be implemented. Through this, it is clear the arbitration has presumed in bias that the claim of the contractor shall be followed and that there shall be no need to decide against the contractor. How and through which laws and basis the arbitration has found evidence that the decision against the contractor shall be enforced, is not revealed by any argument or explanation. In circumstance like these, the case of Corporation Salvadorena de Caldazo Vs Footwear Corporation of Florida finds relevance. Herein, the Federal Court of Miami ruled that the award of arbitration in El Salvador is not applicable in the USA as the latter is not the party to the New York Convention.

In Section 11(1) of the Arbitration Act, 2038, there has been a mandatory provision that, in case the name of arbitrator is mentioned in the agreement, then claims should be laid from the date of dispute and in case arbitrator is appointed after the rise of a dispute, claims should be laid within three months of such appointment. After the appointment of chief arbitrator on 30th February, 1996, the appointment of arbitrator had been completed. Insofar as the letter dated 12th June, 1996 is concerned, it is limited to the subject of logistics during the stay of Mr. Chiou in Kathmandu. According to Section 11(1) of the Arbitration Act, 2038 and Rules 1.2 and 18.1 of the UNCITRAL Rules related to arbitration, the respondent side had to submit its letter of claim before arbitration on 30th February, 1996. Instead, it submitted it on August 21st, 1996. Hence, the appointment of arbitrator had to be ipso facto void according to Section 11(6) of the Arbitration Act, 2038, but it did not. Moreover, the arbitration entered

into the facts in issue with a mala fide intention to give the award to the respondent No.3. As such, its award is bound to be void under Arbitration Act, 2038.

The agreement on guarantee concluded between Government of Nepal and the respondent is not an independent and distinct contract on its own. Instead, it has been done as a complementary or associate agreement to the agreement on construction undertaken between the employer of the contract and receiver of the contract. It has been clearly laid down in Article 5 of the agreement of guarantee between Government of Nepal and Contractor Company that the government shall provide for monetary guarantee to the works completed according to the stipulated conditions and stipulated time-frame, as mentioned in the construction agreement between employer of the contract and receiver of the contract. In case the work is not completed on the provided time-frame and in case of action contrary to the agreement, the liability offered by the Government of Nepal shall not initiate. Without the assessment of the works completed by the contractor, in accordance with the agreement on construction, the provisions of agreement on guarantee shall not be attracted. Considering the agreement on guarantee as an independent and distinct contract and deciding the guarantor that it is the first and unconditional holder of liability, is contravening to the Article 5 of the agreement of guarantee as well as the No. 6 of Chapter on Guarantee in Country Code (Muluki Ain) 2020.

The arbitration which dismissed the claim made by the employer company against the respondent on grounds of limitation, itself has failed to look at whether the respondent has laid its claims against the petitioner within the period of limitation or not. This also corroborates that the award of the arbitration is partial, mala fide and prejudicial. The decision supporting the award is also wholly against the law as well as flawed.

It has been argued from the petitioner's side that the claim laid before the arbitration by the respondent is not made by the authorized person and, as such, its annulment is sought according to No. 82 of Court Management, Country Code (Muluki Ain) 2020. The arbitration has not

given attention to this fact and considering it as being submitted by an authorized person, it has interpreted against judicial standards. In common law system, the procedural law has to be followed akin to substantial law and limitation, jurisdiction, locus-standi, and the regular processes of procedural law has to be duly followed, failing which, the claim cannot be accepted. Therefore, the award of the arbitration made through accepting letter of claims presented in an unauthorized manner, and which should never have been accepted, is bound to be repealed by all considerations.

There is no debate that the construction of ropeway for the respondent (employer to the contract) has been left mid-way without completion. Therefore, no question arises as to the payment of amount for guarantee for a job unfinished. Assuming that the work to the Turnkey Project has been finished from a letter obtained from a non-authorized person of the employer company and deciding on the same is opposed to the acceptable principles of law and justice and henceforth is bound to be repealed by all considerations.

Hence, on the basis of the aforementioned laws, fact and evidence, all the actions of the respondents, awards and decisions have violated the legal rights of the petitioner endowed by Arbitration Act, 2038 and other prevailing laws of Nepal. Hence, a writ petition was filed by Secretary Mr. Bhanu Prasad Acharya on behalf of Ministry of Finance, Government of Nepal seeking the decision of Baisakh 9th, 2059 and the award of 3rd September, 1997 be repealed, in accordance to Article 88(2) of the Constitution of Kingdom of Nepal, 2047, through an order of certiorari and appropriate order, directive including mandamus be issued against the respondents, staying the enforcement of the said decisions and perfect justice be granted.

Pursuant to the above situation, in order for ascertaining what has happened and whether an order according to the request of the petitioner needs to be issued or not, this court on Mangsir 27th, 2059 issued an order to inform the respondents demanding a written reply from them within 15 days of delivery of this order or to duly submit, in case the period of time is elapsed.

The Appellate Court of Patan in its written reply, among other things, has requested for the dismissal of petition on the ground that the award of the Arbitration Tribunal, Kathmandu of Bhadra 18th, 2054 had been challenged in the Appellate Court, upon which the court decided to quash the petition of Government of Nepal on Baisakh 9th, 2059. Therefore, upon decision made in accordance with law, an order of certiorari as demanded by the petitioner according to Articles 23 and 88(2) of the Constitution of Kingdom of Nepal need not be issued.

According to Article 88(2) of the Constitution of Kingdom of Nepal, the writ jurisdiction is attracted only when the state mechanisms create violation, hindrance and obstruction in the enjoyment of fundamental and constitutional rights with scope of remedy and of legal rights without the scope of remedy. The Arbitration Tribunal is a structure and body constituted by the wishes of the parties themselves. Such a tribunal is not a permanent structure. Thus, it is beyond dispute that a structure and body created by the wishes of the parties themselves does not fall under the ambit of the structure and body created by the state. The writ jurisdiction does not attract prima facie in the sense that the result obtained by the body formed by the parties themselves for remedy does not constitute the infringement of fundamental and constitutional rights. The fundamental rights enshrined in the Articles 17, 23 and 88(2) of the Constitution of Kingdom of Nepal are appropriated by the state for citizens or subjects. The fundamental rights enshrined in the Articles are not to be attracted in the case of state itself.

There is no dispute to the fact that the petitioner had filed counter-claim before the tribunal which was founded by its own consent as well. In such case, the situation of compliance towards a favourable decision and non-compliance towards an adverse decision does not arise. Petition as such is bound to be quashed even by the Doctrine of Approbate and Reprobate.

There is also no discord in the fact that the petitioner moved to the Appellate Court of Patan after the award given by the tribunal and the court has also decided in this regard. This petition has been filed after 9 months of the decision by the Appellate Court. Section 22 of the

Arbitration Act, 2038 requires that the award be implemented within 60 days of the decision. Since 60 days of time has been provided for the enforcement of decision, the concerned side should take the way of effective remedy against the decision of the court, within 60 days of the verdict. In case a writ is filed after the expiration of the 60 day time-limit, then the principle of undue delay shall be activated. The petitioner has pointed out the document of agreement dated 14th January, 1983 as the source of dispute. That agreement is a contract concluded between the two parties. It is beyond dispute that all the subject matters espoused in the writ petition are contractual matters and writ jurisdiction and usage is not attracted in cases of such contractual matters and disputes.

Similarly, there is no discord on the fact that the ropeway is fully prepared and is in operation. The subject of preparation and operation of ropeway, documents of tender, guarantee, import of goods from third countries, record of minute book, signatures in the documents, dispute as to the capacity of the ropeway, and the clearance of the contractual facts and disputes pertaining to whether monetary guarantee has to be obtained or not, can be made only through the assessment of evidence and proof. Hence, the writ jurisdiction cannot be invoked in the issues relating to the assessment of evidence and proof. In its written reply, Damodar Ropeways and Construction Company requested for the repeal of the present writ petition on the above grounds.

In this dispute duly submitted before the court, it appears that the agreement on construction of ropeway between Nepal Orind Magnesite and Damodar Ropeways and Construction Company dated 14th January, 1983 is by its nature a turnkey agreement. An agreement of guarantee between Government of Nepal and the contracting company was concluded on the basis of the above agreement. In the wake of the situation that the works of ropeway construction, as per the main agreement, have not been completed, there arises no liability on part of the government according to the agreement of guarantee. However, the Arbitration Tribunal decided for the payment by Government of Nepal on the assumption that the

works have been completed, and the award of the tribunal was upheld by the Appellate Court of Patan. Hence, the petitioner has requested for the annulment of both of the award and decision. In its written reply, one of the respondents Damodar Ropeways and Construction Company has argued that the construction of ropeway has been finished, the agreement on guarantee, in itself, is an independent agreement and the first term of the agreement explicitly imposes the liability of payment on Government of Nepal. Therefore, the award of the tribunal and decision of Appellate Court, Patan are appropriate, thereby requiring the writ petition be dismissed.

On the hearings of Falgun 26th, Chaitra 18th, Chaitra 25th and Chaitra 31st of 2066 and Baisakh 8th and Jestha 5th of 2067, learned Deputy Attorney General Mr. Pushpa Raj Koirala, learned Joint Attorneys Mr. Thok Prasad Shiwakoti and Mr. Kiran Paudel and Deputy Attorney Mr. Khem Raj Gyawali and learned Senior Advocate Mr. Badri Bahadur Karki, learned advocates Mr. Sushil Kumar Panta and Mr. Chet Nath Ghimire advocated on behalf of the petitioner, Government of Nepal. The following major subjects have been raised in their written notes supporting their arguments:

- The claim made by Mr. Shrawan Kumar Agrawal without obtaining authorization from Damodar Ropeways lacks locus standi.
- Since the agreement for the construction of ropeway concluded between Nepal Orind Magnesite and Damodar Ropeways is the primary agreement, the agreement on guarantee shall be activated only after the work is completed according to the primary agreement. Hence, in this case, the Chapter on Guarantee shall apply. Until it is verified that the ropeway has been constructed and handed over as per the Turn Key agreement, the liability on part of the Government of Nepal according to agreement on guarantee shall not be incurred upon.

- While interpreting the agreement it is desirous that the whole agreement be studied. However, since only Clause 1 of the agreement on guarantee has been taken as the basis for making the decision, such decision is contrary to the other terms of agreement.
- Moreover, pursuant to Article 7 of the agreement on guarantee, it has been provided that the parties to the agreement shall resolve their differences or disputes mutually in a friendly manner and only in case of an agreement not reached as above, they will refer the dispute to arbitration. However, the arbitration declined the claim that in the absence of compliance to the above provision, the dispute is immature to be settled by the arbitration. Contrary to the provision that claim should be made within 3 months of the appointment of arbitrator, the arbitration took action in the claim filed on behalf of Damodar Ropeways 7 months after the appointment of arbitrator. On the basis of counterclaim lodged by Government of Nepal, the arbitrator also failed to seek earnest money from Damodar Ropeways as surety. In deciding the dispute between Damodar Ropeways and Government of Nepal, the arbitrator took the basis of completion of ropeway as per the contract. However, the same arbitrator took the exact opposite basis for decision in assuming that the dispute between Damodar Ropeways and Government of Nepal should not be looked at on the basis of Turn Key project. Moreover, the arbitrator who made the limitation provided for in the Contract Act of 2023 as the basis in the dispute between Nepal Orind Magnesite and Damodar Ropeways, in the case of dispute between Damodar Ropeways and Government of Nepal, declined the subject of such limitation. Hence, the award of the arbitrator is against the law as well as bias.

Learned Senior Advocates Mr. Mahadev Prasad Yadav and Mr. Narayan Ballabh Panta and learned advocates Mr. Shambhu Thapa and Mr. Ishwori Chandra Sharma represented one of the respondents

, Damodar Ropeways and Construction Company. The following major subjects have been raised in their written notes supporting their arguments:

- Since the claim has been placed within 3 months of the completion of the arbitration tribunal, hence such claim cannot be regarded as lacking in locus standi. Further, it cannot be said as contrary to law when a claim has been lodged within the time period provided by the arbitrator by duly following the process determined by the rules of UNCITRAL.
- Mr. Shrawan Kumar Agrawal who has submitted the claim before the arbitration on behalf of Damodar Ropeways, had been working as the project manager since the beginning of ropeway construction and he had been entrusted with the authority of doing arbitration related works, by the Board of Directors of the company on 5th August, 1996. That letter of authorization is also duly certified by the Notary Public on 10th of August. In this circumstance, it cannot be maintained that due to the lack of submission of authorization, the claim has been made without due authority.
- Even the Arbitration Act and UNCITRAL rules do not prescribe that letter of authorization be mandatorily presented along with claims. Hence, the argument that due to the lack of submission of authorization, the claim has been made without due authority, does not hold ground.
- Before taking up the dispute to arbitration process, sufficient efforts had been made to resolve the dispute through mutual consent and only upon the exhaustion of such efforts; the dispute has been taken up before arbitration. Hence the argument of the petitioner's side is baseless.
- Pursuant to Section 17 (e) of Arbitration Act, 2038, to accept guarantee is a voluntary provision left in the discretion of the arbitrator and not a mandatory one. Hence, the decision has not

been affected substantially due to lack of acceptance of guarantee.

- Since the Loan and Guarantee Act, 2025 has made exclusive arrangement with regards to loan and guarantee received by the government, in this dispute concerning the enforcement of agreement on guarantee done with Government of Nepal, the Chapter on Guarantee of Country Code (Muluki Ain) does not apply.
- Pursuant to the agreement on ropeway construction, in case Nepal Orind Magnesite defaults on paying the prescribed installment and interest amount, then as per the agreement on guarantee, this liability shifts to the Government of Nepal with certainty. Hence the Government of Nepal cannot abstain from assuming the liability.
- The petitioner has failed to demonstrate the existence of conditions in the arbitrator's award as laid down in Section 21 (a), (c), (d), (e), (f) and (g) of Arbitration Act, 2038. In the absence of bases provided for by the law, the award of the arbitrator cannot be annulled.
- Analysis of factual questions and assessment of evidence is not done through writ jurisdiction. The petition as such is contrary to the principle of extraordinary jurisdiction and the system adopted by this court as well as against the established principles.
- The extraordinary jurisdiction of this court cannot be invoked in disputes espoused from contracts. Such issues do not fall under the purview of Article 88(2) of the Constitution.
- The extraordinary jurisdiction of this court as provided by the Constitution is applied to protect the rights and interests of the persons. Moreover, in this dispute, via the agreement, no meaningful right on part of the Government has been created. The state only has powers and duties and not fundamental and

legal rights. Hence the petition of Government of Nepal is bound to be abrogated.

Now, it would be worthwhile to enter into the subject matter of justice to be delivered after enlisting into points, the fundamental matters inherent in this dispute. As such, the following matters seem to be prominent:

- Nepal Orind Magnesite Company Pvt. Ltd. concluded a contract agreement with Damodar Ropeways and Construction Company, with a view to build a 10.5 km long Monocable Ropeway of 150 TPH capacity between Kharidhunga and Lamosanghu, on 14th January, 1983.
- In the said agreement, the matters of supply of design, drawings and equipment and erection and commissioning were also included. For the works including the above, the contracting amount had been fixed at USD 40, 18, 577. 60. Out of this, it was also stipulated that goods and services worth USD 25,83,646. 60 shall be supplied in supplier's credit.
- Completion of the construction of ropeway by the contracting company within 25 months from the issuance of letter of intent was also one of the terms in the agreement.
- Relating to the construction of ropeway, the payment of amount worth 25,83,646.60 comprising the goods and services to be supplied by the supplier, and as requested for by Nepal Orind Magnesite, a Guarantee Agreement was concluded between Government of Nepal and the contracting company on 16th September, 1983, establishing the Government of Nepal as the guarantor under the terms as set forth in the contract.
- The said agreement provided for guarantee irrevocably, the due and punctual payment.
- In Article 5 of the agreement, it was also mentioned that the contracting company shall complete the ropeway within stipulated time-frame on turnkey basis.

- The statement of the contractor that Nepal Orind Magnesite paid the contractor six installments of interest and stopped further payment thereafter.
- The condition in the contract that in case of arising of any dispute between the contracting parties, it shall first be resolved through mutual consent. In case the dispute is not settled as above, then it shall be forwarded to the arbitrator.
- The condition in the contract that in case a dispute is presented before the arbitrator as above, action shall be taken according to UNCITRAL rules and that Nepalese laws shall be applicable therein.
- Letter of Guarantee also issued in the name of Contractor Company on 12th October, 1985 as per the agreement on guarantee.
- Conclusion of Ropeway Operation and Maintenance Contract between Nepal Orind Magnesite and the contractor company on 25th July, 1989.
- Due to the arising of dispute related to payment, Damodar Ropeways filed a claim before the arbitration tribunal with a view to settle the issue through arbitration. Government of Nepal filed a counterclaim regarding that dispute.
- Nepal Orind Magnesite Pvt. Ltd. lodged a claim before the tribunal that the works have not been completed in accordance with the agreement on ropeway construction. The contractor company lodged a counterclaim regarding that dispute.
- In the dispute relating to the payment of guarantee, a majority of arbitrators decided that in the present discord, a) the legal provision of Chapter on Guarantee does not apply, b) the guarantee is unconditional, c) payment of more than two installments is pending at the time of written demand furnished by the claimant, d) there is no basis to concord with the statement of the defendants that the claimant should have fulfilled the contract. Relying also on the above bases, the

tribunal decided that the defendant should pay to the claimant, the principle under the guarantee, as well as the contractual interest. One arbitrator, upon that decision, had written a note of dissent stating that the supplier does not hold the right to payment until it fulfills the terms and conditions of the agreement.

- Regarding the dispute as to the completion of works in accordance with the agreement on ropeway construction, a majority of the arbitrators concluded that the Nepal Orind Magnesite Pvt. Ltd. did not adopt any measures to cause the completion of ropeway construction by the third party, and that it has accepted through its deed, the completion of ropeway construction, by doing a maintenance agreement with the defendant. In the light of the above, the tribunal decided that the allegation of the claimant regarding the non-completion of the works is futile. Moreover, since the claimant had been unable to pay the delayed amount, the liability to pay additional interest to the defendant rests with the claimant and should pay as such, also because the claimant could not furnish any argument or evidence in this regard. One arbitrator, upon that decision, wrote a note of dissent, deciding for compliance as was previously.
- Secretary Mr. Ram Binod Bhattarai on behalf of Government of Nepal, filed a petition before Appellate Court of Patan challenging the award of arbitration in the dispute relating to guarantee.
- Executive Director Mr. Dinesh Raj Bhattarai on behalf of Nepal Orind Magnesite filed a petition before Appellate Court of Patan, challenging the award of arbitration in the dispute relating to ropeway construction.
- In the dispute relating to guarantee, the Appellate Court of Patan, on Baisakh 9th, 2059, decided to uphold the award of majority of arbitrators of 3rd September 1997, establishing the lack of claim of the claimants, as appropriate.

- In the dispute relating to ropeway construction, the Appellate Court of Patan decided to uphold the award of majority of arbitrators, till the limit of establishing the lack of claim of the claimants, as appropriate. However, it decided to quash the award of the arbitrators, to the limit of causing the payment of sums from claimant to the defendants, as mentioned in Clauses 2, 3 and 4 of the decision part, on the ground that the arbitration accepted the counterclaim, whereas there is no legal arrangement as such to accept counter-claims.
- In the dispute relating to ropeway construction, a petition for review and appeal was filed before the court on behalf of Damodar Ropeways, challenging the decision of Appellate Court of Patan and requesting for the review of case on Jestha 22nd, 2059.
- On behalf of Damodar Ropeways, a writ petition was filed in the court on Shrawan 26th, 2060 on the ground of a principle propounded in the case of Agricultural Inputs Corporation Vs Dinesh Bhakta Shrestha. Therein, a petition to certiorari was filed before the court in accordance with Section 21 of the Arbitration Act, 2038 seeking the abrogation of award given by the arbitration according to Section 19 of the Act. Herein, the court espoused a principle that if there is lack of alternative remedy against the decision of Appellate Court, then a writ can be filed before this court under its extraordinary jurisdiction.
- In the dispute relating to ropeway construction, a writ petition was filed before the court on behalf of Nepal Orind Magnesite on Paush 30th, 2059, challenging the decision of Appellate Court of Patan.
- In the dispute relating to ropeway construction, a writ petition was filed before the court on behalf of Mr. Mohan Gopal Khetan in the capacity of shareholder to Nepal Orind Magnesite Pvt. Ltd. on Kartik 22nd, 2059.

- In the dispute relating to guarantee, a writ petition was filed before the court on behalf of Government of Nepal on Mangsir 25th, 2059, challenging the decision of Appellate Court of Patan.

After factual clarity as above, now it shall be relevant to discuss about the perimeter of judicial enquiry and its basis over the award of the arbitrators.

The subject of testing of validity about the award of arbitration is distinct from other cases. From the appointment of arbitrators to the determination of procedures, the parties to the dispute themselves play the decisive role. Therefore, the arbitrators are considered as competent in solving the disputes presented before by the parties. It is also natural that the arbitrators are informed and learned on the subjects of disputes which need to be decided by analysis of facts. On that basis as well, a concept has evolved to take the award of the arbitration as final without a chance to appeal and such notion is also being assimilated in the national laws as well. Hence, there is a legal arrangement that the award of the arbitration can be challenged in courts and the courts can revoke the award given by the arbitration only on limited grounds. Studying from our perspective, the jurisdiction as such is given to the Appellate Courts, as provided by Section 21 of the Arbitration Act of 2038. Relying on the very same conceptual and legal basis, this court has propounded a principle, through its full bench, that no one can enter this court through ordinary jurisdiction requesting for appeal or re-examination of case against the decision of an Appellate Court which has given a verdict on the award given by arbitration. This principle was espoused in the case of General Manager of Agricultural Inputs Corporation Mr. Krishna Chandra Jha Vs Proprietor of Mili Mili Enterprises Mr. Dinesh Bhakta Shrestha et. al – Nepal Kanoon Patrika 2059, Decision No. 7089, Page No. 285. Looking through the context of aforesaid principle, in this dispute also, a petition was submitted in the Appellate Court of Patan challenging the award of the arbitration of 3rd September, 1997. On Baisakh 9th, 2059, Appellate Court of Patan reversed the award to some extent. It decided to uphold the award of majority of arbitrators, till the limit of

establishing the lack of claim of the claimants, as appropriate. However, it decided to quash the award of the arbitrators, to the limit of causing the payment of sums from claimant to the defendants, as mentioned in Clauses 2, 3 and 4 of the decision part, on the ground that the arbitration accepted the counterclaim, whereas there is no legal arrangement as such to accept counterclaims.

Upon observing the contemporary legal provision on arbitration, it has been laid down in section 21(2) of the Arbitration Act, 2038 that the Appellate Court may revoke the award of arbitration in case there is existence of any of the following matters in its award:

a) If the award is arbitrary or malicious.
b) If the award has been reached through fraud, coercion, or undue influence.
c) If the award contravenes the prevalent laws.
d) If there is a paramount legal flaw in the award.
e) If the award is ambiguous and meaningless.
f) If the award is contrary to any of the terms in agreement.
g) If the award is based on a wrong principle.

Though the above mentioned legal provisions are to be considered by the Appellate Court upon deciding about the award of arbitration, still they are also relevant upon judicial review by the Supreme Court under its extraordinary jurisdiction, over the decisions of arbitration and Appellate Court. The bases as above provided for in the Arbitration Act seem to be concerned chiefly with legal question and legal flaws. Hence, it shall be appropriate to judicially examine the decisions of the arbitration and Appellate Court, in this dispute, by remaining in the perimeter of the said bases.

On looking at the above context:

a) This dispute is between the parties to the contract.
b) The parties to dispute have presented their claims and counterclaims relying on the conditions of the contract.

c) On filing the petitions on Appellate Court and on this court too, the parties to dispute have presented their claims and counterclaims relying on the conditions of the contract.
d) In this context, in the award of the arbitration and the decision of Appellate Court of Patan as well as in the pleadings of the advocates from both sides, the issues of turnkey project and its completion or non-completion, the liability of the guarantor and the conditions for the commencement of liability, have been highlighted significantly.

Hence, in this dispute, the following points deserve prominence:

1. Whether the right to lodge a writ petition in Supreme Court under the extraordinary jurisdiction accorded to it by the Constitution rests with the Government or not?
2. Whether the work related to the construction of ropeway according to the agreement concluded between Nepal Orind Magnesite Company Pvt. Ltd. and Damodar Ropeways and Construction Company on 14th January, 1983, falls under the ambit of turnkey project or not?
3. Upon considering the said project as a turnkey project, while determining liability between parties to the contract, whether the decision of a majority of the arbitrators assuming the completion of works related to ropeway construction is corroborated by relevant facts and evidence to the dispute or not?
4. Whether the agreement concluded between Nepal Orind Magnesite Company Pvt. Ltd. and Damodar Ropeways and Construction Company pertaining to the construction of ropeways and the agreement on guarantee concluded between Government of Nepal and Damodar Ropeways and Construction Company on 16th September, 1983, are mutually related or not?
5. When the liability of the guarantor shall begins, as per the agreement on guarantee?

6. Whether the award of the Arbitration Tribunal of 3rd September, 1997 and the decision of Appellate Court of Patan on Baisakh 9th, 2059, concerning the present dispute, are in consonance with law or not?

Now let us consider on the first point of whether the right to lodge a writ petition in Supreme Court under the extraordinary jurisdiction accorded to it by the Constitution, rests with the Government or not. According to Article 88(2) of the then Constitution of Kingdom Of Nepal, 2047 as well as Article 107(2) of the Interim Constitution of Nepal, 2063, it has been laid down that: "The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution ……. have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute." As such, it is natural to reason that such power is meant to be used in the case of persons, citizens or community. This subject of dispute is related to the award of arbitration and as per Section 21 of the Arbitration Act, 2038, one can petition in an Appellate Court seeking the abrogation of the award of arbitration. Under such provision to petition, this court has analyzed the question of whether the jurisdiction assumed by the Appellate Court in this regard comprises appellate jurisdiction or not. In this light, this court has propounded a principle, through its full bench, that no one can enter this court through ordinary jurisdiction requesting for appeal or re-examination of case against the decision of an Appellate Court which has given a verdict on the award given by arbitration. This principle was espoused in the case of General Manager of Agricultural Inputs Corporation Mr. Krishna Chandra Jha Vs Proprietor of Mili Mili Enterprises Mr. Dinesh Bhakta Shrestha et. al – Nepal Kanoon Patrika 2059, Decision No. 7089, Page No. 285. This court has also dispensed justice by accepting writ petitions from various bodies of Government of Nepal. In this dispute, the Government of Nepal has filed the writ petition not by exercising sovereign power or executive power, but in the capacity of a party to an agreement for commercial transaction or purpose; and it has presented its stand by being under the terms and conditions of the agreement. Since, the writ petition has been filed by the

Government of Nepal as a party to the agreement, since there is no means to remedy through the ordinary jurisdiction on the basis of the principle established by full bench of this court, and upon considering the principles and standards founded by this court, the writ petition filed on behalf of Government of Nepal with reference to this dispute cannot be termed as otherwise. Now, it shall be apt to discuss the conceptual aspect of turnkey project.

A turnkey project is a project that is constructed by a developer and handed over to a buyer in a ready-to-use condition. In Wikipedia, the free encyclopedia, turnkey project is defined as: A turnkey project is a type of project that is constructed by a developer and sold or turned over to a buyer in a ready-to-use condition. Likewise, in his work Understanding and Negotiating Turnkey and EPC Contracts, Joseph A. Huse writes.

The turnkey or EPC contract makes the contractor entirely responsible for both the design and construction of the works. An employer receives a completed project in accordance with his performance specifications. When he looks for accountability as to the performance and quality of the works, he needs to look no further than the contractor.

Likewise, another scholar I.N. Duncan Wallace QC in his work Hudson's Building and Engineering Contracts writes through quoting Mobile Housing Environment v. Barton 432 F. (Supp.) 1343 (1975) that:

The term turnkey construction job under the applicable case law imposes on the contractor the responsibility for providing the design of the project and responsibility for any deficiencies or defects in design, except to the extent such responsibility is specifically waived or limited by the contract agreement.

Following all these definitions, a turnkey project is understood to be a project in which all the responsibility from design of the project to its construction rests with the contractor. The documents related to this dispute themselves have defined the turnkey project. In Acceptance of Tender, the expression 'Complete turnkey handing over of operating

ropeway system' has been mentioned and in Clause 2.1.7 of the same document, there is a provision for Performance Guarantee Tests which is in line with the concept of turnkey project. Likewise, in the preamble of the Guarantee Agreement concluded between Government of Nepal and Damodar Ropeways also, it has been mentioned that: The supply of design, drawings and equipment and erection and commissioning of a ….. monocable ropeway. In Article 5 of the same agreement as well, it has been stated that: The supplier shall complete the ropeway on turnkey basis within the time limit and condition as stipulated in the contract. Similarly in Clause 1(Scope of Work) of the Operation and Maintenance of Ropeway, the expression 'Turnkey contract basis as per Acceptance of Tender' has been laid down.

Looking at the above-mentioned context, in any turnkey project, the works related to design of project and engineering services, its administrative and managerial control, purchase of required material, transportation and inspection, supervision and control of such material, determining the work-schedule, quality control, facilitating work-completion and examining whether the works have been accomplished or not, are included. Moreover, the obligation of training to the related manpower for operation and maintenance also lies with the contractor company.

In the present dispute, there is no basis for debate that the contract agreement between Nepal Orind Magnesite Company Pvt. Ltd. and Damodar Ropeways and Construction Company, with a view to build a 10.5 km long Monocable Ropeway of 150TPH capacity between Kharidhunga and Lamosanghu on 14th January, 1983, is a project to be completed on turnkey basis. The said agreement and all other related documents have characterised it as a turnkey project.

While submitting counterclaim before the arbitration on behalf of Damodar Ropeways, a stand has been taken that the completion of works should not be looked on the basis of turnkey project as the contract had not been done on the ground of turnkey (Clause No. 5.4 of the stand of defendants under the award by the tribunal). In its continuum, the advocates on behalf of Damodar Ropeways, in their

written plead-notes, again raised the stand that the project went outside the ambit of turnkey after the import of goods worth IRs. 1,08,71,000 by the respondent itself, following the third amendment to the agreement effected on January 13, 1983. On considering at this premise, the argument that the contract had not been done on the basis of turnkey is rebuffed by the documents relating to contract themselves. Besides, if we accept the argument that import of goods of a certain value on its own changes the turnkey project into another form, then its consequences shall be reflected on all the actions of the project. To add on that, the act of importing goods as such has only facilitated in the works of the contractor company rather than casting adverse impact and this fact is not denied by the contractor company either. In all the agreements pertaining to this dispute, the construction of ropeway has been defined as a turnkey project and that, in case not being amended by the parties to the contract, to misinterpret as the agreement being amended based on the act of any one party or any incident, shall be contrary to the concept regarding contract.

Now another important question in this dispute deals with the completion of works and the condition determined for it. Since this dispute is contract-related, there can be no other stronger evidence than the document of agreement. Contract is indeed a law formulated by the concerned parties to be applied between them. Hence, the terms of contract are binding on the concerned parties and to obey them becomes the legal obligation of the contracting parties. Indeed, contract law is a law related to liability. That liability is limited to the parties to the contract only.

It is a general principle that one should fulfill one's own commitment. The concept of liability within contract law is founded on the base of the very same principle. In case a party does not fulfill its liability as per the contract, then the other party may also be absolved of fulfilling its responsibility. The side which cannot fulfill its obligation cannot compel another side for the same. In case a contract is breached as such, then the other party may declare the contract as being rescinded. However, in the present dispute, the contracting parties are not found to have rescinded the contract. From the stands of both the

parties, it is seen that they have attempted only to rectify the violation of contract as the terms of contract were infringed upon. Here, one party has claimed that since the works according to contract have been finished, there is only the liability of the other party remaining, whereas, the other party has asserted that since the former party has not yet completed its work according to the contract, the condition for it to assume liability has not arose at all. Therefore, the issue of completion or non –completion of the stipulated work has become the most important subject of this dispute. Considering on this, this bench has arrived to the conclusion that the construction of ropeway has been in the nature of a turnkey project. There shall be a substantive difference between the completion and non –completion of the stipulated work in a turnkey project. In projects as this, the liability of one side shall be to complete the works and liability of the other side shall be to provide facilities for the completion or to ensure payment for completion of works or to assume prescribed responsibility.

In this dispute, while looking at the contractual arrangements regarding work completion, it has been stipulated in Clause 2.1.7 pertaining to Performance Guarantee Tests in Acceptance of Tender that: Performance Guarantee Tests shall be continued operation of the ropeway for a total period of 120 hours on consecutive days-about 10 hours running on each day (running for 4 days and break of one day for rest and maintenance). However, Damodar Ropeways has failed to submit the claim that such test had been conducted. Instead, it has argued that Nepal Orind Magnesite itself has been negligent towards such test. In its support, the issue of causing difficulty in operation of ropeway by not installing electricity flow regulator and by not providing material for transportation has been raised. But, no evidence has been furnished to suggest that these matters were worth of causing hindrance for conducting Performance Guarantee Tests. The company which had been entrusted with full responsibility of ropeway construction cannot skip the liability of conducting Performance Guarantee Tests which comprise a crucial stage to prove the accomplishment of works through such a weak argument. It is not so convincing and plausible either.

The logic that Nepal Orind Magnesite itself had been unwilling to conduct Performance Guarantee Tests is not convincing also on the ground that its future is dependent on the subject of ropeway construction. Hence, there seems no objective basis or reason for the company to not own and run the ropeway whose construction has been completed. The company cannot benefit in any manner by not running the ropeway; instead, the whole institution may become lifeless on not operating it. Moreover, in the ropeway project, a separate investment has been made by the company itself. Even the contractor company has divulged the fact that the company itself has imported goods worth IRs. 1,08,71,000 for the purpose of ropeway. Such a big amount being invested and several possibilities being ready to be opened for the company after the construction of ropeway; in such a scenario, the company has ignored the potential and tried to disown the completed project, this statement is far from being objective and reason-based.

On observing the letter dated September 8th, 1993, said to be signifying the commitment made by Government of Nepal for the guarantee, that letter also has failed to singularly mention the completion of project works. In that letter, it has been said that: Contract is a turnkey contract and your responsibility is also to assure that the equipments supplied are of required standard, erected properly and are functioning well. Your letter of 15th June does not mention when the ropeway was completed and came into operation, neither it says about performance test nor when it was handed over to NOMPL. The documents enclosed in the case-file do not show that the contractor company has ever refuted the content of this letter.

As per the latest amendment to the contract, the contractor company also has accepted to complete the construction on 30th September, 1989. This is also clarified in the Operation and Maintenance Contract. However, even after 4 years from the stipulated time-frame, i.e., till 8th September, 1993, the contractor company has failed to establish the fact that the works have been accomplished. Moreover, the said letter also discloses that the questions of when shall the performance tests be conducted, when it shall come into operation, and when shall it be

handed over. The letter written by such an authentic and responsible body cannot be termed as otherwise. The obligation to prove it otherwise rests automatically with the contractor company, but it had failed to do so as well. Hence a need has arisen to verify truth of the stand of the company that all the works relating to the construction of ropeway have been fulfilled.

In relation to the completion of works, the Operation and Maintenance Contract forwarded by Nepal Orind Magnesite on 25th July, 1989 and quoted by the contractor company, in its Clause 9, it has been mentioned that: Since the ropeway has not been completed strictly in terms of various conditions of contract envisaged in Acceptance of Tender…it is understood that the project in entirety in terms of contract, and handed over. At the end of the same Clause, the date for handover has also been fixed by the expression: handing over shall be organized at the earliest but not later than 30th, September, 1989.

In the dispute where Nepal Orind Magnesite is the claimant, in the stand presented by the defendants before the arbitration (Clause No. 5.2), they have accepted the non-conduction of Performance Guarantee Tests, which has been mentioned in the award of the arbitration as well. In Clause No. 5.3 also, it has been stated that the works had been completed substantially. In the context of turnkey projects, it should be understood that, for the application of Doctrine of Substantial Performance, the works need to be accomplished in such a manner as will fulfill the objectives stipulated in the contract. For Doctrine of Substantial Performance to be applied, the works should be completed barring the exception of some patch-works, which do not affect the objectives stipulated in the contract. Hence, in this case, for the application of above doctrine, there should have to be a condition of operation of ropeway after the completion of it according to the length and capacity of the ropeway as designated in the turnkey contract. For instance, in the premise of this dispute, substantial performance of the contract would have been assumed had the ropeway was of carrying capacity of 149 TPH instead of 150 TPH prescribed or it was of a length of 10 km instead of the prescribed 10.5

km. Here, the function or objectives of the contract should have to be attained by the employer to the contract. In the absence of which, substantial performance of the contract shall not be assumed. In this dispute, the award by the majority of the arbitrators has failed to scrutinize the fact that the contractor company has failed to prove the completion of performance. Instead, it has hypothetically concluded the substantive completion of performance through presumption. Thus, despite the lack of condition signifying the completion of performance, the Doctrine of Substantial Performance is being tried to apply. There is no discord that a condition of quantitative difference had to be established. However, such fact has not been established. Hence, the arousal of question and dilemma as to whether or not the construction of ropeway has been fully accomplished or not, is not unnatural.

Clause 19(2) of General Condition of Contract has authorized only the Engineer in Charge for the certification of work-completion. That Clause reads that: Notice in writing shall be sent by the Contractor to the Engineer in Charge when the erection and commissioning of equipment and accessories in the group as a whole is completed. Likewise, Clause 20 reads that: Engineer in Charge shall pass each section of the erection and commissioning works and such checks shall in no way exonerate the contractor from any of the guarantees of proper function of the equipment and accessories supplied, erected and commissioned as a whole. The arbitration should have contemplated whether the completion certificate given by any other person except the one designated in the contract, is to be recognized or not. It is also a contemplating question here, whether the minutes submitted, trespassing the designated official and procedure as provided in the contract, can be made as the basis to determine the completion of performance or not. In the award of the arbitration, the minutes of the meeting dated 31st May, 1989 have been established as the certificate of completion of performance. However, Clause No. 1 of the minutes reads that: After completion of ropeway erection work and ….. DRCC successfully transported 12 numbers of loaded buckets from Kharidhunga to Lamosanghu on 29th may, 1989. Clause No. 2 of the minutes reads that: Further ropeway load trial could not

be carried out as the crushing plant and conveyor feeding to picking conveyor of ropeway was not ready. Upon observing both the points, they tend to be contradictory in each other. From this, an objective ground suggesting the completion of performance test process could not be found. Mr. PM Dixit who signed on the minutes on behalf of Nepal Orind Magnesite seems not to be appointed by the company as the official for the certification of completion of performance and he himself has also not presented himself in that capacity. In the affidavit of Mr. PM Dixit on behalf of M/S Nepal Orind Magnesite (P) Ltd. dated 14th March, 1997 has testified that those minutes were not issued as Completion Certificate, it has shown only the transportation of 12 loaded buckets and that he is not the authority to issue Completion Certificate. Thus, he has objected towards the claim of Damodar Ropeways. However, the arbitration, in its award failed to analyze the fact appropriately.

The issuance of work-completion certificate in a task importantly related to the fulfillment of the contract pertaining to the building of ropeway should not be limited to the class of general administrative correspondence. The responsibility of issuing such certificate should be borne by the concerned body or person stipulated so by the document of contract and in the absence of such arrangement, should be borne by the authorized person of the company. Except this, it shall be against the established process and norms of the functioning of a company, to make the signature of any other person in a decision, as a basis for completion of performance.

In the award of the arbitration, the maintenance contract has been made as the prime basis to establish the completion of performance. However, in Clause 9, it has been explicitly mentioned that: Since the ropeway has not been completed strictly in terms of various conditions of contract envisaged in Acceptance of Tender…it is understood that the project in entirety in terms of contract, and handed over. At the end of the same Clause, the date for handover has also been fixed by the expression: handing over shall be organized at the earliest but not later than 30th September, 1989. From this, it has been found that the above argument of the arbitration is also not corroborated by objective

factual evidence.Moreover, the condition of submission of evidence confirming the official hand-over of the project has also not been appropriately analyzed in the award by arbitration.

If the conditional maintenance contract, which stipulates for the handing over of the project before 30th September, 1989, is made as the singular basis to establish the completion of performance, that shall be a hypothetical presumption. If the arbitration goes on misinterpreting the facts established through written form by both parties, then there shall be disbelief and mistrust over the process of arbitration as well the system of resolving disputes through the arbitration process. The decision-maker should not give the form of dispute to those facts which have been conceded to by both the parties. In the context of the present dispute, the expression in Clause 9 of the maintenance contract that 'handing over shall be organized at the earliest but not later than 30th September, 1989', has not been duly analyzed in the award of arbitration.

Likewise in the sub-Clause 2.1 of the conclusion section in the award reached by the majority of arbitrators, it seems an irrevocable conclusion has been arrived at regarding: a) completion of performance in the part related to guarantee, b) in other subjects, cent percent of payment has been duly made, c) performance guarantee has been totally released, and on the above bases, d) the contract has been duly delivered. In the same point the dilemma of arbitration is clearly reflected. In case of assumption that Orind and Magnesite could have the authority to complete the construction of ropeway through third party on the expenxe and risk of the claimant. It has been argued that Orind and Magnesite did not embark upon that option as well. But, it is a matter of discretion of the employer to the contract to have works done by third party or not. It is the matter of its own right. On account of lack of use of this right, the contractor company is not absolved of its responsibility to perform according to the contract done.

In the Clause 1 of the summary of conclusion in the award of the arbitrators, it has been deduced that the claim of claimants cannot be fully entertained due to limitation, as provided for in Section 18(2) (c)

of the Arbitration Act, 2038. In the heading of the subsequent Clause 2 it has been stated that: On presumption, we have decided the following. Hence, the decision part following that expression seems to be wholly based on presumption.

The process of dispute settlement through arbitration is only an informal and alternative procedure within the judicial process. Simply on the basis of it being concluded outside the court, it should not be established as a process wherein presumption, suspicion and imaginary matters can be made as the bases to decision. Even in the process of arbitration, in order for reaching the decision regarding the facts in issue, the facts need to be proved, relevant evidence have to corroborate the facts and these should be in accordance to the document of contract. Only if the terms of contract are ambiguous or silent on an issue, it should be interpreted on the basis of prevailing laws, related notions and standards. However, the tendency to reach to a conclusion on the basis of presumption, in place of established values, standards and prevailing laws, shall weaken the possibility of fair justice. Decision as such shall be relied on imaginative logic and discretion of the decision-maker instead of relying on facts and laws. The acceptable principles of justice do not allow for any judicial decision to be subordinated by supposition.

Now, in the present dispute, it shall be worthwhile to scrutinize agreement on guarantee and its terms, liability of the guarantor, and the condition for the beginning of liability, among others. Prior to that, it shall be relevant to discuss the notion of guarantee as well.

> Wikipedia, the free encyclopedia, defines guarantee as: A surety or guarantee, in finance, is a promise by one party (guarantor) to assume responsibility for the debt obligation of a borrower if that borrower defaults. The person or the company that provides the promise is also known as a surety or guarantor. Following another definition: A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. Through the above definitions, the prime objective of a guarantee

agreement is to guarantee the transaction between two main parties. Whether this agreement is independent in itself or is it a part or associate of the principal contract, depends on its conditions.

The issue of when shall the liability incurred through the guarantee agreement begins, is based on the terms of principal contract and the conditions laid down in the guarantee agreement. Fundamentally, the liability of the guarantor is always secondary. Only in case of principal debtor not fulfilling its obligations, the liability of the guarantor begins. Until the commencement of the principal debtor's liability, the liability of the guarantor cannot arise. Unless the party beneficiary to the guarantee contract fulfills the terms, the liability of payment by the principal debtor does not initiate. Until the liability of the employer to the contract starts, the beneficiary party, here the contractor company cannot compel the guarantor side to assume liability. It is because the authority to request the other party for the discharge of conditions envisaged in an agreement arises only upon the fulfillment of conditions stipulated by the main agreement. The liability of the guarantor commences only upon denial of request for compliance of the conditions.When the issue of whether or not the terms of principal agreement have been fulfilled, is itself contentious, then it shall not be mature to enter into the subject of agreement on guarantee. Even to do this, one should follow the process designated by the agreement.

Despite all these, since in the subject of contract, the terms of related contract document are considered as the main basis, we should look also at the terms of the concerned guarantee agreement. It has been expressly stated in the preamble of the agreement that: An agreement for ropeway construction was concluded between Nepal Orind Magnesite Pvt. Ltd. and Damodar Ropeways and Construction Company on 14th January, 1983. Pursuant to the agreement relating to the construction of ropeway, the payment of amount worth USD 2583646. 60, comprising the goods and services to be supplied by the supplier, and as requested for by Nepal Orind Magnesite, a Guarantee Agreement was concluded between Government of Nepal

and the contracting company on 16th September, 1983, establishing the Government of Nepal as the guarantor under the terms as set forth in the contract. Out of the total 9 Articles in the agreement, the first Article provides for mode of payment, the second for liability of the guarantor, third for exchange of foreign currency, fourth for providing statement or particulars, fifth and sixth for the obligations of the supplier, seventh for procedures of dispute settlement, eighth for authentic address of both parties and the ninth Article provides for law that shall be enforced.

In Article 1 of the agreement, the fact that Government of Nepal has stood as a guarantor worth USD 25, 83, 646. 60 to ensure regular payment, has been mentioned. Besides, a condition that payment can be demanded until two installments of payment is pending, is also envisaged. In Article 2, the matter of payment has been taken as primary obligation and not alone guarantee. The claim from the contractor company has been put forth on the basis of these two Clauses. The majority of arbitrators also have given the award relying on these conditions. But, Article 4 of the same agreement lays down as the liability of the contractor company that it should submit the progress report of construction works every three months and the quantity as well as cost shall also be included in it. In Article 5 of the Guarantee Agreement, it has been expressly laid down that: HMG/N shall guarantee only the amount equivalent to the value of those works completed by the supplier within the time limit and condition as stipulated in the contract. Hence, this Clause has rendered Clauses 1 and 2 as conditional. Hence, looking at this, there is not a condition to interpreting Articles 1 and 2 absolutely. Though Article 2 of the guarantee agreement has made the obligation of guarantor as primary, Article 5 has made it conditional and turned it into secondary obligation.

Even on observing in principle, the interpretation of an agreement has to be made in its entirety. A different outcome may be achieved on interpreting it only on the basis of a Clause or Part. The rules of interpretation do not support such monolithic interpretation. If we go on recognizing such explanations, then the parties to agreement shall

lodge their claims by standing on the conditions or parts of the agreement that are favourable to them. This shall render the document of whole contract as ineffective and useless. If a claimant places its claim based on some provisions of the agreement and if the defendant also accepts that claim of the claimant, then a situation may arise in which the decision-maker may decide through literal interpretation of the related provision. However, if the claim of the claimant is challenged or refuted by the other party, then the decision-maker shall have to reach a conclusion only after extensively interpreting on the basis of relativity of agreement, interrelation between one and the other Clause, situation at the time of contract and on the basis of the objectives enshrined by the agreement.

In the present dispute, while looking at the award of arbitration, the claimant has presented the agreement on guarantee as an unconditional guarantee standing on Article 1 of the agreement. However, on behalf of Government of Nepal the guarantee has been termed as associate to the principal agreement; and a stand has been put forth that without claiming against Nepal Orind Magnesite, a claim against Government of Nepal cannot be made and since the works are not completed as yet, the liability of the defendant for payment has not incurred. In the conclusion part of award of arbitration, it is stated that: Article 7 of the Guarantee Agreement has stipulated for attempts to cordial settlement in case of arousal of dispute, however, nothing has been found in regard that the parties have tried to resolve dispute through amicable means nor have they mentioned any precondition prior to the submission of dispute before arbitration (Conclusions, Clause 1.1). Apart from this, the following matters also have been mentioned in the conclusion:

- The conditions laid down in Article 1 of the Guarantee Agreement are clear and unambiguous; and wording of Article 5 has not made it dependent in complying with Article 1, as the defendants have tried to interpret.

- In case the claim of defendants pertaining to Article 5 of guarantee agreement is to be recognized, then it shall defeat the commercial intent of guarantee.
- The ropeway was duly completed and the claimants had not failed in delivering their part of contract or to demonstrate their readiness to complete it.

To reach the above conclusion, the minute of 31st May, 1989 is also taken as the basis. However, the matters expressed in Clauses 1 and 2 of the minutes do not convince the subject of ropeway completion. Since, that subject in itself is the bone of contention; conclusion can be arrived upon only after extensive analysis over the subject. In the award by a majority of arbitrators, Article 1 of Guarantee Agreement has been interpreted as an absolute provision, rather than looking at in its relativity. The monolithic explanation that any of the provision is not dependent on the compliance of another provision has resulted in the neglect towards entirety of the guarantee agreement. Even the general principles of interpretation do not permit for such explanation.

In the award of the arbitration, stress is laid on theoretical aspect of guarantee by focusing on commercial intent of guarantee. By looking through the context, an agreement on guarantee in itself can be unconditional. However, it cannot be forgotten that this agreement can be interdependent on the principal agreement. Whether an agreement is conditional or unconditional is determined on the basis of holistic terms and conditions of guarantee agreement. A contract on guarantee signifies a contract wherein a third party volunteers to fulfill the liability in case any person defaults on fulfilling his/her liability. The contract related to guarantee of contract, in all circumstances, shall not be deemed to be as unconditional because contracts as such are made between any party of the first contract and other third party, specifying that in case any person does not fulfill its obligation created by a contract between any two sides, then obligation as such shall be fulfilled by the third party. Hence, the agreement guarantee related to this dispute cannot be considered as unconditional.

In this dispute as well, an agreement had been made on 14th January, 1983 between Nepal Orind Magnesite and Damodar Ropeways and Construction Company to construct ropeway. In the course of executing that agreement, the Government of Nepal stood as a guarantor for payment in case Nepal Orind Magnesite defaults on payment for the supply of goods and services from the contractor company. Therefore, in this situation, it can be deduced that naturally the agreement on guarantee is inextricably linked to the agreement on ropeway construction. The agreement to guarantee, if it contains several Clauses and if such Clauses enlist clearly the responsibilities of both sides, then, any one Clause or condition cannot be studied absolutely, in isolation. All the terms of an agreement are relative and interrelated with each other. This is a general principle of contractual jurisprudence and the commercial intent of guarantee can also be no different.

Upon looking at context of the contractor company's claim that the letter written by the Government to the company on September 8th, 1993, represents its commitment towards the guarantee, still one can observe the emphasis given in the letter to establish clearly the fact of completion of works. The letter reads: It will be better if you first settle your case with NOMPL and come to us along with them for amicable solution of the problem related to guarantee. Similarly, in the same letter, it has been clarified that there is no dispute between Contractor Company and Government of Nepal and that the Government is prepared to deliver its responsibility in the capacity of guarantor; but prior to that, the contractor company shall have to fulfill its liability. The letter further reads: We, however, would like to be sure that all due obligations on your part as well as on the part of the NOPL, have been fulfilled before you come to us with your grievances. The contractor company has not officially refuted the contents of that letter and also has not stated otherwise. In this premise, the arbitration cannot award its decision relying solely on the claim made by the claimant. The agreement on ropeway construction which is the bone of contention and the issue of whether or not its terms have been complied with by the parties to the agreement have not been explored with basis of evidence. In this context, while reaching to the conclusion, majority of

the arbitrators seem to have made dilemmatic and confusing statements. The arbitration has also not been able to be clear, confident and undoubting regarding the issue of guarantee.

The majority of arbitrators, while presenting their conclusion, have not been able to present clear grounds relating to major subjects, which have been raised as dispute and which are in cognizance of the Arbitration Tribunal. The document of contract in itself is a whole and complete document, the Clauses of the contract bear individual significance and in the absence of one Clause the other shall also lose their relevance. This is a general principle of contract law and the commercial intent of guarantee. Interpreting this situation differently and hypothetically shall, in itself, be deemed to be as against the prevailing laws, flawed from the legal perspective, ambiguous, against the terms of agreement and being relied on wrong principle. Such decision shall be ipso facto contrary to Section 21(2) of Arbitration Act, 2038. In this situation, other questions raised in course of dispute shall become less significant.

Therefore, also on the basis of above analysis, the fact has been established that the contract agreement concluded between Nepal Orind Magnesite Company Pvt. Ltd. and Damodar Ropeways and Construction Company, with a view to build a 10.5 km long Monocable Ropeway of 150 TPH capacities between Kharidhunga and Lamosanghu on 14th January, 1983, is a turnkey agreement. In turnkey agreement as such, the responsibility to fully complete the works according to the agreement rests with the contractor company. So, in order for determining whether the fact of work-completion is established or not, the situation and evidence shall have to be studied, observed, evaluated and analyzed before reaching to a decision. However, failing that, the majority of arbitrators concluded the completion of performance and made the same conclusion as their basis to decision. Moreover, the arbitration interpreted the liability incurred upon Government of Nepal through the Guarantee Agreement done between the Government and Damodar Ropeways and Construction Company on 16th September, 1983, as an absolute liability. Hence, the award of the arbitration that Government of Nepal

shall have to make payment to Damodar Ropeways and Construction Company according to the claim of the contractor is found to be contrary to the terms of agreement. In the decision of Appellate Court of Patan also, which upheld the award of arbitration, scrutiny of terms of agreement and fundamental theoretical question, is not found to be made. Section 21(2) (f) of Arbitration Act, 2038 provides a basis for abrogation of award of arbitration if it is found opposed to any term laid down in the agreement. At this context, the award of the arbitration dated Bhadra 18th, 2054 and the corresponding decision of Appellate Court of Patan dated Baisakh 9th, 2059, as well, are hereby repealed through the order of certiorari. Since a party to the dispute, here, Government of Nepal has expressed distrust towards the Arbitration Tribunal constituted for this dispute; it shall be desirable to settle this dispute by new arbitration tribunal. Therefore, by considering all factual questions and relevant legal issues, if the claimant so desires for deciding said claims be submitted before arbitration tribunal, then process of appointment of arbitrators should be started according to the procedure envisaged in terms of contract/agreement concluded between parties to the present dispute. For that purpose, a mandamus is hereby issued in the name of Appellate Court of Patan to inform the parties to dispute with regards initiation of appointment of new arbitrators in accordance with Section 21(3) of Arbitration Act, 2038, and the case file be duly sent to the concerned District Court. This Court directs to relay the order to Appellate Court of Patan, and to hand over the case file according to the Rules.

I concur with the above decision.

Chief Justice Ram Prasad Shrestha

Done on Ashar 23rd 2067 B.S (July 07, 2010)
Translated by Narayan Sharma

In order to enhance the welfare of senior citizens the law has made provisions and fixed criterions. The court cannot interfere in such affairs since it depends on the resources availability of the State.

Supreme Court, Division Bench

Hon'ble Justice Ram Prasad Shrestha

Hon'ble Justice Prakash Osti

Writ No. WO-0195 of the Year, 2066

Subject: Mandamus and others.

Petitioner: Man Badhur Karki, Chairman, represented on behalf of Senior Citizen's Society, Central Office, Ward No. 14, Kathmandu Metropolitan City, and on his own.

Vs.

Respondents: The Office of the Prime Minister and the Council of Ministers & others.

- **The society comprising of segments of senior citizens is a testimony of living history and human reflection of a state or society covering a certain period of time. The fulfillment of duties and responsibilities by a state toward its senior citizens tends to reflect its identity as a dutifully-abiding state committed to human rights and democratic values.**
- **It has become the sacred duty of the state to ensure the creation of an environment whereby the senior citizens also can enjoy all the human rights at par with other citizens in an honorable way, without discrimination and with secure livelihood.**

- **Since the senior citizens are being provided with monthly allowance along with its periodical increments, taking into consideration of such factors as financial resources of the state including their outlets, national economic condition, and assessment of the necessity of the facility for senior citizens, it would not be appropriate for the court to interfere in such an affair.**

Decision

Ram Prasad Shrestha, J; - The fact and decision on the writ petition filed under Article 107(2) of Interim constitution of Nepal, 2063 B.S. are as follows:-

The petitioner is an operational organization, affiliated with the Social Welfare Council and registered with District Administration Office in the fiscal year 2064/2065. It has the mandate for the promotion of rights and welfare of senior citizens. We have filed twelve points demand with the Ministry of Finance, Government of Nepal on 2066/1/12 for the protection and promotion of rights and interest of the senior citizens. Since no effective action has taken place on this as yet, we have taken resort to the court with this writ petition with the plea that our grievances be addressed effectively.

The legal provision along with the Preamble of the Interim Constitution of Nepal, 2063 hence recognized the right to livelihood with dignity guaranteed for children, women, elders, disabled and other economically and socially disadvantaged group or communities of the country making special arrangements. In compliance with the constitutional provision and as per the ruling of the Supreme Court in the cases (Nepal Law Journal, Decision No. 7643), the Senior Citizens' Act, 2063 has been put into effect. But despite the provision for several committees at various levels as per Section 13 of the Act, no action has so far been taken to their formation. Besides, the proposed Senior Citizen Commission has not been constituted yet. The court has thus the legitimate right to issue an order to the concerned authority to form the said committees and the commission

pertaining to senior citizens in accordance with the spirit and provision of statute and the constitution.

The Government of Nepal has decided to grant Rs. 500/- per month to the elder citizens attained 70 years of age and above and widows crossing 60 years of age and above, in order to ensure their well-beings care and safety. This decision, taken by the government is in itself an appreciative step; however, the amount is deemed very small and inadequate even to meet minimum expenses incurred in medical treatment of elders and the market price hike in most essential commodities. Though lately, the allowance has been increased to Rs. 1000/- per month for the elders of Karnali Zone, that increment too is considered very low in view of hardships of livelihood, dearness and geographical making of the region. By presenting all these facts, we have requested the government to exceed the allowance at least up to Rs. 1500/- per month but no attention has been paid in this concern. Besides, we have requested the government to recognize the age of 60 as mentioned in the Section 2(a) of Senior Citizens' Act, 2063 as a base for eligibility for the grant of allowance to senior citizens without discrimination. But that demand has not been fulfilled yet. All these difficulties have stood as hindrances to the senior citizens and widows to secure an honorable livelihood. We have made a plea to the government for the rise in allowances up to Rs. 1500/- per month to be granted to senior citizens and the widows. But no action has been taken on that. Besides, we made request to have issued an appropriate order including Mandamus in the name of respondents seeking the formation of committees as soon as possible in accordance with Section 13 of Senior Citizens' Act, 2063 which has not been attended. As the decision of the Government of Nepal granting monthly allowances only to the elders attaning 70 years of age is in contradiction to the Section 2(a) of Senior Citizens' Act, 2063, the decision of the government be reviewed. A writ order be issued to grant monthly allowances of at least Rs. 1500/- to all senior citizens who have reached 60 years of age. In case of widows such allowance be granted from the date of their widowhood. An appropriate order be issued to institutionalize a system by which

identity cards are issued to these people for granting concession in fares charged by public transport services. Similarly preference should be given to senior citizens when they attend in the hearing of their cases in the law court and facilities in attending the day appointed by the courts as well as in other public offices. The order of Mandamus or other appropriate order be issued to execute the above claims including allowance to the retired public servants who have attained 60 years of age; such being the substance of the petitions dated 2066/5/21.

What are the basic contents of the case? Is there any ground for denying issuance of an order as claimed by the petitioner? Respondents be officially notified through Attorney General's Office requiring their written replies within 15 days from the date of receiving the order allowing for additional time required for journey enclosing with the concerned case file. Such was the order issued by this court on 2066/5/23.

The Government of Nepal has brought into effect the Senior Citizens' Act, 2063 to be effective from 2063/8/8 with the objective of honoring the senior citizens while ensuring protection and social security to them. In the budget speech for Fiscal Year 2066/2067 presented to the Legislature - Parliament, the Finance Minister has announced the continuity of the social security allowance that has been granted to senior citizen, single women, and persons belonging to the indigeneous people on the verge of extinction as well as fully or partially handicapped persons. The program offering free medical service and to patients undergoing heart surgery and dialysis of the kidney, free of cost, to the senior citizens above the age of 75 is also declared to be continued. The budget has been allocated for the treatment of senior citizens above the age of 75, suffering from cancer disease at the cancer hospital located at Bharatpur from the forthcoming fiscal year. As the Government of Nepal is favorably addressing the demand put forth by the petitioner to the extent allowed by government's available financial resources, there is no need for issuing the writ order. So far as the question of granting allowances to only those senior citizen reaching 70 years of age is

concerned, it is an issue being addressed gradually by the Government of Nepal itself. The question relating to the decision on determination of allowances to senior citizens above 70 years of age is concerned; it will have to take into consideration such factors as availability of resources, need of the hour, and the capacity of Government. Thus, issuance of an order in this direction by this honorable court on such a subject is not appropriate. Since the issue raised by the petitioner is concerned with policy matter, it is not desirable to pronounce an order where such matter lies outside the domain of writ jurisdiction. The process of implementing the provision of law through the formation of committees in accordance with Section 13 of the Senior Citizens' Act, 2063 is of policy concern as well. It is not worthy of issuing order on such a subject. Therefore, the writ petition be dismissed is the substance of the written reply from the office of the Prime Minister and the Office of the Council of Ministers dated 2066/7/13.

Distribution of social security allowances has been underway since last Fiscal Year following the enforcement of Section 2 (a) of Senior Citizens' Act, 2063 by the Ministry of Finance. It is not mandatory to grant allowance to the senior citizen of 60 year of age, although, they are recognized as senior citizens in accordance with the definition of the Act. The Government of Nepal has recognized only those senior citizens of 70 years of age as eligible for the allowance as against those commonly recognized as senior citizens. It is the duty of the state to provide social security to all its citizens of the country as far as the resources of the government permit, there is no justification in the petitioner's contention that the right of the senior citizens has been violated since certain criterion has been adopted in regard to the distribution of allowances. Therefore, the writ petition be dismissed is the substance of the written reply of Finance Ministry submitted on 2066/7/24.

The petitioner Man Bahadur Karki is of 84 years of age and the other petitioners are also entitled to receive the benefit in accordance with Section 10 of the Senior Citizens' Act, 2063. So the petitioner's claim

to give priority in hearing the case is granted as it concurs with the provision of law.

In regard to this case submitted for decision as listed in the daily cause list, and after hearing the arguments of the learned advocates represented behalf of the petitioners, advocates Guru Prasad Baral, Ramji Bista, Santi Devi Khanal, Rajiv Bastola, Ravi Khanal, Suvam Raj Acharya who referred the provision as per which the allowance is to be provided to the disabled women along with the senior citizen under the sub-Article (17) of Article 35 of the Interim Constitution of Nepal, 2063. The constitution has acknowledged the right of every citizen to live a honorable life within the framework of fundamental rights. The state can bring into effect specific scheme of social security based on the welfare state concept with a view to ensuring social security to the elders, women, children, widows, handicapped persons, other groups and the disadvantaged communities. The Senior Citizens' Act, 2063 was brought into effect to ensure social security to the elders, Section 14 of the Act empowers the Government of Nepal to define and categorize the senior citizens as prescribed and grant them the allowance or facilities as prescribed. There is thus the provision for granting social security allowance of Rs. 500/- per month as laid down in the Budget Speech for the Fiscal Year 2066/2067. But, as the amount of allowance given has been deemed low against the rising inflation and the increased expenses incurred in health care, an order be issued to raise the allowance to the level of at least Rs. 1500/- per month. Since the committees to be formed as per the Section 13 of the Act have not yet been put into effect, it is justifiable to issue the order of Mandamus directing to the formation of the committees. All citizens of 60 years of age come under the definition of senior citizens as per Section 2(a) of Senior Citizens' Act, 2063. The adjustment of budget to give allowance for the elders of 70 years of age only is in contradiction to the above legal provision, as this fails to embrace all senior citizens who come under the definition of the Act. So the order of Mandamus be issued directing to grant monthly allowance of Rs. 1500/- to senior citizens of

60 years of age and to form the belated committees in accordance with Section 13 of the Act.

Pleading on behalf of the respondents the Prime Minister and the Office of Council of Ministers, learned Deputy Attorny Mr. Shri Krishna Bhattarai contended that the state being aware of its responsibility towards the senior citizens has put into effect the Senior Citizens' Act, 2063. Although Section 2(a) of its Act has defined as senior citizens as those of 60 years of age, it has become necessary to redefine senior citizens on the basis of age criterion and to determine the amount of allowance to be granted based on the financial capacity and the resources at the disposal of the state. In the beginning, the allowance was fixed at Rs. 100/- and it was later revised up to Rs. 500/- per month. As the issue calls for determining the limit and criterion for fixing the allowance, the court should not interfere as it is concerned with policy matter. The enforcement of the provision of the Act regarding the formation of the committees also is a matter to be addressed gradually by the Government of Nepal taking into account the necessity and appropriateness in course of time. Therefore, the claim that the senior citizens reaching 60 years of age are all entitled to receive social security allowance is a topic that does not fall under writ jurisdiction. So the writ petition be dismissed was the pleadings of the government counsel on the ground that such an act would prove to be an inappropriate intervention.

Having reviewed all the facts of the case file and after reflecting on the pleading of both parties to the case, it appears that the issue to be resolved is whether or not the writ is worthy for issuance as claimed by the petitioner.

The main contentions of the petitioner concerning this dispute can be framed in the following terms: The budget speech delivered by the Finance Minister for the Fiscal Year 2066/2067 underlined the continuity of monthly allowance of Rs. 500/- granted for the senior citizens. But, since the amount is inadequate to meet the basic needs of the elders, it is pleaded that the allowance should be raised to Rs. 1500/- per month. At the same time, since the eligibility for the monthly

allowance is limited only to senior citizens attaining 70 years of age, it is pleaded that all elderly citizens attaining 60 years of age, come under the definition of a senior citizen in accordance with Section 2(a) of Senior Citizens' Act, 2063. Since this Act of granting allowance could sound discriminatory as it is against the provision of law, all the senior citizens must be given the same amount of allowance without discrimination. The committees will have to be constituted as laid down in the Section 13 of the Act. Hence, to that effect, an order of Mandamus be issued is the pleading of the petitioners.

In the written replies of Office of Prime Minister, Office of Council of Ministers and Ministry of Finance, on behalf of respondents, it was mentioned that the allowances were granted to senior citizens in consideration of the limit set by the availability of resources and financial capacity of the state. It was also mentioned in the replies that determining the amount of allowance and fixing the age limit for the entitlement of allowance are factors related to the availability of resources of the state. There is no mandatory obligation to allot the resources for distributing allowances to senior citizens who have reached 60 years of age. Hence, the completion of 70 years of age was set as eligibility criterion while distributing social security allowances. So the contentions of the petitioners are untenable and issuing the writ is not justifiable.

Senior citizens constitute a significant segment of the society anywhere. To provide social security to them and to acknowledge the senior citizens' right to live with dignity reflects a key feature of a welfare and humanitarian society. United Nations, General Assembly has endorsed a certain principle regarding the senior citizens through Resolution No. 3091 passed on 16th December 1991. While ensuring their right to honorable livelihood with liberty and fundamental human right the principle has made a provision for extending social security and medical care facilities to the senior citizens. This has been laid down as a component of responsibility entrusted to the concerned state for ensuring the right to livelihood with dignity of the senior citizens in any society. Any initiative undertaken by a state for ensuring security, dignity and honor of the senior citizens tends to

reflect the commitment of the state toward human right, civil liberty and security. As a matter of fact, the society comprising of segments of senior citizens is a testimony of living history and human reflection of a state or society covering a certain period of the past. The fulfillment of duties and responsibilities by a state toward its senior citizens tends to reflect its identity as a dutifully abiding state committed to human rights and democratic values.

Although aging of a person is a natural phenomenon, being an elderly citizen due to natural process must not lead to such a situation whereby citizen of such a state feel neglected and are being considered as a burden to the state. In case such a situation happens to exit, it may be deemed as a deplorable stain for the whole human society. Therefore, it has become the duty of the state to ensure the creation of an environment whereby the senior citizens also can enjoy all the human rights at par with other citizens in an honorable way, without discrimination and with secured livelihood. For this purpose, the state has to adhere to a plan of social security for providing medical treatment, care taking, priority in public service and other facilities granted to the senior citizens.

The Interim Constitution of Nepal, 2063 has incorporated fundamental human right in an extensive form and has made a provision of social security to senior citizens to enable them to lead lives with dignity. The sub-Article (9) of Article 35 was thus inserted in the policy so that the benefits to those citizens could be ensured. In the same way, sub-Article (17) of the same Article was intended to ensure granting allowances to the elders as prescribed by law. The Government of Nepal has brought into enactment various laws and has enforced them directing to abide by the role and responsibility of welfare states as envisaged in the Directive Principles of the state and the State Policies mentioned in Article 34 and 35 of the Interim Constitution, 2063 respectively. In that process Senior Citizens' Act, 2063 was enforced adhering to the main objective of providing social security and ensuring a livelihood to the senior citizens of the nation. In the same spirit, Nepalese citizens attaining 60 years of age were defined as senior citizens. The Act has made a provision for the formation of

Central Senior Citizens Welfare Committee at the central level and the District Senior Citizens Welfare Committee in every district with the objective of caring, nursing and providing social security to all senior citizens. Apart from the definition, it has laid down duties and responsibilities of the state toward the senior citizens, obliging the state to provide Senior Citizens Welfare Fund, care-taking service centers etc at the central and district levels. The Act contains special provision for giving priority to senior citizens for providing the services granted by the state. Section 24 of the Act deals with granting allowances to benefits to the senior citizens as defined, by categorizing all beneficiaries into senior citizens, helpless senior citizens and disabled (physically impaired) senior citizens as defined by the Government of Nepal.

Against this background, GON, for the last few years the Government of Nepal have granted allowances to senior citizens aiming to provide them social security through budgetary provision as stated in the budget speech. The allowance of Rs. 500/- per month given to the senior citizens completing 70 years of age has been continued as per the Budget Speech for the Fiscal Year 2066/2067. While reflecting on the claim of the petitioners which states that the monthly allowance of Rs. 500/- is inadequate to meet the cost of medical treatment of the elders and as against the rising inflation and the senior citizens reaching 60 years of age should have also been included, acknowledging their legitimacy for the allowances. But in contradiction to the provision of the Act, only those citizens reaching the age of 70 and above were being granted the allowances where as all the senior citizens alike are to be declared eligible for receiving the allowances etc were the contentions of the petitioners. The related Section 24 of the Act has laid down the provision for allowance distribution to senior citizens as categorized in accordance with the stated criterion and the actual amount of allowances or facilities to be availed to them should be fixed as per the stated criterion and the authority has been delegated to the Government of Nepal. Although a separate regulation to put into effect such categorization has not been drafted as yet, the constitutional guidelines for pursuing the responsibilities of a welfare

state and the provisions of the Senior Citizens' Act, 2063 enable the government to avail allowances to the certain age group of senior citizens on the basis of a criterion taking into consideration of the available resources and the financial capacity of the government. It is not viable to provide the allowance to all senior citizens defined in terms of age limit of 60 years flatly at one time following the same criterion. The plausible criterion for determining the age limit of senior citizens for granting allowance by the state should take into account several relevant factors such as the total number of senior citizens, their social and economic status, extent of financial liability due to allowance distribution at the disposal of the state, and the financial limit set by the economic condition of the country. It would not be justifiable for the court to meddle in such matters in resolving the issue through writ jurisdiction. At the outset the amount of such allowances was fixed at Rs. 100/- per month and it has lately been raised to Rs. 500/-. Since the senior citizens are being provided with monthly allowance along with its periodical increments, taking into consideration of such factors as financial resources of the state including their outlets, national economic condition, and assessment of the necessity of the facility meant for senior citizens, it would not be appropriate for the court to interfere in such an affair.

So far as the issue raised by the writ petitioners calling for the formation of the Central Senior Citizens Committee as per Section 13 and the District Level Senior Citizen Welfare Committee as per Section 15 of the Senior Citizens Act, 2063 is concerned, Section 13(1) of the Act has provided for the formation of Central Welfare Committee by publishing notice in the Nepal Gazette to address the concerns related to providing care, nursing and the social security services to the senior citizens. The committee will have to be constituted under the chairmanship of Minister of State, Ministry of Women, Children and Social Welfare with 18 members as announced through the publication of notice in Nepal Gazette. Similarly, Section 15(1) of the Act provides for the formation of 7 members District Level Senior Citizens Welfare Committee chaired by chairperson of the District Development Committee. Section 14 of the Act underlines the

details of functions, responsibilities and authorities of the Central Senior Citizens Welfare Committee. Similarly, Section 16 of the Act has elaborated the functions, responsibilities and authorities of the District Senior Citizens Welfare Committee. The Central Committee is required to formulate the policy, plan and the program aiming at providing protection and social security to the senior citizens and submit the related documents to the Government of Nepal for approval. The Central Committee is entrusted with the role of implementation and the monitoring of the policy, plan, and program once it is endorsed by the Government of Nepal. It is apparent that the Central Committee is given wider responsibility of monitoring the activities of Care Centers, Day Care Centers, Senior Citizens' Clubs as well as institutions mandated for the service of senior citizens all over the country.

An overview of all provisions of the Act concerning senior citizens, one gets an impression that the formation of legal devices in the form of Central Senior Citizen Welfare Committee and the District Level Senior Citizens Welfare Committees are constituted with the purpose of taking concrete decision on matters concerning policies and social welfare activities on behalf of the state. It appears that central and district level committees are meant for advising the Government of Nepal on matters related to various social welfare activities. The services and facilities to be provided by the state including the welfare programs to be implemented to ensure the provision of social security to the senior citizens are entrusted to those committees. The senior citizens welfare committees formulate necessary policy, modality of programs and determine the allowance etc on the basis of national data collected in regard to senior citizens and give necessary advice to the Government of Nepal, while taking into consideration the limit of resources and the financial capacity of the Government of Nepal. All provisions incorporated in Senior Citizens Act, 2063, that are meant to enhance the welfare of the senior citizens do not admit for enforcement easily in the absence of committees as provisioned in the Act. So it has become necessary that the Central Senior Citizens Welfare Committee and the District Senior Citizens Welfare

Committees be constituted at the earliest possible to oversee the implementation of all activities designed for promoting welfare of senior citizens.

The written replies from the office of the Prime Minister and the Office of the Council of Ministers do not indicate the formation of the committees as envisaged in the Section 13 and 15 of the Senior Citizens' Act, 2063. It is indeed undesirable to remain ineffective in addressing the need for the formation of the committees as provisioned in the Act for an unlimited period of time. Against the above perspective, the directive order is issued to the respondents, the Prime Minister and the Office of the Council of Ministers, to form the Central Senior Citizens Welfare Committee and the District Senior Citizens Welfare Committees within three months period from the date of receiving this order. The respondents are notified through Attorney General's Office enclosing the copy of this order.

I concur with the above decision.

Justice Prakash Osti

Done on this day of 5th Falgun, 2066 (17th February 2010)

Translate by Shyam Bahadur Pradhan

The provisions of the national laws shall prevail in disputes arising from arbitration. Our Appellate Court is not authorized to act going beyond the limitation set between the parties to the agreement they originally entered.

Supreme Court, Division Bench

Hon'ble Justice Khil Raj Regmi

Hon'ble Justice Bharat Raj Upreti

Writ No. 2779 of the year 2062

Subject: Certiorari & others.

Petitioner: Bikram Pandey, authorized on behalf of Kalika Swochhanda, Kanchanjungha JV located at Kathmandu Metropolitan City (KMC), Ward No.4, Maharajgunj, district Kathmandu.

Vs.

Respondent: Ministry of Physical Planning and Works, Department of Roads and others

- **The provisions of arbitration in UNCITRAL Rules do not ipso facto apply as the laws of the land. Its application and binding force are attained through agreement and only as condition of that Rule, the provisions of a Rule are applicable to the parties of the same agreement, and shall have to be abided.**
- **Since the provisions of the Rule are not binding in nature as are the national laws, the parties may restrict the applicability of any of the provisions. Hence, the scope of the Rule depends on the terms and conditions between the parties to an agreement.**
- **In case nothing is mentioned in the agreement between parties to a dispute as regards the appointment of**

arbitrators as per the provisions of Section 7(1) (a) and (b) of Arbitration Act, 1999 or in case no arbitrator could be appointed following the above procedure, then the authority to appoint arbitrators in such cases shall rest with the Appellate Court itself.

- **When a party to a dispute, after being committed to resolve a dispute according to the process laid down in the agreement and which is conscious of its right to appoint arbitrator(s) from its side, does not appoint as such after the request from the first party to do so, then it shall be deemed that the party has relinquished its right as such. In this light, when the first party which appoints arbitrator(s) from the latter party's side, then it cannot be asserted that the UNCITRAL Arbitration Rules have mandatorily provided for the appointment of arbitrator from the agency designated by the General Secretary of the Permanent Court of Arbitration.**
- **Whereas arbitrator could not be appointed following the process laid down in the agreement or when nothing is mentioned in the agreement as to the appointment of arbitrator, then when the provisions of national laws and UNCITRAL Arbitration Rules do conflict, in such a case, it has been explicitly stipulated in the Section 1(2) of the Rules, which form the main basis of the claim, that the provisions of national laws shall prevail. As such, in case the second party does not appoint its arbitrator, then the provision of Section 7(2) of the Arbitration Act, 1999 shall attract regarding the authority of appointing arbitrator from its side.**
- **The arbitrators appointed from both the sides to a dispute shall have to appoint the third arbitrator and the 3 member arbitration shall have to be retained. However, the act of Appellate Court itself appointing the third arbitrator, to reach the number of three arbitrators, has been seen as against the authority and jurisdiction.**

Decision

Bharat Raj Upreti, J; The brief facts and decision of the present writ petition filed in this court according to Articles 32 and 107(2) of the Interim Constitution of Nepal, 2063 are as follows:

The respondent Department had filed an application in the Appellate Court, Patan as per Section 7(1) of the Arbitration Act seeking appointment of arbitrator. An agreement was concluded between the respondent Department and my company on 18th April, 2001. When the contractor demanded amount more than what was stipulated in the agreement, then a dispute arose and the Department submitted the dispute before the adjudicator. On that, the adjudicator decided on 28th June, 2004 that the company is liable to receive additional amount of money. Upon that, the dissenting Department corresponded to my side asking for the appointment of Eng. Deepak Bhattarai as its arbitrator to enter into the process of arbitration. When I raised the issue of jurisdiction, the Department filed an application in the Appellate Court, Patan seeking appointment of arbitrator. Acting on that, the Court decided to appoint an arbitrator by itself. This decision of the Appellate Court is contrary to the laws and the contract agreement. In the Clause No. 25 of the agreement done between this JV and the Department of Roads, the procedure of dispute resolution is clearly mentioned. It has been laid down in Clause No. 25(3) of the agreement that: The arbitration shall be conducted in accordance with arbitration procedure published by the institution named and in the place shown in the contract data. Institution whose arbitration procedures shall be used: The United Nations Commission on International Trade Law (UNCITRAL) and the venue of arbitration shall be Kathmandu, Nepal. Hence it is beyond dispute that all the processes of arbitration shall be governed by the UNCITRAL Arbitration Rules. In such a scenario, the respondent cannot claim that a part of the provisions shall apply in its case, while, a part of, do not. In case of disagreement as regards the appointment of arbitrators, the provision of Rule 7.2 (b) of the UNCITRAL Arbitration Rules shall attract. As such, if no arbitrator is appointed through mutual consent or

if an official cannot nominate arbitrator within 30 days, then the party desirous of appointing arbitrator shall have to move to the General Secretary of the Permanent Court of Arbitration, Hague to designate official to appoint arbitrator as such and the official designated as such shall appoint the second arbitrator. Therefore, the respondent can move to the Court only after the attempts enshrined in the procedures above, which form an integral part of the agreement, have exhausted. Failing these procedures, the jurisdiction of the Appellate Court does not attract on a direct basis. In this light, the Appellate Court of Patan, without entering into the legal questions espoused in the complaints between the petitioner and respondent, unilaterally decided on 29th Chaitra, 2061 to appoint Mr. Chitra Deb Bhatta and Khem Nath Dallakoti who were presented and agreed upon by the respondent as well in accordance with the Section 7(3) of the Arbitration Act, 1999, as the arbitrators.

Section 6(3) of Arbitration Act, 1999 reads: In case there is a separate arrangement in the agreement as to the appointment of arbitrators, then the arbitrators shall be appointed as such. In other words the Act has accepted the preference of the process established in the agreement itself. Section 39 of the same Act reads: Notwithstanding what has been provided for in other prevailing laws, unless otherwise provisioned in this Act, no Court shall have jurisdiction over the matters regulated by this Act. Section 6(3) is the subject regulated by this very Act. Since the legal provision has conceded the agreement and its terms as the integral part, there is a binding situation to adopt the process of appointment of arbitrators as stipulated in the procedure itself. The agreement has laid down all the procedures to be compatible with the UNCITRAL Arbitration Rules, and not in parts. Hence the procedure encapsulates the matters right from the notice to arbitration to the winding up of arbitration. The UNCITRAL Arbitration Rules have arranged for a step-wise progression of these matters as well. Hence no discord arises to the fact that the process of appointment of arbitrator also falls under the same procedure. The procedure of dispute resolution is mentioned in Clause No. 25 of the agreement. As per the provisions of Clause No. 25 and 25(3) of the agreement, the whole of arbitration process shall be in accordance

with the UNCITRAL Arbitration Rules. As such, the respondent cannot claim that only a part of the provisions shall apply in its case and the rest could not. In case of disagreement as regards the appointment of arbitrators, the provision of Rule 7.2 (b) of the UNCITRAL Arbitration Rules shall attract. As such, if no arbitrator is appointed through mutual consent or if an official cannot nominate arbitrator within 30 days, then the party desirous of appointing arbitrator shall have to move to the General Secretary of the Permanent Court of Arbitration, Hague to designate official to appoint arbitrator as such and the official designated as such shall appoint the second arbitrator. Thus, in a scenario where the respondent has not attempted to appoint arbitrator as per the procedure which forms an integral part of the agreement, then it cannot seek for the appointment of arbitrator as per Section 7(3) of the Arbitration Act and neither the Appellate Court can appoint as such. The best peculiarity of the arbitration process rests in the dispute settlement through private procedure, agreed in advance. When the respondent fails to adopt the previously agreed UNCITRAL Arbitration Rules, then it cannot take the defence that it has complied with the procedures of agreement neither the Appellate Court, Patan can decide that arbitrator could not be appointed even while following that process. Hence the decision of the Appellate Court, Patan is flawed.

Section 4 of the Contract Act reads: The parties to the contract are autonomous as to determine the measures of dispute settlement in accordance with the contract. The parties here too have accepted the prevalence of UNCITRAL Arbitration Rules, however, the respondent has not even tried to appoint arbitrator as per the Rule and has hypothetically adopted the misinterpretation that arbitrator could not be appointed as per the provisions of the contract, after elapsing the stipulated deadline. The decision of the Appellate Court which was taken without delving into what has been enshrined in the UNCITRAL Arbitration Rules, agreed upon by both the parties, as regards the appointment of arbitrators, has clearly flouted No. 85 of Chapter on Court Management of Country Code(Muluki Ain) and accepted principles of justice too. In the process of appointment of arbitrators, until the respondent furnishes all the proofs that all the measures of

appointment have been undertaken, till then the jurisdiction of Appellate Court as per the Section 6(3) of Arbitration Act, 1999 does not arise. The Appellate Court, Patan has termed this legal question posed by us as a procedural mistake and it has been interpreted that this question can be cleared by the tribunal of arbitrators itself. This resembles an illusion as to the facts on the side of the Court.

Therefore, as per the UNCITRAL Arbitration Rules, in the light of appointment of arbitrators not even being started and the jurisdiction not being arisen according to Section 7(3) of Arbitration Act, 1999, the decision of Appellate Court, Patan lacks jurisdiction. Hence, I urge for the revocation of Appellate Court, Patan's decision of 29th Chaitra, 2061 through an order of certiorari. The writ petition filed in this Court on 16th Ashwin, 2062 by Kalika Swochhanda-Kanchanjungha JV read as above.

Acting on the writ petition, the Court on 6th Kartik, 2062 ordered to send notice to the respondents for obtaining written replies within 15 days excluding time for journey, as to know what in fact has happened and why order as demanded by the petitioner should not be issued. The order also clarified to duly submit the case before the Court once the written reply is received or the time-limit is expired.

As to this effect, the respondent in its written reply has stated that: Upon differing with the decision of the adjudicator's decision of 14th Ashar, 2061 enabling the Company of the petitioner to receive an additional payoff of Rs.14, 64, 204- apart from the amount prescribed in the agreement, the Department of Roads applied to the Court seeking the Court itself to appoint an arbitrator as per Arbitration Act, 1999. Hence the petition should be dismissed as the process to appoint the arbitrator as mentioned in the terms of agreement has been flouted. In the written response filed by the respondent, it was argued that the petition is bound to be dismissed as the process of UNCITRAL Arbitration Rules provided for in the agreement has not been followed while appointing arbitrator for dispute resolution. However, as per Clause 25.2 of the agreement done between the petitioner and respondent on 18th April, 2001 has laid down that the party which is dissenting towards the adjudicator's decision may move

to arbitration for resolving the dispute. In the same stage, whether procedural mistakes have been committed or not may also be scrutinized. Hence, the application submitted before the Court according to Section 7(2) of Arbitration Act, 1999 seemed to be lawful. As such, the Court on 29th Chaitra, 2061 decided to appoint Mr. Chitra Deb Bhatta and Khem Nath Dallakoti whose names were approved by the respondent as well, as arbitrators pursuant to Section 7(3) of the same Act. Hence, the writ jurisdiction cannot be moved to repeal a lawful decision of the Court. Therefore, the writ petition of the petitioner should be dismissed. The written reply furnished by Appellate Court, Patan on 12th Mangshir, 2062 read as above.

Moreover, the written response filed by Department of Roads on 24th Mangshir, 2062 read: There is no clear provision over appointing authority for arbitration in the contract data of the present contract. Besides, in Clause 3 of the Contract data, it has been clearly mentioned that the law that applied to the contract is law or laws of Nepal. Hence, Department of Roads filed an application before the Appellate Court, Patan pursuant to Section 7(3) of Arbitration Act, 1999 seeking the appointment of arbitrator from the side of this Department. The decision of the respected Court on 29th Chaitra, 2061 appointing the arbitrators is in congruence with the provisions of contract agreement. The Department after duly appointing arbitrators from it side and after repeatedly and unsuccessfully requesting the respondent to do so, the respondent tried to evade its responsibility in appointing its arbitrators, by interpreting about the arbitration tribunal itself, in place of the Court. Following this, the Department moved the Court to appoint the arbitrator and the Appellate Court, Patan appointed them in the same vein. None of the fundamental and legal rights of the respondent have been infringed upon through this act. The Department dissented over the decision of adjudicator in the dispute of payment between this Department and respondent, repeatedly requested the respondent to appoint its arbitrators, as per the provisions of contract agreement, in course of seeking dispute settlement through arbitration. As such, the writ petition of respondent which has ignored the affirmative efforts of the Department and which has challenged the decision of the Court duly appointing the

arbitrators bears no rationale. Hence, as the decision of Appellate Court, Patan on 29th Chaitra, 2061 is within its jurisdiction and according to law, the writ petition of the respondent be dismissed.

On the writ petition duly submitted before this Court, Learned advocate Mr. Satish Krishna Kharel representing the petitioner's side argued: In the dispute ensuing between petitioner and the Department of Roads, the contract data has laid down that after the decision of adjudicator has been made, in order to appoint arbitrator according to the UNCITRAL Arbitration Rules, application shall have to be filed before the Secretary General of the Permanent Court of Arbitration, Hague. However, the respondent has filed its application in the Appellate Court, Patan and the Court invoked its jurisdiction. Both the acts are flawed and lack jurisdiction. Hence the decision from an unauthorized sector shall have to be repealed. Likewise, learned Joint Attorney Mr. Krishna Prasad Paudel, representing the respondent side argued: The agreement speaks merely of following the procedures of UNCITRAL Arbitration Rules, how to appoint an arbitrator is not disclosed in the contract agreement and as the process of appointing an arbitrator is not stipulated in the contract, the Appellate Court is entitled to appoint arbitrator as such. Hence the decision of Appellate Court, Patan is lawful and should not be repealed.

Upon considering over the decision, there was a contract agreement between me, the petitioner Kalika Swochhanda-Kanchanjungha JV and Road Development and Maintenance Project (RDMP) under the Department of Roads, Government of Nepal to upgrade the Gorusinghe-Sandhi Kharka road. The respondent Department took the issue of contractor demanding extra payment for the works before the adjudicator upon which the adjudicator decided that the contractor is entitled to receive additional payment as demanded. After dissent with that decision, the prescribed course of action for the side wanting to appoint an arbitrator is to apply before the Secretary General of the Permanent Court of Arbitration, Hague. However, contrary to the contract agreement, the Department moved to the Appellate Court, Patan. As per the Arbitration Act and Contract Act, the Court should not have accepted such application. However, the Court invoked its

jurisdiction and decided to appoint arbitrators all by itself. Hence, I urge for the repeal of that decision. This is the content of writ petition. On the other hand, the written reply counters this on the ground that there is no express provision pertaining to the appointment of arbitrators in the contract agreement, there has been a delay on the appointment process, and the Court can appoint arbitrators as it has been written in the contract agreement that the Nepalese laws shall apply. Hence the writ petition should be annulled. Between the parties to this dispute, there is a general agreement as to the following facts:

a) The party dissenting towards the adjudicator's decision may move the dispute before arbitration.

b) In the contract between the parties, Nepalese laws shall apply.

c) The UNCITRAL Arbitration Rules shall apply as to the actions relating to arbitration.

d) There is no provision in the contract agreement as regards dispute over the appointment of arbitrator, when one side of the dispute does not help the other side leading to the non-appointment of arbitrator and how to appoint arbitrator in such scenario. The agreement is also silent as to who is the appointing authority of arbitrator as such.

The parties are agreeable on the major facts which form the crux of dispute. However, the bone of discontent lies in the facts that there is no provision in the contract agreement as regards dispute over the appointment of arbitrator, when one side of the dispute does not help the other side leading to the non-appointment of arbitrator and how to appoint arbitrator in such scenario. The agreement is also silent as to who is the appointing authority of arbitrator as such. Clause No. 25 provides for the applicability of UNCITRAL Arbitration Rules and the Section 7(2) (b) of the Rules authorizes only the Secretary General of the Permanent Court of Arbitration, Hague to appoint arbitrator or name an appointing authority. The writ petitioner claims that the

appointed authority only can nominate arbitrator as such. On the other hand the principal stand of respondent Department of Roads is that in the contract agreement between the parties to dispute, it has been laid down that Nepalese legal provisions shall apply. Hence, the power to appoint arbitrator shall rest with the Appellate Court according to Section 7 of the Arbitration Act, 1999 as there is no express mention of the appointing authority in the contract agreement. The Appellate Court, Patan also nominated two arbitrators on the very same basis. As such, this Court has to decide precisely on whether the Appellate Court has the power to appoint arbitrator on behalf of the petitioner or not. While considering the arguments of legal practitioners of both sides, claims made in the writ petition and the contents of the written replies, the following questions need to be resolved in order for reaching a decision:

1. What is the nature of UNCITRAL Arbitration Rules and in what circumstances the provisions herein apply to the disputes raised from any contract or agreement?
2. Whether the UNCITRAL Arbitration Rules apply or not in the process of appointment of arbitrators and the authority to do so. If they are applicable, in the present dispute pertaining to the authority of appointing arbitrators, the provisions of Nepalese laws and that of UNCITRAL Arbitration Rules are in conflict or not.
3. In case of conflict between the provisions of Nepalese laws and that of UNCITRAL Rules of Arbitration, which one shall prevail?
4. Whether the Appellate Court, Patan possesses the necessary jurisdiction or not to appoint arbitrators in the present dispute.
5. Whether the decision of Appellate Court, Patan to appoint Mr. Chitra Deb Bhatta and Mr. Khem Nath Dallakoti as arbitrators acting on the application of petitioner is lawful or not.

While considering the nature of UNCITRAL Rules of Arbitration, we have to observe the provision enshrined in Article 1 of the Rules which reads as:

Article 1

1. Where the parties to a contract have agreed in writing* that disputes in relation to the contract shall be referred to arbitration under the UNCITRAL Rules of Arbitration, then such disputes shall be settled in accordance with these Rules subject to such modifications as the parties may agree in writing.
2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

*Model Arbitration Clause

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note: Parties may wish to consider adding:

a) The appointing authority shall be …… (name of institution or person);

b) The number of arbitrators shall be …… (one or three)
c) The place of arbitration shall be ……(town or country)
d) The language(s) to be used in the arbitral proceedings shall be..

Upon observing the above provision enshrined in Article 1 of the UNCITRAL Rules of Arbitration, this Rule is not subject to its independent use. The Rule shall apply as the term of contract only when the parties to a contract agree in writing to submit a dispute in

relation to contract before the arbitration under the Rules. The model clause of arbitration agreement has been supplied in the Rule and in that model there is flexibility as to the number of arbitrators, appointing authority, etc.

From the above provisions, the arrangements of arbitration in UNCITRAL Rules do not ipso facto apply as the laws of the land. Its application and binding force are attained through agreement and only as condition of that Rule, the provisions of a Rule are applicable to the parties of the same agreement, and shall have to be abided. Since the provisions of the Rule are not binding in nature as are the national laws, the parties may restrict the applicability of any of the provisions. Hence, the scope of the Rule seems to be undisputedly dependant on the terms and conditions between the parties to an agreement.

Upon considering the second question of the process of arbitrators' appointment and authorization which is the fundamental claim espoused in the writ petition, the petitioner seems to have taken the claim that as regards the procedure of appointing arbitrator(s), Article 7(2)(b) of the Rule only the Secretary General of the Permanent Court of Arbitration, Hague is authorized to nominate an appointing authority for such, as UNCITRAL Arbitration Rules are applicable in the process of such appointment. As such, the act of Appellate Court, Patan of naming the arbitrators, lacks authority and jurisdiction. This is the claim of writ petition. On deciding about this issue, it needs to be ascertained in what circumstances, the Secretary General of the Permanent Court of Arbitration, Hague is authorized to nominate an appointing authority for such and in which circumstances the agency designated by national laws or the courts shall have the authority to do so. This issue needs to be decided in the context of the provisions laid out in Article 5 of the UNCITRAL Arbitration Rules about the number of arbitrators and Article 7 about the process of appointment of arbitrators in case more than one arbitrator has to be nominated. As per the provision of Article 5 of the Rule, in case there is no mention about the number of arbitrators in the agreement between the parties, then the number of arbitrators shall be three in case the defendant side does not agree within 15 days of receipt of arbitration notice, that

the number of arbitrators shall be one. Similar arrangement has also been made in the Section 5(1) of Arbitration Act, 1999. Hence, as regards the number of arbitrators, the provisions between the UNCITRAL Rules and Nepalese arbitration law do not seem to conflict. In the agreement between the parties, number of arbitrators has not been stipulated and instead it is provided that the actions of arbitration shall be conducted as per the UNCITRAL Rules of Arbitration. Moreover, as per the provision in Article 5 of the Rules, as there was no previous consent over a single arbitrator, there have to be three arbitrators by default. On this basis, the Department of Roads deputed Mr. Deepak Bhattarai as an arbitrator from its side and communicated the same to the contractor, herein the writ petitioner. However, the writ petitioner failed to appoint arbitrator from its side, as claimed in the written reply of Department of Roads. Hence, the act of Department of Roads of naming Mr. Deepak Bhattarai as its arbitrator seems to be in accordance with the Clause No. 25 of the contract agreement between the parties, Clause 25 of the contract data as well as in harmony with Articles 5 and 7(1) of the UNCITRAL Rules of Arbitration. As such, it cannot be agreed that even an effort was not initiated to appoint arbitrator as per the UNCITRAL Rules of Arbitration. As no revocation was sought of appointing Mr. Deepak Bhattarai as an arbitrator, his appointment shall sustain and no further elaboration is necessary regarding this.

The respondent Department of Roads seems to have moved the Appellate Court, Patan after it appointed its arbitrator and after the petitioner's side failed to appoint arbitrator from its side and inform the respondent Department of Roads as per Article 7(2) of the UNCITRAL Rules of Arbitration. On the other hand the petitioner seems to have moved this Court after objecting the appointment of arbitrators by the Appellate Court, Patan without following the process of UNCITRAL Rules of Arbitration. As per Article 7(2) of the UNCITRAL Rules of Arbitration, the authority to appoint arbitrator(s) rests with the appointing authority designated by Secretary General of the Permanent Court of Arbitration, Hague and not with the Appellate Court. This constitutes the chief stand or claim of the writ petitioner side.

Upon deciding that, we have to study the whole provisions laid down in Article 7(2) (a) and (b) as well as 7(2). As per the arrangement made in Article 7(2), as the second party (herein the petitioner) fails to appoint arbitrator from its side, the first side (herein the respondent Department of Roads) has to move the appointing authority to name arbitrators from the first side, if such an authority is prescribed in the agreement. In the agreement between the parties to dispute, no such authority is provided for. Hence, only in case there is no mention of appointing authority in the agreement or in case the appointed authority does not nominate the arbitrators, then only, if the side willful of appointing arbitrators so desires, the authority of the Secretary General of the Permanent Court of Arbitration, Hague to designate an appointing authority shall commence. However, pursuant to Section 7(1) (a) and (b) of the Arbitration Act, 1999 of Nepal, it has been laid down that in case there is no mention of appointment of arbitrators in the agreement between the parties or in case arbitrators could not be appointed by adopting the process of agreement, then the Appellate Court shall have the authority to appoint arbitrators as such. In the present controversy, both the circumstances as envisioned by Section 7(1) of the Arbitration Act, 1999 are present: Since the petitioner failed to assume its liability to appoint arbitrator from its side as per Article 7(2) of the UNCITRAL Arbitration Rules and at the same time under the given situation, there is no mention on the appointing authority for arbitrators in the agreement between the parties. In such a scenario, the Appellate Court has named the arbitrators. Moreover, there does not seem to be a mandatory situation where-in the first party (herein the Department of Roads) has to move the Secretary General of the Permanent Court of Arbitration, Hague to designate an appointing authority for the sake of nominating arbitrators for the second party. In the Article 7(2) (b) of the Rules, it has been stated that: The first party may request the Secretary General of the Permanent Court of Arbitration, at The Hague to designate an appointing authority. Here the term **'may'** does not hold an imperative intent, rather it seems to accord discretionary right to the desirous party either to follow the processes laid down in the national laws or to request the Secretary General of the Permanent Court of Arbitration, at The Hague. Several

reasons may necessitate the need of providing the first party that initiates the proceedings of arbitration, with the choice of decision as to approach to which agency for appointment of the arbitrators. Particularly, in relation to the agreements involving companies, organizations or individuals of two different nations, this discretionary power assumes significance. In case the initiating side of the arbitration deems that it can have an easy and fair access to justice by the arbitrators selected by the appointing authority designated by the Secretary General of the Permanent Court of Arbitration, as compared to appointing the arbitrators through following the procedures of domestic laws, then the initiating side may apply for the nomination of appointing authority before the Secretary General. However, if it deems to appoint arbitrators pursuing the process of the domestic laws by considering the factors of time and cost, then Article 7(2) (B) of the Rules has provided for the freedom to the first side, i.e. the willful side to do so. This freedom has also not been curbed by any of the provisions of the domestic laws or the Rules either. While naming arbitrators through this process, no adverse impact shall be cast on the rights of second party, i.e. the side not nominating its arbitrators. When a party to a dispute, after being committed to resolve a dispute according to the process laid down in the agreement and which is conscious of its right to appoint arbitrator(s) from its side, does not appoint as such after the request from the first party to do so, then it shall be deemed that the party has relinquished its right as such. In this light, when the first party which appoints arbitrator(s) from the latter party's side, then it cannot be asserted that the UNCITRAL Arbitration Rules have mandatorily provided for the appointment of arbitrator from the agency designated by the General Secretary of the Permanent Court of Arbitration.

Yet another issue is also worth contemplating in this regard. In case there is no mention of appointment of arbitrators in the agreement between the parties or in case arbitrators could not be appointed by adopting the process of agreement, if the provisions on whom to appoint arbitrators come into conflict between national laws and the UNCITRAL Arbitration Rules, then the provisions of national laws shall rule over. This has been expressly stated in Article 1(2) of the

UNCITRAL Arbitration Rules which the petitioner has taken a main basis for its claim. As such, when the writ petitioner, i.e. the second party does not appoint arbitrators from its side, then the provision of Article 7(2) of Arbitration Act, 1999 shall attract as to the authority of appointing arbitrator from its side. Hence, the jurisdiction seems to remain with the Appellate Court, Patan to appoint the second arbitrator from its side as the side has failed to appoint one on its own. In this context, it cannot be agreed to the claim of the petitioner that the act of invoking of its jurisdiction by Appellate Court, Patan and the subsequent decision is contrary to the provisions including those of Article 27(2) (b) of the UNCITRAL Arbitration Rules.

Now let us ponder over the last issue. After the respondent Department of Roads appointed Eng. Deepak Bhattarai as an arbitrator from its side and moved the Appellate Court to appoint second arbitrator from the non-cooperating second party in the arbitrator appointment process, the Court has appointed two persons, viz. Mr. Chitra Deb Bhatta and Mr. Khem Nath Dallakoti as arbitrators. As the Appellate Court appointed two arbitrators, acting on the application of Department of Roads seeking the appointment of second arbitrator for the other side, after it duly appointed Mr. Deepak Bhattarai as an arbitrator from its side. As such, this Court has to decide whether that decision of the Appellate Court is in consonance with the provisions of Arbitration Act, 1999 and of the UNCITRAL Arbitration Rules. On deciding that, one has to look at the provisions stipulated in Sections 5 and 6(4) of Arbitration Act, 1999 and Articles 5 and 7(1) of the UNCITRAL Arbitration Rules. Section 5 of Arbitration Act, 1999 prescribes that in case the number of arbitrators is not fixed in the agreement, their number shall be generally three. A provision of similar intent is also made in Article 5 of the UNCITRAL Arbitration Rules. After one arbitrator each from a party is appointed from the two contesting parties, the third arbitrator is appointed by these arbitrators themselves unless provided otherwise in the agreement. This provision of Section 6(4) of the Arbitration Act, 1999 is also resembled in Article 7(1) of the UNCITRAL Arbitration Rules. However, in this dispute, after the respondent Department of Roads dissented on the decision of adjudicator and started proceedings for arbitration as per

the terms of agreement and accordingly named Eng. Deepak Bhattarai as arbitrator from its side and since the petitioner failed to appoint an arbitrator from its side, the Department of Roads moved to the Appellate Court, Patan seeking the Court's appointment of an arbitrator on behalf of the defaulting side. As such, whereas only one arbitrator was to be nominated, the Appellate Court, Patan appointed two such arbitrators. Hence, this decision of the Court is found to be in contrast with Section 7(1) of the Arbitration Act, 1999 as well as Article 7(1) of the UNCITRAL Arbitration Rules. It is evident that in case the number of arbitrators is not fixed in the agreement itself, then the number of arbitrators to be appointed for dispute resolution is three indeed. However, the Appellate Court is not authorized by prevailing laws to make the number three by appointing two of them itself. As soon as the respondent Department of Roads appointed Eng. Deepak Bhattarai as an arbitrator form its side, then the writ petitioner shall have no right to declare whether such appointment is appropriate or not. Moreover, after such appointment, even the Department of Roads cannot annul such appointment as an arbitrator. He shall remain in office as long as he does not tender his resignation willfully. Hence, his nomination should be seen as the appointment of first arbitrator. The arbitrator appointed by Appellate Court to represent the side unwilling to appoint one shall be the second arbitrator and the arbitrator nominated by these two arbitrators shall be the third one. This process shall mark the completion of appointment of all the three arbitrators as prescribed in Section 6(4) of the Arbitration Act, 1999 as well as Article 7(1) of the UNCITRAL Arbitration Rules. The arbitrators appointed from both the sides to a dispute shall have to appoint the third arbitrator and the three member arbitration shall have to be retained. However, the act of Appellate Court itself appointing the third arbitrator, to reach the number of three arbitrators, has been seen as against the authority and jurisdiction.

As analyzed in the above chapters, the act and decision of the Appellate Court, Patan dated 29th Chaitra, 2061 of appointing Mr. Chitra Deb Bhatta and Mr. Khem Nath Dallakoti as arbitrators have been repealed as they have been found to be in contrary to Section 6(4) of the Arbitration Act, 1999 as well as Article 7(1) of the

UNCITRAL Arbitration Rules, which represents the term of agreement. As the decision made by the adjudicator regarding the dispute between the opposing sides of contractor and Department of Roads is not an ultimate, binding decision and the appropriateness of such verdict is still in the process of review and since the dispute has to be resolved by way of arbitration as prescribed in the terms of agreement, it has been found that settlement of this controversy forms the subject matter of interest, concern and right of both the litigants. As the dispute settlement process is found to be obstructed owing to the non-appointment of arbitrator from the petitioner's side, removing that hindrance has been found to be indispensable to facilitate for justice also. Hence, this Court issues an order of mandamus in the name of Appellate Court, Patan to duly appoint the second arbitrator representing the petitioner's side, as requested by the respondent Department of Roads. The notice of this decision should be sent to the Department of Roads via the Attorney General's Office. The case file shall be duly handed over after writing it off from the registry.

I concur with the above decision.

Justice Khil Raj Regmi

Done on the day of 24th Jestha, 2067 (7th June, 2010)
Translated by Bishnu Prasad Upadhaya

The eminent domain right of the state in regard to acquisition of land will be created through law. Hence the state is liable to provide just the compensation as constitution guarantees the rights over private property of the citizens.

Supreme Court, Division Bench

Hon'ble Justice Balaram K. C.

Hon'ble Justice Mohan Prakash Sitaula

Writ No. WO - 0662 of the year 2063

Subject: Certiorari & others

Petitioner: Netraraj Pandey, resident of Dumarwana Village Devlopment Committee Ward No. 9

Vs.

Respondent: Office of The Prime Minister and Council of Minister, Singhadarbar and others.

- **The ownership of the petitioner's land was transferred into the Mill's name duly following the process of law; and after removing entry the name of petitioner from the record, such land is considered as to be sold. In this context, the petitioner seems to have no Locus Standi.**
- **Only if the acquired land is not used as promised by the written document made under Section 4(c) of the Land Acquisition Art, 2034, except this, the land once acquired could not be returned to the expropriated land owner.**

- **When land is acquired from a person by using eminent domain right of the state under Land Acquisition Act, 2034BS, the expropriated land owner shall get the price of the land as per the market value of the land; practiced at the time of acquisition plus migration cost as of compensation.**
- **The consequence of the acquisition of the land is considered equivalent to the selling and buying of the land, because the petitioner has got or will have got the price of the land as per the market value of the land; practiced at the time of acquisition; and, the price of the house, shed etc, if any; and, paid cost or cost to be paid for the migration from one place to another place for residence or business purpose or for the losses thereof.**
- **The acquired land can not be return to the petitioner, because, the Sugar Mill had established and came into operation after acquisition of the land, and, after its close down, the acquired land is decided to be used for the establishment of Special Economic Zone by the government.**

Decision

Balaram K.C., J: The brief facts of this writ petition filed under Articles 32 and 107(2) of The Interim Constitution of Nepal and verdict thereupon are as follows:

The petitioner has claimed that the 14 plots of land, total area of 8-9-0, comprises plot No. 1, 5, 6, 7, 8, 15, 16, 34, 37, 43, 45, 61, 72, 74 situated at Dumarwana Village Development Committee Ward No 6, are inherited to me and under my title after the death of my mother. Those plots of land were acquired by the then His Majesty Government according to the previous Land Acquisition Act, 2018 BS, for the purpose of development of Sugarcane farm for the *Birgunj Sugar mill limited (Biruanj Chini KarKhana Limited).* However, due to the dissolution of the *Birgunj Sugar Mill Limited* by the then His Majesty Government, according to the Privatization Act, 2050BS, by

publishing notice at Nepal Gazette, dated 2059-11-16, I do not make this *Mill* as a respondent.

According to Section, 34 of the Land Acquisition Act, 2034 BS, and Land Acquisition Act, 2018 BS if the Acquired land is not utilized for the purpose, for which it has been acquired, the acquired land shall be returned to the expropriated land owner. It becomes obvious that those plots of land are not necessary to the Mill, and, will not be utilized for the purpose of development of Sugarcane farm, for which it has been acquired, because a sealed tender notice has been published on 2057-5-23 at the *Gorakhapatra* News Paper to give this land to the lease for five years. So I approached to the District Administration Office as an expropriated land owner along with an application (dated 5057-07-08, Reg. No. 5919) requesting to return the said land to me. However, the said office did not take action on this petition, so I went to the *Appellate Court Hetauda* with the writ petition of *Mandamus* requesting for the issue of the writ of *Mandamus;* but, Appellate Court also dismissed the petition, saying that the Local Administration did not take any action. So, again I knocked the door of Supreme Court with appeal against the Appellate Court's decision. However, Supreme Court also delivered its judgment with sustaining the Appellate Court decision.

These plots of land were acquired by the then His Majesty Government for the purpose of development of sugarcane farming. Land Acquisition means it is acquired for the purpose of public work, public interest, public utility or for the benefit of the people at large. That was construed and made clear by the Supreme Court in 2024B.S in writ No. 410. If the proposed work has not been done, the land shall be returned. Due to the acquired land was not utilized to Sugarcane farming, the Mill has already been returned (transferred) near about 50 *Bigha* land; situated at *Chhata Pipara VDC of Bara* District; to His Majesty the Government, according to Section 4(3)(1) of Land Acquisition Act, 2034 BS.

The said land has been transferred as per the decision of Land Revenue office *Bara* dated 2062-7-7, which was known to me on 2063-9-20 after obtaining the duplicate copy of the decision. The act

of transfer and registration of the land into the name of Nepal Government without any purpose is mischievous and so voidable.

Without having taken any action on my petition, the action of making transfer of the title of the land into the name of Ministry of Commerce, Industry and Supply is against the legal provision of Section 34 of the Land Acquisition Act, 2034 BS. Thus, such illicit action of making transfer and registration of land has encroached my property right conferred by the Constitution. I request the Court that such mischievous decision should be quashed by issuing an order of *certiorari*, and, I also request the court to issue an order of mandamus, or any other appropriate order or decree to return the said land in my name by accepting the refunded amount of compensation money.

This Court issued show cause order for serving a notice enclosing a copy of the petition in the name of respondents asking them to make written reply within 15 days why an order as requested by the petitioner shall not to be issued? And, duly submit the case for hearing after submission of written reply of the respondents or after the expiry of stipulated time.

The written reply submitted by the Office of the Prime Minister and Council of Minister stated that the decision taken by the Council of Minister has made according to law for transferring the land which was under the ownership of *Birgunj Sugar Mill*, used for sugarcane farming totaling an area of 833-0-13 *Bigha* into the name of Ministry of Commerce, Industry and Supply for the purpose of establishing Special Economic Zone in order to appropriate utilization of the land. The acquired land could be utilized for another purpose if it is not utilized for the purpose for which it has been acquired; - this is the clear legal provision under Section 33 of the Land Acquisition Act, 2034 BS. Likewise, according to the Section 34(1) if the land is found unnecessary for the purpose for which it has been acquired or remaining land after using for such purpose; shall be returned to the expropriated land owner only if it was not utilized for any other purpose.

The land, as claimed by the petitioner for return has been transferred into the name of Ministry of Industry, Commerce and Supply for the purpose of establishing Special Economic Zone. Petitioner has

mentioned that he had file a petition at the Appellate Court in respect of this land, but without waiting Appellate Court's decision he came to the Supreme Court with this petition. Hence, the writ petition deserved to be dismissed. Besides, according to the Section 31 of the Land Revenue Act, 2034 BS an appeal can be lodged at the Appellate Court against the decision of the Land Revenue Office. On the basis of availability of alternative remedy writ jurisdiction could not be entertained. Thus, it is requested that the petition should be dismissed; State Council of Minister in its written reply.

The written reply submitted by the Ministry of Industry, Commerce and Supply contends that the said land claimed by the petitioner is among the plots of land which was duly acquired by the government according to the prevailing law. After dissolution of the *Birgunj Sugar Mill*, the total area of land 833- 0-13 *Bigha*, including above mentioned land, under the ownership of Mill, has been transferred into the name of this Ministry for the purpose of establishment of Special Economic Zone as per the legal provision that permits acquired land could be utilized for another purpose under the Section 33 of Land Acquisition Act, 2034 BS. Hence, it is requested that the writ petition should be dismissed.

The written reply submitted by the Chief District officer of District Administration Office Bara states that the Chief District Officer or District Administration office has no discretionary power regarding the acquisition and return of the land. In this regard, if the government issue any order according to the law that will be implemented accordingly. Hence, it is requested that the writ petition should be dismissed.

While hearing this petition which now presented before this Bench after being duly enlisted in daily cause list, the learned senior advocate Krishna Prasad Bhandari and advocates Shree Prasad Pandit, Shiva prasad Sigdel, Balmukunda Shrestha and Sudarsan Tiwari appearing on behalf of petitioner, have argued that the land including petitioner's land had been acquired according to the Land Acquisition Act, 2018BS for the operation of *Birgunj Sugar Mill,* and, has been utilized for the development of sugarcane farming. Section 34 of the Land Acquisition Act, 2034 BS and Land Acquisition Act,

2018 BS has stated that if the Acquired land is not utilized for the purpose, for which it has been acquired, shall be returned to the expropriated land owner.

Birgunj Sugar Mill has been already dissolved by the then His Majesty Government according to the Privatization Act, 2050BS, by publishing notice in Nepal Gazette, dated 2059-11-16. And, since the *Mill* did not require the said land for the purpose of development of sugarcane farm, it has already returned the land to the then His Majesty Government according to the Land Acquisition Act, 2034 BS. In this context, the acquired land should be returned to the expropriated land owner, however, according to the decision of District Land Revenue Office dated 2062-7-7 as directed by the decision of Council of Ministers dated 2062-1-28; this land has been transferred into the name of Ministry of Industry, Commerce and Supply.

As above mentioned legal provision, Nepal government is obliged to return the land to the expropriated land owner if it has not been utilized for the purpose, for which it has been acquired. Without having return, government could not utilized citizen's property for any other purpose whatever it like. The government had obligation to return the land to the expropriated owner, but instead of having return the land to the expropriated land owner government took the decision making transfer it into the name of the Ministry of Industry, Commerce and Supply. Therefore, the decision concerning to the transfer of the ownership of the said land into the name of Ministry of Industry, Commerce and Supply is against the legal provision mentioned above, and voidable. Hence, it should be quashed by the order of certiorari, as well as an order of mandamus also be issued in the name respondents to return the land into the name of petitioner which was under his title.

The learned Deputy Attorney Sarad Khadka appearing on behalf of the Office of Prime Minister and Council of Minister has argued that there is no dispute on the fact that compensation has been given to the petitioner while his land was acquired. Once, if the land is acquired by giving compensation it is clear that the land has come under the ownership of the government. The disputed land was acquired for the purpose of operation of the Sugar Mill, and the said Sugar Mill has

come into operation. So the petitioner holds no right to say that the land has not been used for the purpose. In the context, where government has changed its policy and decided to dissolved the Sugar Mills operating it up to forty years, no one can said that government has no right to use the land of its ownership for the purpose of establishing Special Economic Zone under its own control and ownership. Government has not sold this land to others thinking that the land is unnecessary; rather the land has been held on, as per the policy of the government only for the broader national interest. According to the legal provision as mentioned Section 33 of the land Acquisition Act, 2034 BS the land which was acquired for the institution under the full ownership of the government it can use the acquired land for any public work after dissolution of such institution. Hence, the writ cannot be issued as demanded by the petitioner, so that the petition should be dismissed.

After hearing the pleading presented by the learned legal practitioners the following questions are required to be settled before reaching the conclusion:

- Whether or not the expropriated land owner has the right to claim for the return of the land even after duly acquired it according to the legal provision of the Land Acquisition Act, 2018 (2034)?
- In which condition the land acquired by the government shall be returned to the expropriated land owner?
- Whether or not an order shall be issued to return the land to the petitioner as demanded by him?

Whereas, dealing with the first question to be decided, first of all, constitutional provisions in respect of land acquisition need to be observed. For that, it requires to be observed the constitutional provision of repealed Constitution of the Kingdom of Nepal 2047BS and current Interim Constitution of Nepal 2063BS. Both Constitutions seem to have largely similar provision regarding the fundamental right of the right to property. The provision regarding the land acquisition is mentioned under the fundamental right of the right to property. When state acquires land from person, it resulted in deprivation of him/her

from exercise of the property right on such land. So that, the Constitution has guaranteed that personal property shall not be acquired without having given just compensation, and the acquisition of personal property for private purpose is prohibited. Land could be acquired only for public purpose and only after giving reasonable compensation. This is mentioned as a fundamental right. Because of the similarity of the provisions, regarding to the right to property between previous and current constitution here is analyzed the provision of Article 19 of the Interim Constitution of Nepal 2063BS.

The right to property has been placed under Article 19 of the Interim Constitution of Nepal 2063 BS as fundamental right. Clause (2) of the Article 19 has stated that the state shall not, except in the public interest acquire or requisition the property of any person; and Clause (3) has stated that the compensation shall be provided for any property acquired by the State according to law for public interest.

The provision of the Clause 2 of the Article 19 is fundamental right for the person and right of Eminent Domain for the state. The right of Eminent Domain is the right of an exclusive and superior right over all the property available within state. Under this right, state has right to acquire all kinds of property of person within the state, only for public purpose, public work and public interest; and, only after providing compensation. In another terms, in any kinds of jurisprudence or Constitutional setting and state system; state can acquire citizen's property only for public interest and public work only after providing just compensation under the right of the state as mentioned under Article 19(2).

Regarding the state power in respect to acquisition of property for public interest, in Constitutional Law of the United States, Hugh Evander Wills says:

> *"Eminent Domain is the Superior Domain of the State over all the property within the state. It is not an accident of tenure but an offspring of political necessity. It differs from taxation. In that the taxation is the contribution levied on people whereas Eminent Domain is a compulsory sale of property to the government although both involve the taking of property. Eminent Domain differs from police power. In that the police*

power is not a taking of any rights whether of property or a person from people, but a limitation on the exercise of such rights by people, although the police power may also result in making people loses their property"

Like wise, regarding other inherent rights of every sovereign state has been mentioned in this way, -

"The police power is the legal capacity of sovereignty, or one of its governmental agents to delimit the personal liberty of persons by means which bear a substantial relation to the end to be accomplished for the protection of those social interactions which reasonably need protection. Taxation is a legal capacity of sovereignty or one of its governmental agents to exact or impose a charge upon persons of their property for the support of government and for the payment for any other public purpose which it may constitutionally carry out. Eminent domain is the legal capacity of sovereignty, or one of its governmental agents, to take private property for a public use upon the payment of just compensation. Eminent domain is not an accident of tenure, but like taxation and the police power, it is offspring of political necessity. It is the superior domain of the people as a whole over one individual and the power delegated to an agent of the people to take the private property of such individual."

Regarding the right of the state of taking property for public work; in the case of *Polard vs. Hagan*, Supreme Court of United States of America (*1845 "Law Ed.)* has said in this way, -

"The right which belongs to the property or to the sovereign of disposing in case of necessity and for the public safety of all the wealth contained in the state is called the eminent domain. It is evident that this right is in certain cases necessary to him who governs and is consequently a part of the empire or sovereign power."

There are two conditions regarding the sovereign right of Eminent Domain of every sovereign state. One of the conditions is that a state

can take private property only for public work in public interest. And, the second condition is that, while taking such private property just, prompt, adequate and effective compensation shall be given to the owner of that property.

In *Constitutional Law page 79)* Willoughby has said, -

"As between individuals no necessity however great no exigency however imminent no improvement however valuable, no refusal however un neighborly, no obstinency however unreasonable no offers of compensation however extravagant can compel or require any man to part with an inch of his estate."

It can be said that the Eminent Domain right of the state is as follows,-

a. Private property can be acquired for public work by giving compensation.
b. Private property cannot be acquired for private use even after providing compensation.
c. Private property cannot be acquired without providing compensation even for the public work.
d. After acquisition of property for public purpose by giving compensation, ownership of such acquired property is transferred into the government, and ownership of earlier owner cease to exist.

Considering on the inherent right of the sovereign state, Clause (2) of Article 19 of the Interim Constitution of Nepal, 2063 BS has conferred the right to the state about acquisition of private property for public work, and, Clause (3) has imposed the duty to provide compensation according to the system of law while requisition or acquire private property for public interest. In this way, after acquisition of private property for public work of public interest by giving just compensation according to the law, the ownership of such property transferred into the state from the owner. After that, the rights of previous owner on the property cease to exist. This is a recognized principle.

Another inherent right of the sovereign state is that state can nationalize foreign investment for public purpose or internal needs in

the time of necessity. The world of today is depends on foreign investment, world trade, liberal economy, foreign capital and technology. Foreign investors seek for stable state system, investment friendly legal regime, independent judiciary, stability of investment agreement - stability is given by the stabilization clause of an agreement. Investment agreement also assures that ex-parte change or amendment of facilities or immunities as provided by the agreement during the period of agreement shall not be made. In such agreement, the assurance clause of not being nationalization of foreign investment is also included. In the context of Nepal, it has been declared even by the law that industry shall not be put in nationalization.

An article on the heading of *International Arbitration between States and foreign Private Parties* (1981) published at *The American Journal of International Law, Robert B. von Mehren and P. Nicholas Kourides* has said that the act of nationalization of foreign investment is not considered to be legitimate by the international law. The act of nationalization is illegal, except, proved following conditions,-

I. It must be for a public purpose related to the internal needs of the taking state, and

II. It must be followed by the payment of prompt, adequate and effective compensation.

In this way, it can be recognized that nationalization (of foreign investment) could be made only to serve the causes of public purpose or internal needs (of the state) and after giving just compensation by the state's inherent right of sovereign.

Here, more discussion is not required on this issue, because this dispute is not related to the foreign investment.

Let consider on petitioner's claim. The land was acquired including petitioner in 2023BS for the purpose of the operation of development of Sugarcane farming, by publishing notice in Nepal Gazette which is - illustrated both by the petition and written reply of the respondents. At the given time of acquisition, the Land Acquisition Act, 2018 BS was

prevailed. Section 3 of that law had stated that the land could be acquired for the corporation or public work. The term 'public work' is defined in Section 2 (c), and, 'corporation' defined in Section 2(d). While considering both definitions, it seems that Sugar Mill falls under Section 2(d) and the work of Sugar Mill falls under Section 2(c). While acquisition of land, the criteria to be considered in determination of compensation to be given to the petitioner was mentioned in part III of that Act. There is no dispute on the fact that all the provisions mentioned at part III was considered while giving compensation to the petitioner. In this way, for the purpose mentioned in Section 2(c), by exercising the authority given by the Section 3, and by publishing notice in Nepal Gazette as mentioned at Section 4, and, in the given circumstances where complain was not file by the petitioner as per Section 6, and, by giving compensation according to the law after consideration of legal provision including part III, petitioner's land was acquired by the government for the Mill's purpose, after that, according to Section 17 the ownership was transferred into the name of Mill from the petitioner. In this way, the ownership of the petitioner's land was transferred into the Mill's name duly following the process of law; and after removing entry the name of petitioner from the record, such land is considered as to be sold. In this context, the petitioner seems to have no *Locus Standi*.

Therefore, the petitioner shall have no *Locus Standi* to claim for the return of the land which was acquired by giving compensation and by following the procedure as mentioned in prevailing law relating to the land acquisition under Clauses (a), (b) and (c) of Section 19 of the Land Acquisition Act, 2018 BS.

While considering the second question, the land seems to have been acquired for the purpose of development of sugarcane farming, as mentioned in Nepal Gazette published in 2023BS. There is no dispute on the fact that Sugar Mill was operated on this land until 2059 BS. And, there is also no dispute that the land including of the petitioner was acquired by the then government by following the law. The action of establishment of Sugar Mill is of the public interest. By the establishment of Sugar Mill thousands of citizens have got employment, thousands of farmers worked there, foreign imported

sugar was replaced by the domestic sugar production, and state had collected tax from the benefit of the Sugar Mill and has accrued its revenue. The Mill was operated near about forty years. It reveals that there is no dispute on the fact that the land had been used for the purpose for which it was acquired. And, there should be no dispute that, after operation of forty years long period the Mill was went to be closed down after government adopted the liberal economic policy with following the principle of government role is as a regulator/ facilitator instead of operating industries by itself for the purpose of appreciation of private sector through the policy of privatization of industrial business. The acquired land including of petitioner is found having used for the purpose for which it had acquired. Hence, the claim of the petitioner is found inappropriate.

The ownership of the said land has been transferred into the name of Nepal Government, Ministry of Industry, Commerce and Supply from the name of *Birgunj Sugar Mill;* according to the decision of the government dated 2062-1-28 for the purpose of establishment of 'Special Economic Zone' when Sugar Mill was went to be closed down in 2059-11-16.

Let consider on petitioner's claim that the land shall be returned to him, because the said land has not been used for the purpose for which it had acquired. Now, it is appropriate to observe the provision of Section 33 and Section 34 of Land Acquisition Act, 2034 BS.

Section 33 of the said Act, states that the land acquired for one purpose may be used for another purpose, and Section 34 has mentioned that if the land found unnecessary shall be returned to the expropriated land owner.

Here, in this context, it is required to analyze the provision of Section 33 of the Land Acquisition Act, 2034 BS regarding the provision that if the land has not been used for the purpose for which it has been acquired and if the land is remained surplus upon using it, such land shall be returned to the expropriated land-owner.

Section 33 reads as follows:

Land Acquired for Purpose may be used for Another purpose: *In case the land acquired for the Government of Nepal or on institution*

fully owned by the Government of Nepal pursuant to this Act is not required for that purpose as it was acquired or there remains surplus land upon using it for that purpose, the Government may use such land for public purpose and the institution may use such land in the activity as mentioned in sub-Section (1) of Section 4.

The construction of this Section 33 is simple and to interpretation of this Section, shall be appropriate to apply the principle of literal interpretation, - interpretation of law by its literal meaning. In order to draw the meaning of the terms, - the land is not required for that purpose as it was acquired. Here it is to understand the provision of related legal provisions under Sections 3, 4, 5, 6 and 9 of the Land Acquisition Act, 2034 BS (currently, the Land Acquisition Act, 2034 BS is enforced after repealing Land Acquisition Act, 2018 BS). Section 3 of this Act regarding the right of the Government has stated that the government can acquire any land if it is needed for itself, for any public purpose. Likewise, regarding to provide land to the institution, Section 4 has stated that if any institution needs land not for the government the land will be provided upon request of such institution, for the purpose mentioned in the Clause (a) and (b) of sub-Section (1) of Section 4.

The action shall be taken according to Section 5, while acquisition of the land for the purpose mentioned under Section 3 and 4. After completion of the procedures mentioned in Sections 5 and 6, public notice shall be published according to Section 9 about acquisition of land. Such public notice is published according to the internal administrative decision reached on the basis of preliminary action taken under Sections 5 and 6. On that notice, the purpose of acquisition for which the said land is to be acquired shall be published as mentioned at Section 9 (1) (a). Or, according to Section 9 (1) (a) the purpose for which the land is to be acquired shall be published according to the Section 3 of the Act, - any development activities is to be conducted by the government, such as for the purpose of construction of roads and ways or hospital or factories or industries or schools or government buildings or any other economic developments activities, social works or works of any public benefit or works of any public interest etc. Whatever work is to be done, the proposed

programme of the work shall be published on that notice. In this way, when once acquired land has been utilized for the purpose as mentioned Section 9(1) (a) such land is considered to be used automatically for the purpose of acquisition.

Petitioner has claimed the return of the land by citing the provision of the Section 34.

Section 34(1) reads as follows; -

> *If any land acquired pursuant to this Act is found unnecessary for the purpose for which it has been acquired, or there remains surplus land upon using for such purpose, it shall be returned to the expropriated land-owner, unless it is otherwise utilized by the Government of Nepal or an institution fully owned by it under Section 33.*

The Section 34(1) is itself clear. The provision of Section 34(1) is to be analyzed by making it into two parts. First, provision is related regarding the return of the remaining surplus land, and the next is, - unless it is otherwise utilized by the Government or institution. Only if both conditions are met; government could return the land by accepting refunded money from expropriated land-owner. This is only a facility to an expropriated land owner not as a right.

There are two situations (mentioned in the law) for the return of acquired land, - First, if the proposed work would not be taken place according to Section (9) (1) (a), or in other terms, one of the two situation is that the acquired land could be returned in the condition when proposed operation of the work as mentioned Section (9)(1)(a) was canceled or suspended. This is the immediate situation at the beginning. It means acquired land can be returned in the situation when proposed operation of the work would not be started. The second situation is remaining unnecessary surplus land can be returned to the expropriated land owner if he/she refunds compensation money according to the Section 34(3), - only if the proposed operation of the work would not be started as published notice according to Clause (a) under Section (9) (1), and the proposed

land would not have otherwise utilized by the Government of Nepal or an institution for the work of any other public interest.

The acquired land can be otherwise utilized without using for the purpose of Section (9) (1) (a) of this Act. If the government can use acquired land for any other work without using for the purpose of Section (9) (1) (a), then, in the situation, when Mill has been closed after using acquired land for a long period as stipulated purpose under Section (9) (1) (a). In this situation, the petitioner seems to have no right to claim for the return of the land by misinterpreting or by drawing wrong meaning of the provision of Section 34. The provision of Section 34 is automatically become ineffective; if the land is acquired under Section (9) (1) (a) and has been used for the same purpose; or if the said land has not been used for the purpose under Section (9) (1) (a), but has been used for any other public work or work of any other public interest. The expropriated land owner will lost his/her capacity and right to claim for the return of the land according to Section 34(1) and (2), If the land has been used according to Section (9) (1) (a), or for any other work according to Section 34(1). Let petitioner should realize this. In this case, whereas government had acquired petitioner's land around 2023BS, and after operation of the Sugar Mill up to forty years, the purpose of the acquisition of the land under Section (9) (1) (a) has been fulfilled. In this situation, Section 33 and 34(1) can not be invoked, so that petitioner seems to have no right to claim for the return of the land. Hence, the demand of the petitioner is found inconsistent to the law.

While interpreting Section 34, Court should consider on the eminent domain right of the state, constitutional provision of the Article 19 of the Interim constitution of Nepal, legislative intent and objective of the Land Acquisition Act, 2034 BS and its various sections. Today's state is considered as a welfare state, but not a police state. It is the duty of the state that getting implementation of the Directive Principle and policy of the State, at the fast pace, as stated at part IV, and, full enforcement of the fundamental rights of the citizen enshrined by the part III of the Constitution. It is possible only through rapid economic development. Economic development activities are directed toward economic interest of the citizen. Land is basis of every development activities. And, land is required for economic development. Therefore

the provision of eminent domain right of the state is created for acquisition of land through this provision. Article 19 of the Constitution has contained the right of the citizen as fundamental right to get reasonable compensation for any property while acquired by the State. So that, the acquired land cannot be returned to the expropriated land owner in the situation when compensation is provided according to the law by following legal procedures. And, transformation of the ownership of the land as mentioned in Clauses (a) or (b) under Section 4(1) according to Section 22 and, after utilization of the land as mentioned Section (9) (1) (a), or after utilization or after making decision for utilization to any other purpose by the government according to Section 34(1). The objective of Section 34 for the return of the land is effective in the situations as mentioned above, only if the proposed operation of the plan or programme would not be started, and, the proposed land would not be otherwise utilized by the Government of Nepal or an institution, at the immediate stage.

Section 34 has contained the provision that the acquired land shall be returned if the land is found unnecessary for the purpose for which it has been acquired, or remained surplus upon using it. The interpretation of the Act about the meaning of the provision, - 'the acquired land shall be returned if the land is found unnecessary for the purpose for which it has been acquired' has already been made above. Here, it further states that remaining surplus land shall be returned, so that let consider on the meaning and implications of the provision of 'remaining surplus land'.

The 'remaining surplus land' signifies that not only the occupied land for the factory, residence etc according to the plan and programme for which the land was acquired, but also it indicates for long term purpose or programme as mentioned under Section 9 (1) (a). For example, - if the state acquired the land for the purpose of university, at the beginning, - there might be built administrative building, there might be built building for the teaching of some faculties, than gradually other faculties might be extended, might be built library, might be built recreation center or hostels for the students etc. The land can be used as a planned way according to the economic capability of the University. If the total acquired land has not been

used immediately at the beginning, only some part of the land has been used, and, some of the land is remained surplus, - it does not mean that the remaining unoccupied land is surplus and unnecessary land for the purpose of Section 9 (1) (a), so that, it can not be claimed for the return of the land according to Section 34(1).

While considering on the third question to be decided, if the acquired land is found unnecessary for which it has been acquired or remained surplus land; Section 33 of this Act has permitted that, whether there is government it can use such land for any other public work, and whether there is an institution, such institution can use such land for making residence for its staff, employee or labour in order to provide facilities to them, or can use for any other works of public interest, or can use for the operation of the programme related to the institution, or can make warehouse related to the transaction of the institution. The provision of Section 33 is applied for the situation in the context of immediate after acquisition of land. It means, the provision of Section 33 is applicable, if the land is considered, or found, or said to be a surplus, upon using the purpose for which it has been acquired; immediately after acquisition; by the institution for which the said land has been acquired. Still, in immediate context also, the land which is acquired by giving compensation according to law with following due procedure, is considered to be as such a land of bought through a deed; so that, the expropriated land owner shall have no right to claim for the return of such acquired land, even if such acquired land has been used for any other purpose under Section 9 (1) (a) or Section 33. If the surplus land is not required for ancillary work of acquisition purpose, that can be used for any public purpose.

Section 33 and 34 has contained the provision relating to the return of the unnecessary land. According to Section 34, if the land is found unnecessary for the purpose for which it has been acquired or if the land is remained surplus upon using it, and, only if such land was not utilized for any other purpose according to Section 33 such unnecessary land shall be returned to the expropriated land owner. The next condition for the return of the land has been mentioned at Section 34(2). It has said that the acquired land shall be returned to the expropriated land owner if the land is acquired for the institution which is not under the full ownership of the government, and, only if

such institution did not use acquired land as promised by the written document made under Section 4(c). Except this, if the land is acquired once, could not be returned in any other situations.

The Land Acquisition Act, 2034BS has been made for the fulfillment for the constitutional provision of Article 19 of the Interim Constitution 2063BS. The land can be acquired for the public work of the public interest. When land is acquired from a person by using eminent domain right of the state under Land Acquisition Act, 2034BS, the expropriated land owner shall get the price of the land as per the market value of the land practiced at the time of acquisition; and, plus migration cost as of compensation. Considering on this fact, Clauses (a) (b) and (c) Section 18(2), of Land Acquisition Act, 2034 BS has made sufficient and clear legal provision in this respect. The consequence of the acquisition of the land is considered equivalent to the selling and buying of the land, because the petitioner has got or will have got the price of the land as per the market value of the land practiced at the time of acquisition the price of the house, shed etc, if any and, paid cost or cost to be paid for the migration from one place to another place for residence or business purpose or for the losses thereof. Hence, the acquired land can not be return to the petitioner, because, the Sugar Mill had established and came into operation after acquisition of land, and, after its close down, the acquired land is decided by the government to be used for the establishment of Special Economic Zone. Hence, the writ can not be issued for the return of the land as demanded by the petitioner on the basis of the facts of the case, legal grounds and recognized principle of justice mentioned above. Therefore, the writ petition has been quashed. And the file of the case is handed over as per the rule removing from the record of regular proceedings.

I concur with the above decision.

Justice Mohan Prakash Sitaula

Done on this day of 19th Magh, 2065 (01 February 2009)

Translated by Kamal Prasad Pokharel

Where the series of facts sequentially linked with the crime committed are enough to prove the accused guilty the court will not spent extra time in the searching of direct or other types of evidences.

Supreme Court, Division Bench

Hon'ble Justice Ram Kumar Prasad Shah

Hon'ble Justice Gauri Dhakal

Criminal Appeal No. 3353 of the Year 2062

Case: - Culpable Homicide.

Appellant/Defendatnt: Charles Gurumukh Shobhraj, son of Bhawani Gurumukh Sobhraj, a resident of 20 Avenue Ivry, 75013 Paris, France and currently imprisoned in prison section Jagannath Dewal, Kathmandu

Vs.

Respondan Plaintiff: Government of Nepal, by the First Information Report of Gunahari Adhikari

- **The death of the deceased has been caused by homicide, and the criminal committing the offense should be punished and it is the duty of the court to sentence the offender even on the ground of indirect evidence.**
- **He/she should be equally cautious of the fact that the victims would get justice. The fundamental goal of the justice system is to provide justice in a balanced way to both accused and victims. The judgment made by focusing only one party cannot take the form of justice.**
- **Looking at the modus operandi used while committing the crime and the nature of crime it has been obvious that the criminal has committed the crime with full caution,**

carefulness and in planned and organized way. In such situation, the offender has to be reached based on indirect evidences submitted by the prosecution specially the circumstantial evidence and the accused should be punished if he/she is found to be guilty.

- **The court can decide whether the matters presented as evidence as per the law are relevant to this case or not.**
- **Interpol being the international organization of Police and recognized by the General Assembly of the United Nations established to make available of the information regarding the organized crime and the criminals at international level as well as to promote cooperation, the data provided by this organization regarding crime investigation cannot be held otherwise readily.**
- **Only the statement of the accused person whether confession or denial on the offense charged cannot take place of evidence on his behalf or against him. Instead that confession or denial must be corroborated by basic, factual and assertive evidences.**
- **Denial without any evidence the statement becomes meaningless and useless and in such condition the indirect evidence collected against the defendant shall be accepted as evidence by the court.**
- **If any accused pleads that he/she was elsewhere at the time that a crime was committed, the onus of proving that plea of alibi lies on the accused. Such plea of alibi if it is based on fact or corroborated by assertive or written evidence it can be admissible for the accused side. It is used as evidence against the accused if it could not be corroborated by indisputable and factual evidence.**
- **When the acts or conditions of behavior and activities of the accused are socially linked and it suffice to draw the conclusion that a criminal act was committed and it establishes that the accused has committed an offense, such hierarchical chain of facts is called circumstantial**

evidence. For it every series of the fact must be relevant to each other and interrelated and it is regarded as disproved (refuted) in absence of any one of these sequences.

Decision

Ram Kumar Prasad Shah, J.: The brief description of the fact and decision of the case filed in this court as an appeal pursuant to Section 9 of the Administration of Justice Act, 2048 (1991) against the decision of Appellate Court Patan dated 2062/4/20 (August 4, 2005) and decision thereof is as follows;

While going on patrolling at 7 A.M., under the road to Sinamangal from the new Chinese road from Kathmandu to Bhaktapur, the western side of the Manohara river, east from the tarred road, there was a gathering of some people we went there and saw a dead body of female aged around 18-20, the dead body was naked, burnt by spraying petrol, the back side of the dead body was burnt, the underclothes was also burnt by fire, the dead body seemed as if it was killed by stabbing with knife at the centre of the stomach near the heart region, the heridity of the deceased could not be identified, seemed like a European by sight. It is mentioned in the police report of head constable Gunahari Adhikari and others

Approximately,100 yards west from the Manahara river and about in distance of 25 yard north of the Araniko highway, east from the road to Sinamangal, south from the way to the rice field below the road within this periphery lay the dead body with the head to the western side, legs turned upward, burnt hair, closed eyes, the body burnt from head to leg. It was bleeding and bubble coming from the right nose, liquid gliding from the left nose, the both the nostrils were closed, tongue bitten by teeth, the whole body naked, both of the nipples of the breasts were not visible. There was bruise at the right breast around three finger-width, four wound near the heart's region, both of the hands pierced and folded and fingers burnt, the entire region of the vagina was burnt, a bracelet in the left wrist made whether of gold,

silver or brass was burnt, left ear wearing ornament was burnt (Jhumka), left leg of the corps burnt. With these features, about 18-20years of age, a dead body of female seemed like a tourist whose heredity cannot be identified. The left leg tied with a rope of cloth and about 6 inches of which a finger length measuring a Kuret) was left un-burnt, a bruise scare present at inner part of the left thigh, the left leg burnt wholly from foot to hip on the left side buttock making the inner bone and vein visible from outside, the posterior of both shoulders as well as the part between hip or waist wholly burnt showing the inner muscle, the middle part of the left arm wholly burnt, the right leg from toe to thigh burnt by fire and bubble grew and burst as mentioned in the deed of the examination of the dead body done in 2032/9/8/3 (December 23, 1975).

The report submitted by sub-Inspector of police Nanda Ram Shrestha and other states that while inquiring with the proprietor of the Oriental Lodge, situated at Jhonchhe of Kathmandu district it has been learnt that on 14 December, 1975 an American girl named Connie Jo Bronzich lived and after three days a Canadian Carriere Laurent (Male) came and lived in the lodge. On 2032/9/5 (December 20, 1975) Carriere left for Dhulikhel to stroll. After two days the American Connie Jo Bronzich also left the lodge saying that she would go to meet Carriere Laurent and both of them had not returned. KIRSTY M. MACMILLAN an Australian was called to the place where the dead body was located as per the information that she could identify Connie Jo Bronzich. She verified that the deceased was Connie Jo Bronzich. Other person Laurent had not been traced.

Timothi M. Lawless, holder of British Passport No. C 979827 staying in room No. 13 of Star hotel, in his statement made on December 12, 1975, has stated that Connie Jo travelled from Delhi to Kathmandu through his bus on 9 December, and stayed in Oriental Lodge in Kathmandu. He added that he saw her around 18/19 of December for the last time. He also added that he had heard that police was inquiring about Connie Jo.

> " I identified the body to be of Connie Jo and I remembered. There was a ring on her hand which I can remember wearing. I was also

> shown a bracelet which I identified as belonging to Connie Jo. I also identified an earring which I have seen Conni Jo wear knew and identified that as the ring, earring and the bracelet are worn by her. She added that she (Conni Jo) had told that she had met one Vietnamese jeweler who had lived along with his spouse in Hotel Soaltee Oberoi. I know that she had met them at that hotel". It is stated in the statement of Kristy Marion Macmillan an Australian Citizen, Address: 28, Anderson St. 1, East Geelong 3219, and Australia bearing Passport No. 728001, made on 24/12/1975

Autopsy report dated 2032/09/09 (December 24, 1975 mentioned that the death is occurred by sudden shock caused by bleeding due to strike in the heart.

The receipt made by the Vice Counselor of American Embassy, Alan Isthum undertaking the dead body of the deceased Connie Jo Bronzich from the morgue of Bir Hospital after the completion of the process of deed of examination of the dead body and post mortem dated 2032/09/10 (December 25, 1975).

Carriere Laurent looked like monostrous, gorgeous and poor person, whereas the dead girl Connie Jo Bronzich looked like a rich person. Carrier Laurent escaped to Bangkok via airlines and due to that, therefore I have confidence that Carrier Laurent murdered and threw Connie Jo Bronzich. It is stated in the statement made by Chandrika Lal Shrestha.

As American citizen Connie Jo Bronzich came to the hotel around at 16 hours of 2032/08/28 (14th December 1975) and asked for room, she was asked to stay in the room No. 27 and accepted and stayed there. The next day, I allowed her to stay at room No. 17. Thereafter she was making so much prattle and also the room No. 9 became vacant and she lived in the room No. 9. At 11:30 in the morning she came with one Canadian Citizen named Carriere Laurent and both of them stayed in the same room. On 20th December 1975 around 15:00 hours, carrying many of his belongings, the Canadian citizen Carriere Laurent said he would go to Dhulikhel and will be back after two days

but did not return thereafter. Connie Jo also went on December 22nd saying that she would return after meeting Carriere Laurent and both of them did not return. After knowing from the police that the dead body of the girl Connie Jo Bronzich had been thrown on Manahara river on 2032/09/08 (November 23, 1975).and also that Carriere Laurent has not returned till today. It has also been known that Laurent feed to Bangkok in 2032/9/8 via Royal Nepal Airlines Corporation; therefore, I believe that he had absconded after murdering the American citizen. It is written in the statement made by Ravi Bahadur Singh, the manager of the Oriental Lodge.

The Car bearing No. plate Ba. A. 5001 is of Gorkha Travels. I do not remember the exact date. About for last owned by one year I was driving the car as driver. I had driven the car till five on 2032/09/04 (December 19, 1975). Thereafter, I kept the car on motor garage and the next day the foreign passenger staying at Soaltee Hotel named "Dutch" had driven from the 5th to 8th . Now I do not know whereabouts of the person "Dutch" and also don't know about the death of the foreigner. I had not kept the blue pant found in the car during my driving period. I did not see how the pant was kept in the car after driving the car by the person "Dutch". It is stated in the statement made on 2032/09/18by Purna Bahadur Maharjan dated.

The deed of inventory of the goods belonging to Connie Jo Bronzich lay on Room No. 9 of the Oriental Lodge dated 2032/9/18 recorded the goods including blouse, sleeping bag, coat and shawl.

It has been known that Carriere Laurent has already flown to Bangkok at 11:30 on 2032/09/08 (November 23, 1975).and he has not returned to the Oriental Lodge after he left the hotel on 2032/09/05 saying that he would go to Dhulikhel. Carriere Laurent murdered Connie Jo Bronzich and absconded. It is stated in the report submitted by the Police sub-Inspector Nanda Ram Sherestha and others 2032/9/18.

> "On 2032/09/06 B. S. corresponding to 21 December 1975, the dead bodies of Canadian citizen Laurent Armond Carriere had been thrown in the bank of road of Sanga Pass (Sanga Bhanjyang) of Bhaktapur. Likewise, on 2032/09/08.B. S. corresponding to 23

December 1975 the dead body of American citizen Connie Jo Bronzich had been thrown naked on the bank of Manahara River after burning the dead body making its face unidentifiable. According to Ms. Jen, an Australian national, Connie Jo Bronzich had the acquaintance with the Vietnamese boy who was staying at Soaltee Hotel at that time. And also that the person had comfortable car and Connie Jo frequently went to meet him. While making enquiry at Soaltee Hotel it was found that no Vietnamese tourist had stayed at that hotel. However a boy with face like Sino-Indian and a European girl were staying there from December 18 and shifted to Hotal Malla on 24th December and come to live there again on the 25th and lived at room No. 415. While inquired about their name the Vietnamese boy told his name as Henricus Bintanja and the girl told her name as Cocky-Hemker and said that they were the citizens of Holland. The murderer of Laurent Carrier affixing his own photo in the passport of Laurent Carriere and forged his signature, and flew to Bangkok and returned the next day with the purpose of creating confusion that the murderer of Connie Jo was Laurent Carriere. Inquiry was being conducted with Henricus Bintanja and Cocky Hemker. They could not be taken into custody since there was no concrete evidence and sufficient suspicion against them. Therefore, they were allowed to stay in Soaltee Hotel under general supervision. It was learnt that they were in the room till 10 PM of December 27th however it was unknown when at what time or night they moved out. In the room No. 415, there were three suitcases, shoes and other garments. The nylon wallet left in the room was identified as belonging to the deceased Laurent Carriere as per the identification made by his brother Gilles M. Carriere. Information was received that foreigners were murdered in Bangkok also. According to the news received, it was learnt that all of them were intoxicated and their bodies were burnt by pouring gasoline. While going through the Bangkok Post of May 7th and 8th, 1976 it was published with the picture of Alen Gotier who was living in Kathmandu as Henricus Bintanja and Monic Le Clerk who was staying in Kathmandu as Cocky Hemker with the information that they were in the wanted list. Also

published in the Bangkok Post were the the photographs of four persons murdered in Bangkok namely Henricus Bintanja, his spouse Cocky Hemker, Teresa Knowlton and Stephanie Parry. Allen Gauthier stayed in the Soaltee Hotel in the name of Henricus Bintanja had written his passport No. as S 4869206 in the hotel registration card No. 6431 whereas, the passport number in the passport of Henricus Bintanja was S 438929. According to the opinion of the expert the letter and signature made by Allen Gauthier alias Bintanja in the registration card number 6449 of the Soaltee Hotel and the embarkation and disembarkation card filled by Laurent Carriere while flying to Bangkok on 23rd December 1975 and coming back the following day were similar. The elder brothers of Laurent Carriere named Giles M. Carriere verified and said the letter in the cards were not written by his brother. Now, on the basis of the information provided by this Interpol to Indian Delhi Interpol the news has been received that the Delhi Police had arrested Allen Gauthier and Monique Leclerc along with other three foreigners. According to the said news it was known that the real name of Allen Gauthier is Charles Shovraj and the real name of Monique Leclerc is Marie Andre Lucie Leclerc. Based on these evidences collected, it has been established that in combined conspiracy of the two persons Charles Sobhraj, who was staying in Kathmandu as Henricus Bintanja and Indian citizen Ajaya Chaudhari murder of the two foreigners had been committed. It is stated in the copy of the report submitted by S.P. Chandra Bir Rai dated 2033/4/20 (August 4, 1976) addressing to the Ministry of Home Panchayat for the purpose initiating proceeding for asking for extradition of the criminals arrested in India under the Extradition Act.

We had not met, seen and identified the deceased whose name is Connie Jo Bronzich as we know now, before her death and also we had not seen and known the dead male named Laurent Carriere who died in Sanga pass of Bhaktapur District. We had seen the deceased female named Connie Jo Bronzich thrown in the spot after murder in the morning on Tuesday dated 2032/09/08 (November 23, 1975), however, we do not know in which date they had been killed and who

killed them. We saw the photographs of the persons accused of killing, we have not seen and known them before. We also have not known the accuse French citizen's named as Charles Shovraj alias Allen Gauthier and Monique Leclerc as well as the Indian citizen Ajay Chaudhary whose names have been made known to us now. Only those three persons know in which circumstances and time they had murdered the deceased. We do not think that our Nepalese' would have consented in the killing of Ms. Connie Jo. We had heard later that the said culprits came to Kathmandu and stayed in different hotels, committed murder and left. It is stated in the deed of statements of the witnessess around the spot *(Sarjameen)* recorded in 2033/04/28 (August 12, 1976)

In the present case while carrying out investigation to find out who the perpetrator, on the basis of the evidence collected so far it came to be identified that the the persons who had stayed in the room No. 9 of the Oriental Lodge of Jhonchhe were American citizen's Ms. Connie Jo Bronzich and Canadian citizen Mr. Laurent Armond. Both of them had interest in collecting precious and ordinary fixed gems (stones) and had business of these things. Charles Shovraj Gurumukh told both of these persons that he was Dutch citizen and he stayed in Hotel Soltee from December 18 and moved to Hotel Mall on 24th and again returned to the Soaltee Hotel on 25th and stayed at room number 415. Mr. Charles Shovraj took in confidence of Ajay Chaudhary, resident of Delhi. Through Ajaya he came to contact with Canadian citizen Laurent Armond Carriere and Ms. Connie Jo Bronzich who were stayed at the Oriental Lodge at Jhonchhe and he, having known that Laurent Armond Carriere and Ms. Connie Jo Bronzich possessed precious goods made them believe that he himself also involved in the business of such precious and fixed stones. Ajay Chaudhary worked as mediator and facilitator winning the confidence of Laurent Armond Carriere and Connie Jo Bronzich who were staying in Oriental Lodge and making them come to Hotel Soaltee from time to time. Determining to murder Laurent Armond Carriere and Connie Jo Bronzich who were stayed in the Oriental Lodge Allen Gauthier alias Charles Shovraj Gurumukh, Monique Leclerc alias Marie Andre Lucie Leclerc and Ajay Chaudhary hired the Datson car of Gorkha Travels

Pvt. Ltd bearing the number Ba. A. 5001and brought Canadian Citizen Laurent Armond Carriere at the night of 2032/9/6, murdered and thrown him in the road situated in the Sanga pass of the ward no. 6 of Chittapol Village Development Committee of Bhaktapur district.

Since Connie Jo did not know about the conspiracy of murder Charles Shovraj Gurumukh and others in pretence of meeting Laurent Armond who had moved for Dhulikhel also brought Connie Jo Bronzich with them on the next day of the murder of Laurent Carriere at the night of December 22-23, 1975. (2032/09/07) at the passing of the night of 7th of Poush and onset of 8th of Poush killed Connie Jo Bronzich making the body unidentifiable and threw in the north part of Bhaktapur Kathmandu Arniko Highway located in the Sinamangal Village Panchayat of Kathmandu district and committed an offense under No. 1 of Chapter on Homicide of Country Code (Muluki Ain).

Thus, after committing homicidal killing of Laurent Armond and Ms Konnie Jo on the said date and throwing the dead body Charles Shovraj Gurumukh alias Allen Gauthier affixed his own photo in the passport of one of the murdered persons Laurent Armond Carriere. Ajay Chaudhary arranged for air ticket for Charles Shovraj and himself and Charles Sobhraj by making fake signature in the name of the deceased Laurent Armond flew to Bangkok on 2032/09/08 (November 23, 1975).at 11:30 and returned to Kathmandu the next day. Thereafter, one of the three culprits Monique Leclerc alias Marie Andre Lucie Leclerc who had not accompanied them came to stay once again at Soaltee Hotel with Allen Gauthier from Mall Hotel. In this way, they were staying in Hotel Soaltee as innocent persons concealing the crime. The accused persons Charles Shovraj Gurumukh alias Allen Gauthier, Monique Leclerc alias Marie Andre Lucie Leclerc staying in the name of Cocky Hemker, and Indian citizen Ajay Chaudhary after killing the above mentioned persons, absconded from the hotel at the night of 2032/9/12/7 escaping from criminal liability. After absconding in this way, it has been learnt from the Nava Bharat Times dated 13 July, 1976 that, when he was arrested in the accusation of robbing the Ashok Hotel in India, the accused persons confessed that they had also murdered tourists in

Nepal, India and other countries. Therefore, it has been established that the three persons including Charles Sobhraj have murdered Ms. Connie Jo Bronzich on the night of 2032/9/8 (December 23, 1975). Since the spot of event of the killing of Laurent Armond falls under the jurisdiction of Deputy Superintendent of Police of Bhaktapur district, the case should be lodged in the concerned court by the Deputy Superintendent of Police of Bhaktapur. Therefore, the murderer of the American citizen Ms. Connie Jo Bronzich, holding passport number F165439 killed in the said spot under Sinamangal of Kathmandu district, Charles Gurumukh Sovraj staying with the alias Henricus Bintanja and Marie Andre Lucie Leclerc alias Monique Leclerc stayed in the name of Cocky Hemker have been arrested in India and correspondence has been made through the Ministry of Home Panchayat on 2032/04/20 (August 5, 1975)for extradition under Extradition Act to initiate proceeding against them according to Nepal law and in case of absconded Indian citizen Ajaya Chaudhary search has been ongoing from Nepal Police and Nepal India Interpol International Police. Therefore, the culprit named Charles Shovraj Gurumukh alias Alien Gauthier, Marie Andre Lucie Leclerc alias Monique Leclerc and Ajay Chaudhary have been hereby charged under No. 1 of the Chapter on Homicide of Country Code (Muluki Ain) punishable under No. 13 of the same Chapter with the request to initiate proceeding after their presence in the court through their extradition or their finding or arrest. It is stated in the Charge Sheet.

In this case, while reviewing the case file it is written in the charge sheet filed jointly by the police and prosecutor that the case shall be initiated after the presence of the suspects through extradition, therefore let the case be postponed for now. It is mentioned in the order of Kathmandu District Court dated 2034//3/14.

Whereas this case has been postponed by the postponement order of this court dated 2034/03/14 (June 28, 1977), defendant Charles Shovraj Gurumukh has been presented to this court along with the letter of Kathmandu District Government Attorney Office dated 2060/06/30 (October 17, 2003)Ref. No. 777 this case has been reopened from the postponement. Let the case be registered in the

registration book of Government Cases as per the rule and let the case be presented before the bench for recording the statement of the defendant and other proceedings. It is stated in the order of the Kathmandu District Court dated 2060/06/30(October 17, 2003).

Charles Gurumukh Sovraj in his statement in the court has stated that he is unknown about the accusation of killing of the American citizen named Connie Jo Bronzich beneath the bridge located in the Ward No. of 5 of Sinamangal Village Development Committee of Kathmandu District at night of 2032/09/08. He has arrived in Nepal for the first time on September 01, 2003, and that he had never committed such crime and had been arrested from Royal Casino of Durbar Marg on September 19, 2003. He added that the statement that he had killed the American citizen Connie Jo Bronzich and thereafter affixing his own photograph in the passport of Laurent Carriere, flew to Bangkok and returned to Kathmandu on the next day, thereafter stayed in the Hotel Soaltee and absconded at the night of 2032/09/12 and arrested from Amir Hotel in the accusation of robbing the Hotel Ashok is false. He added that he had been arrested from the Vikram hotel of New Delhi on July 15, 1976. The arrest had been made in another case and the court had given him acquittal. He further added that he went to France after the case had been withdrawn by the Government of India in charge of absconding from Tihad Jail in 1986. He added that he had never used fake passport. He has not known to any person named Connie Jo Bronzich, Laurent Carriere and the persons mentioned in the file as Monique Leclerc, Henricus Bintanja and Ajay Chaudhary. He added that it is also untrue that he, Marie Andre Lucie Leclerc and Ajay Chaudhary killed Connie Jo Bronzich along the Manahara River in the night of 2032/09/07 carrying in the car number 5001 of Gorkha Travels and Tours on 2032/09/06. He has not known the person mentioned above. He has neither came to Nepal and hired any car nor had murdered anybody. A case has been filed against him relating to the use of fake passport he added. He added that he has been released in common date of attendance. It was relating to the registration card of the Malla Hotel and Soaltee Hotel. He saw the copy of photo attached in the files which were his photos. These were the pictures taken in the police

station in September 2003. He further added that he was the Assistant Producer of Film, TV program and Documentary and that he came to Nepal by obtaining visa to conduct research and study on handicrafts for TV Documentary with the request made to the French Embassy by his French Company. Prior to this, he had been acquitted from all the accusations. He pleaded that since he has not committed any crime in Nepal he had not been acquitted in any allegation. He added that he has been acquitted in allegation outside of Nepal. As he has not committed any crime, there need not be any of his witness and evidence and he was fully innocent in this case. It is stated in the statement made by Charles Gurumukh Shovraj before the Kathmandu District Court on 2060/07/03 (October 20, 2003).

In the jail, bail/general attendance order of the Kathmandu District Court dated 2060/07/03/02 (October 20, 2003), it is stated that the dead body of the deceased of this case Ms. Connie Jo Bronzich's has been found as burnt and the bag of deceased Laurent has been found in the room of the person stayed in the Hotel Soaltee in the name of Bintanja, the specimen signature taken from the defendant and the signature in his passport has been found to be similar with signature of the person lived in the name of Bintanja as per the expert's opinion. Those evidences available for the time being are admissible for the purpose of jail, bail or general attendance hearing as per the Evidence Act, 2031. Based on those evidences the defendant Allen Gauthier alias Charles Shobhraj Gurumukh stayed in the name of Henricus Bintanja be kept in judicial custody unless proved to be contrary pursuant to No. 118 (3) of the Chapter on Court Procedure and let him sent to Jail Section Kathmandu for that purpose.

The respondent Charles Shobhraj Gurumukh arrived in Kathmandu in December 1975 and stayed at the Hotel Soaltee the name of Bintanja Henricus. The dead body of the Canadian citizen Laurent Carriere who was staying together with Connie Jo had been found in Sanga of Bhaktapur on 2032/09/06. The nylon wallet of the deceased was recovered from the room number 415 of the Hotel Oberoi where the defendant had stayed and the cap, glasses and jeans pant of the deceased Laurent was recovered from the white car bearing the

number 5001 hired from Gorkha Travels and driven by the defendant. As per the statement of driver Purna Bahadur Maharjan it has been established that the car was hired by a foreigner. The dead body of the deceased Connie Jo was found in the solitary place in the morning of the 8th of Poush on the way to the place where the dead body of Laurent was found. On the day of 2032/09/08 (November 23, 1975).at 11:30 ,the respondent flew to Bangkok in the name of Laurent Carriere and returned the next day. The name of the defendant has been mentioned in the diary of the deceased Connie Jo. If the deceased Connie Jo had not been met in Kathmandu and there had not been relation with the defendant his name could not be mentioned in her diary. Kirsty Marion Macmillan has stated that Connie Jo used to go to meet the Vietnamese to meet him. Thus, it has been obvious that the defendant had meeting and direct relationship with Connie Jo and therefore, the defendant's plea that he had not come to Nepal at the date of occurrence of crime has been disproved. The defendant has been failed to submit proof of his presence elsewhere and therefore his plea of alibi is admissible as evidence against him. While making inquiry about this murder at the time of occurence of the crime the defendant had left his belongings in the hotel and absconded to India on taxi by road. There is similarity in the modus operandi of murdering the deceased and leaving the dead body making it unidentifiable by burning and selecting foreign tourists to kill. The facts mentioned above have been corroborated with each other and based on the circumstantial evidences analyzed above, it has been hereby decided that the defendant Charles Gurumukh Sovraj has committed culpable homicide of the deceased Connie Jo Bronzich. It is hereby so decided the defendant Charles Gurumukh Sobhraj has been sentenced to undergo imprisonment for life along with the confiscation of the entire property pursuant to No. 13 (3) of the Chapter on Homicide of the Country Code(Muluki Ain), 2020B.S.

In the report filed by His Majesty's Government against me does not consist any evidence relating to the murder of the so-called deceased Connie Jo Bronzich. The circumstantial evidences are important in absence of direct evidence. Those circumstantial evidences are speaking about the events. While it is said that conclusion can be

drawn through the proper evaluation of established relationship of these evidences with the event there exist no evidence having close relationship with the case. In the charge made against it is stated that it has been learnt from the so called confession from the Nava Bharat Times of 13th July, 1976 on the fact that after being arrested while living in India in the accusation of robbing the Ashok Hotel on the matter of killing of foreign tourists in Nepal, India and other countries. Against these grounds, it is charged that three persons named Allen Gauthier alias Charles Shobhraj Gurumukh along with Monique Leclerc alias Marie Andre Lucie Leclerc and Ajay Chaudhary had murdered Laurent Armond Carriere in Sanga and also murdered Ms. Connie Jo Bronzich in Sinamangal on the night of 2032/09/08. Whereas, the prosecution has not been able to submit, under the evidence part, the so-called confession given by me before the police in India. It is not also mentioned that what confession have I made against me. The charge sheet has been filed only on the ground of the news published on the paper stating that confession has been made. The so called confession made before the police authority of the foreign country and which is not submitted with the evidence lacks evidential value and therefore should not be admitted as evidence. With the letter of Interpol New Delhi, dated 24/09/2003, the photos of defendant Charles Sobhraj and Miss Marie Andre Leclerc have been sent stating that there is no reason to send the statements, which are not made or done. The court has held that the statement made by the defendant before Delhi authorities in India was admissible as evidence stating that both of the finger prints, one taken after the arrest of the defendant and the fingerprint of the defendant taken by the Indian authorities received through Interpol India are of the same person as per the examination report of the Centreal Police Laboratory dated 2060/07/06 (October 23, 2003) and that the defendant has given statement in the court that the Delhi Police had arrested him in 1976. Likewise, as the French Embassy in Nepal on 28 February, 1997, had asked for providing the documents related to the murder of two foreign tourists for the purpose of initiating proceeding against Sobhraj since he had been released from jail after 20 years of imprisonment in India. Showing these grounds, stating

that, these documents were received from authentic body/ institutions and that while considering whether these documents are admissible as evidences or not, looking at our judicial practices making reference of the principle propounded by the Supreme Court that Post Mortem Report conducted in the foreign country is admissible (Ne. Ka. Pa. 2022, part 6 p. 123 Decision No. 289) and held that the statement of the defendant made before the Indian authorities is admissible. The matter of admitting the postmortem conducted abroad as evidence and to admit the statement made before the police in abroad as evidence are totally opposite from the theoretical viewpoint and judicial values and standards. The documents prepared in the foreign country always remain under purview of suspicion. Within the country of Nepal also the statements made before the police is always under suspicion and there is compulsory provision of recording the statement before the court. The confession of the defendant made before the police is looked with suspicion and the defendant cannot be convicted on the ground of such confession unless it is corroborated by other direct evidence. Any judicial and existing jurisprudence does not recognize the so called statement taken in the foreign country. These are not admissible against the existing legal and judicial principles in Nepal and should not be admitted in evidence under No. 77 and 87 of the Chapter Court Procedure of the Country Code (Muliki Ain), and Section 5 (1) (2) (3), 6, 7, 8, 9 (1) (2) (3) and Section 10 (1) (2) of Evidence Act, 2031 (1974).

Among the evidence taken against me in the court are the matters that the pictures of Konnie Jo Bronzich, the deceased of this case and the picture of Laurent Carriere as well the picture of the Oriental Lodge in which they had stayed at that time, had been published in the pages after page number 208 of the book entitled 'The Life and Crimes of Charles Sobhraj. In addition to that, in the page no. 226 and 241 of the same book there is description about me, Connie Jo Bronzich and Laurent Carriere as well as the description of their killing and in the page number 349 so called one page long letter sent by Charles Shobhraj from the Tihad Jail was published. In that letter expressing the relationship with Marie Andre it was mentioned in the No. 5 that, “In none of her letters to her family did she ever mention anything

about the Nepal activities”. On these grounds showing that she had lived with the defendant in Nepal in 1975 in the name of Cocky Hemker charge sheet has been lodged against her and therefore, the statement made in the court with the plea that he has come to Nepal only on 1st September, 2003, has been repudiated. In the report of the then Superintendent of Police Chandra Bir Rai dated 2033/04/20, it is stated that the defendant had stayed at the Soaltee Hotel in the name of Bintanja Henricus. He was then kept under surveillance after enquiry, he had rented a car with number 5001 from Gorkha Travels and had absconded leaving his belongings at Soaltee Hotel. The defendant in his statement before the Indian official in New Delhi has stated that he had stayed in the Oberoi Hotel in Nepal in December 1975 in the name of Bintanja and was in Kathmandu during the murder of Connie Jo Bronzich. Likewise, the deceased Connie Jo and Laurent had stayed together at room No. 9 of the Oriental Lodge in Jhonchhe. Likewise, the dead body of Laurent was found in Sanga of Bhaktapur on 2032/09/06. The goggles, cap and jeans pant found in the car number 5001and the blue nylon wallet recovered from the room Number 415 of the Soaltee Hotel where Henricus Bintanja stayed belonged to Laurent as per the identification made by his brother Gilles Maurice Carriere. From the opinion of the expert, it has been revealed that the signature made in the embarkation and disembarkation card to and from Bangkok on 23rd and 24th December is similar to the signature made by Henricus Bintanja in the Hotel Soltee as per the report of the S.P. Chandra Bir Rai. Stating that those compared embarkation and disembarkation cards, recovered glasses, cap, jeans pant, wallet and hotel registration card the statement made by Marie Andre Lucie Leclerc before the Indian officials in 1976 also confirms that the defendant had meet Connie Jo in Kathmandu. The court has admitted the matters as proof stating that since there exist these proofs mentioned above and also that it was not reasonable to examine that evidence now because it was the crime occurred 29 years ago. Admitting those matters as proof is to nullify the Section 18 (1) (2) of the Evidence Act, 2031 and ignoring the provisions of Sections 3, 4, 5(1)(2), 6, 7, 8, 9(1)(2)(3), 10(1)(2) and Section 18 that prescribe the types and method of admitting the proof

on the basis of presumption. However, the matters admitted by the court as evidence do not fall under this. Publishing any matters in newspaper, publishing photographs of any one in it or and writing off hand in the newspapers cannot take the form of evidence. The book which is published as novel and considered as fiction by the publisher himself is not admissible as evidence only on the ground that photograph of the deceased Connie Jo Bronzich and the description about murder had been made on the book. That book is not admissible as evidence and has not been shown and read to me. It is absolutely wrong to admit such so called novels as evidence. It is obvious that the writer is motivated to earn profit by composing and selling a fictitious novel based on novice imagination.

The circumstantial evidence taken as ground against me on the basis of the statement made by Kirsty Marion Macmillan during the identification of the dead body of the deceased Connie Jo Bronzich on 24th December, 1975 as "She mentioned to us that she had met a Vietnamese jeweler and his French wife who were staying at Soaltee Oberoi. I know she visited them at the hotel" is itself controversial. It has not been shown and told to me. There is no existence of the deed of seizure of the different goods seized. The goods, which were said to have been identified, have not been submitted as real evidences. The charged of the killing of Connie Jo Bronzich has been made against me and it has been linked with the subject of the death of Laurent Carriere. I have been charged in this case with the presumption that the killing of Laurent and also the killing of other persons in Bangkok had been committed by me. However, it is obvious that there is no evidence against me about the killing of the deceased Laurent Carriere. The court has convicted me based on suspicion made in the paper about the murder of some persons in Bangkok and based on the description made in the paper referring the news published in newspaper of the confession made before the Indian Police, the report submitted by Chandra Bir Rai based on those news papers and in absence of direct evidence on the basis of modus operandi based on circumstantial evidence and on the fact that I arrived in Nepal only on 2003, the court misinterpreted the expert's opinion that the signature made in my passport and of the

Guest Registration Card of Soaltee Oberoi in 1975 may be of the same person and held that it was authored by the same person. Stating that since the defendant has taken the plea of alibi and he had to prove that he was elsewhere at the time of crime otherwise it is used against him, the court has convicted me based on circumstantial evidences. The chain of circumstantial evidence must be unbroken and there must not be any gap. However, there is no any relevancy of these matters.

To prove my presence in Nepal uncertain and presumptive opinion, given after examining in absence of original copy, has been admitted which is contradictory to the precedent established in Ne. Ka. Pa.2048, Vol. 5, Decision No. 4278 p. 186. I should not prove that I was not present in Nepal. I am a foreigner, a French citizen. There is no evidence of my visit to Nepal at that time. The fact that I had come to Nepal in the so called name of Henricus Bintanja must be proved by the plaintiff. There is no such evidence. I have no relationship with the deceased Connie Jo Bronzich. The so called deed of identification has been made without following the prescribed procedure and such document is not admissible as evidence. The prosecution has tried to accuse me on the ground that the address of Bangkok as Mr. A. Gautier, Kaint House has been mentioned in the diary of the deceased Bronzich. If I had any relationship with the deceased the address should be of Kathmandu. The name and address mentioned above is not mine. There is no evidence of my relationship and contact with the deceased. Instead, as said in the paper of Kirsty Marion Macmillan, the deceased was curious to buy morphine and heroin and therefore her relation with the organization of drug smugglers has been obivious. There is description of white car in connection to murder that is irrelevant. I have not hired any car and there is not any proof of that while had not come to Nepal. Therefore on the grounds of abovementioned reasons, law and precedent, the decision of the Kathmandu District Court is against the law and judicial principles, against the principle of evidence, but influenced by the story, monograph influenced by journalists propaganda and therefore should be quashed, and I should be acquitted. It is stated in the

appeal filed by the defendant Charles Sobhraj in Court of Appeal, Patan, dated 2061/07/13 (October 22, 2004).

The persons making deed at the time of event have not been testified, the expert examining the handwriting has not expressed the opinion that there is complete similarity but only says that there are some resemblances. The defendant has denied the crime and there exists no direct evidence to prove the offense of the defendant. In such situation it seems that there may be reversal in the decision of the district court. Therefore, let the Appellate Government Attorney Office be subpoenaed for discussion notifying the date of hearing and let the case be presented before the bench for hearing along with the other case related with this case. It is stated in the order of the Court of Appeal Patan, dated 2061/10/22

It has been obvious that Mr. Guna Hari Adhikari has appointed lawyer in the capacity of the informer, while submitting the report (Information) of the present case on 2032/09/08 (December 23, 1975), Head Constable Guna Hari Adhikari of Koteshwor Police Station has been mentioned. Therefore, he seems only a police personnel and there is no purpose of appointing a lawyer in capacity of reporter and it is not permitted by law therefore, he shall not be permitted to appoint a lawyer on his behalf. While issuing the order for calling the respondent in 2061/12/18, it has also been mentioned that the persons whose statement was recorded by the police at the time of inquiry (occurrence) has not been testified. Therefore, let the reporter Head Constable Guna Hari Adhikari and Constable Narayan Bahadur Khatri be called along with Chandrika Lal Shrestha, Ravi Bahadur Singh, Purna Bahadur Maharjan through the Office of Appellate Government Attorney Office, Patan and be testified and the case be presented for hearing as per the rule. It is stated in the order of court of Appeal Patan dated 2061/12/18.

I had operated a Lodge named as Oriental in Jhonchhe Street of Kathmandu about 30 years ago. The foreigners named as Carriere Laurent and Connie Jo Bronzich had stayed in my lodge. Recalling those days, I think that they had stayed there for 3 to 4 days and thereafter went to Dhulikhel. They did not come back again in my

lodge. I have heard that the boy accompanied Connie Jo Bronzich killed her, however, later I heard that Charles Shobhraj had killed her. I have not seen. I knew from the newspapers and radio about the killing of Connie Jo by Charles Shobhraj. I saw the deed made on 2032/09/11 in the Office of the Deputy Superintendent of Police Kathmandu as shown and the statement along with the signature and thumb impression (finger prints) are mine. The signature and thumb impression, made in the part *in presence of* the Sarjamin (deed of recognizance) dated 2033/04/28 mentioned, as the owner of the Oriental Lodge, are mine. What is written in the statement dated 2032/09/11 must be the same. In the statement of 2031/09/11 it was mentioned that Laurent Carriere had killed Connie Jo Bronzich flew to Bangkok, but later I knew that in reality it was not so, but the killing was committed by Shovraj. The news of killing is the matter of 30 years ago. As far as I know, I have known from the news of the Gorkhapatra and the Rising Nepal. In the deed made in the Office of the Deputy Superintendent of Police I did not mention that the murder was committed by Shobhraj. I have stated these matters now, as I have heard now and I have known from the newspapers. It is stated in the testimony made by Chandrika Lal Shrestha testified as per order in the Patan Appellate Court, dated 2062/01/15.

Since defendant Charles Shovraj, through the prison section, has urged for calling off the case file lodged in Bhaktapur District on 2033/09/22 and postponed on 2033/09/29/04 enclosing the copy of the charge sheet and order, let the case file caused to be received from the Bhaktapur District Court and the case be presented as per the rule. It is stated in order of the Appellate Court, Patan dated 2062/02/05 (May 18, 2005).

The plea of the defendant Charles Gurumukh Shovraj that he had not come to Nepal in 1975 has not been established and it has been proved and corroborated that he had been Nepal at that time. Since the wallet of the Canadian citizen named Laurent Carriere, who stayed in the room No. 9 of the Oriental Lodge with the deceased Connie Jo Bronzich, has been recovered from the room No. 415 of the Soaltee Hotel, where the defendant had stayed. Likewise, the glasses and

jeans pant of Laurent Carrere were found in the white Car No. 5001of Gorkha Travel. The name and address of the defendant has been written in the diary of the deceased Connie Jo Bronzich and the defendant has been unable to furnish the reason for mentioning his name in her diary. Therefore, his plea that he had no contact with the deceased has been proved false. The defendant had left the hotel ignoring the instruction of the police to notify them while leaving the hotel at the time of inquiry about the killing of the deceased at that time and he had absconded to India through via land leaving his belongings in the hotel. It has been established that he had meet the deceased and had relationship with her regarding the precious stones. It has been proved form the circumstantial evidences that the respondent had killed the deceased Connie Jo Bronzich making her allured on precious stones. The statement of the respondent that he came to Nepal only on 1st September 2003 has been proved unbelievable from the opinion of the expert showing the probability that the signature made in the Guest Registration Card and the passport may be of the same person. It has been proved from the Guest Registration Card that the respondent was present in Nepal in December 1975 and his relation and frequent meeting with the deceased in connection with the precious stones has been established. Therefore, the decision of the Kathmandu District Court dated 2061/4/28 (August 12, 2004)to convict the defendant Charles Sobhraj and sentence him to undergo imprisonment for life with the confiscation of entire property pursuant to No. 13(3) of the Chapter on Homicide of the Country Code(Muluki Ain), is justifiable and hereby upheld. It is stated in the decision of the Court of Appeal Patan, dated 2062/4/20 (August 4, 2005).

Based on circumstantial evidence the court has drawn a fictitious conclusion that I appellant had come to Nepal in 1975. The letter of the then Superintendent of Police Chandra Bir Rai dated 2032/4/20 consisting the description based on presumption and fiction and so called statement made by me /appellant in New Delhi, India on 6th July 1976 which has been admitted as primary evidence against me is not a report in fact. Since there is no legal ground to admit any document, made before Indian Police in Criminal case of India, as

evidence for judicial purpose in Nepal and therefore, it should not be admitted (held) as evidence pursuant to the Evidence Act, 1972. The statements of the letter submitted by the Superintendent of Police on 2033/04/20 (August 4, 1976) has not been testified and examined from both the original and appellate court in the porcess of judicial hearing. There exist neither any circumstances nor any judicial grounds to examine them after a long interval of 30 years. S. P. Chandra Bir Rai in his letter has specifically mentioned that as he enquired the young boy and maid, stayed in the room No. 415 of the Soaltee Hotel about the deceased they told their names as Bintanja Henricus and Cockie Hemker respectively and both of them were Dutch and both of them said that they did not know the deceased. Because of the lack of any ground to make instant doubt, they could not be arrested at that time. Mr. Rai has not been able to take the photographs of both of the suspects or take the signature, thumb impression or statement at that time and let them free maintaining them innocent. Despite of this, the plaintiff has made false charge against me after 30 years, based on the statement mentioned in that letter, presuming me as Charles Sobhraj alias Henricus Bintanja, in the name of Bintanja which name I had never heard. It is the violation of the principles of justice fair and pure to convict me for culpable homicide and sentence me to undergo imprisonment for life with the confiscation of the entire property based on the ground of that letter.

The so called statement made on 1976/07/06 before the Delhi Police Officials of India stating that it was made by me and presented to the court has not been received through the authorized officials according to the existing process and procedures under international or bilateral treaty or agreement. Since the said document has not been shown to me and my view regarding it has not been heard, it is not admissible as evidence according to law. However, it has been admitted as evidence which is the violation of the principles of natural justice. The Appellate Court, Patan has admitted the opinion of the expert which said that the signature in the photo copy of the registration card of the Hotel Soltee and Hotel Malla and the my signature of in the passport at present may be of the same person. By admitting that opinion the Appellate Court, Patan has given decision against the universal

principles of criminal law that the 'benefit of doubt goes to the accused' and the principle that onus of proof in criminal case lies with plaintiff. It is also against the Section 25 of the Evidence Act, 2031.

The present decision is biased and prejudicial and is in violation of the dual guarantee provided by the Article 14 of the International Covenant on Civil and Political Rights, 1966 and Section 9 of the Treaty Act 2047 which is made by presuming me guilty. Likewise, where is the original copy of suspicious guest registration card? With whom is it and in what condition? After these questions are raised: why has not the original copy been presented or has been destroyed? The court has not made any inquiry about it and has not settled the questions raised. It is unjust to punish me by admitting the photo copy without the original copy.

False propaganda has been made against me to create a circumstance of prejudice for not letting me an opportunity of fair hearing and impartial justice. Since the prosecution has not charged against me in the case of the murder of Laurent Armond Carriere. The goods of the deceased found in the white Datsun Car No. 5001 have not been presented as real evidence and the deed of seizure of the goods has also not been presented in the court. The decision made by admitting the fictitious evidences based on the subject which has not happened but based on the fictitious creation, consists grievous legal error. The person who hired the white car is Dutch as stated by the driver Purna Bahadur Maharjan in his statement. The plaintiff has not been able to present him in the court as witness. Likewise, I am a foreigner, a French citizen. The plaintiff has not been able to present any proof to establish my presence in Nepal during the time and situation of the happening of the crime. The fact that I came to Nepal during the time of the event of crime in the name of the so called Henricus Bintanja must be indubitably proved. There is no evidence presented to prove such collateral fact. The proceeding has been carried out and I have been convicted and punished admitting the things as evidence which is not admissible and should not be admitted as evidence which is in contravention with the principle and the provision of Evidence Act, 2031 (1974). There is no

any evidence establishing my contact and relation with the deceased. Therefore, there is no any evidence in the decision of the Appellate Court of Patan other than the influence of fictitious and the false propaganda of media which is in contravention with legal and judicial principles and standard of evidence law. The Evidence Act, 2031(1974) has made clear provisos about the evidence admissible and non-admissible. There is no existence of evidence provided in the Sections 8, 9(1)(2)(3), 10(1)(2), 15 and 18 admissible under these provisions. The mandatory procedures to be followed for admitting the evidence have not been adopted. From this, I have been aggrieved by the prejudicial and subjective decision and my personal liberty and right to fair trial has been violated unlawfully, and the decision has been made violating the integrity of international law and therefore I pray to quash the decision and declare me innocent. It is stated in the appeal filed by the defendant in this court dated 2062/07/13 (October 30, 2005)

The Court of Appeal Patan has taken the Guest Registration Card and the report of Chandra Bir Rai as primary ground while convicting and sentencing the appellant/defendant Charles Shobhraj Gurumukh as per the claim of the prosecution. The original copy of that Guest Registration Card does not exist. The photocopy of the Guest Registration Card has been examined by the police expert. Such examination report has also been taken as the sequential chain of circumstantial evidence. There is lack of analysis of evidential value of the report received from the examination of such photo. In this regard, what and where is the original copy of such Guest Registration Card? Where has the photocopy of that card been received? Inquiring all of it, causing the original card to be produced, and taking specimen of the signature of the concerned person it has to be examined from the specialist of RONAST or Finger Print and Hand Writing Examination Section of the Supreme Court. Superintendent of Police Chandra Bir Rai, the reporter of the investigation report dated 2033/04/20 (August 4, 1976) has not been testified in the court pursuant to the Section 18 of the Evidence Act, 2031. It is also mentioned as ground that the address of Charles Shobhraj had been found in the diary of the deceased, however, while going through the deed of inventory of the

goods of the deceased there is no mention of diary in it. The decision of the Court of Appeal, Patan sustaining the decision of the Kathmandu District Court without examining the witnesses recorded at the time of investigation, including driver Purna Bahadur Maharjan and S. P. Chandra Bir Rai, seems in violation of the principle established from this court in Nepal Law Report, Decision No. 4287, P. 186 and may be reversed. Therefore, let the Officer of the Attorney General defending the respondent/plaintiff the Government of Nepal, be notified of the schedule of hearing of the case and present the case for hearing as per the rule. It is stated in the order, this court dated 2063/03/04.

The signature and statement of letter dated 2032/04/20 (August 5, 1975) is mine. The defendant Charles Shobhraj Gurumukh who came in Nepal and stayed in Soaltee Hotel the name of Allen Gauthier and Charles Sobhraj alias Henricus Bintanja by in 2032 (1975) is the same person. The person who killed Connie Jo Bronzich is the defendant Charles Shobhraj Gurumukh. During his stay at the Soaltee Hotel police personnel were kept in his surveillance in civil dress outside hotel in connection with the murder of Connie Jo Bronzich. The defendant was ran away and escaped from the back door of the hotel. I knew from the Interpol about the arrest of the defendant in India. As there was no evidence to arrest him before his escape hence it was not reasonable to arrest him without evidence. I was personally involved in investigation about the dead body found in Sanga pass and Manohara river and handed over to inspector Bishwa Lal Shrestha for action. I have not been involved during making deeds. I have been to the spot of the crime scene. It is stated in the testimony made by the reporter Chandra Bir Rai before this court on 2063/09/17(December 25, 2006).

The statement and signature of the document made on 2032/09/18 before the Superintendent is mine. While driving the car of Gorkha Travels in 2032 the foreigner “Dutch” stayed in the Soaltee Hotel had hired the car No. 5001 from 2032/09/05-8 of the said Gorkha Travels is the same person as defendant. I mentioned about the person named Charles Shobhraj knowing it from the news published in the

newspapers. I do not know the detail of the place where the car was drove since it was hired. I can not mention in detail where I had driven the car on 2032/09/01 and I can’t also say where he drove the car on 2032/09/15. I do not also remember where had the car been taken from Poush 1 to15. I have seen the person named Charles Shovraj on photograph, bringing in the court and in the newspapers. It is mentioned in the testimony of the driver Purna Bahadur Manandhar before this court dated 2063/09/17(December 25, 2006)..

In this case presented before the court as per the rule the summary of the argument made by the learned legal practitioners presented on behalf of the appellant/defendant, respondent /plaintiff and father of the victim/deceased is as follows:

Senior Advocate Laxmee Bahadur Nirala argued that the defendant entered into Nepal only in 2003, however the event of the case of homicide wherein the defendant has been charged is of 2032/9/8(December 23, 1975). Although the death of the American citizen named Connie Jo Bronzich is caused by murder, no evidence or things or goods connected with the crime has been seized which indicates that the homicide has been committed by the defendant. According to the Section 25 of the Evidence Act, 2031 the burden of proof of proving that the accused has committed the offence in a criminal case lies on the plaintiff however, it has not been dispensed. It is not justifiable to charge and maintain guilty based on hypothetical and artificial evidence. As it is claimed that the defendant is Henricus Bintanja and that Bintanja is defendant Sobhraj, no any evidence to prove and establish such fact has been submitted. It has been claimed that the defendant has come to Nepal based on the Guest Registration Card however, the situation is that only the photo of the card without original card has been submitted. The original evidence to establish its authenticity has not been produced from the hotel or has not been caused to be produced and therefore the charge cannot be proved and sustained. Since there is no original documentary evidence and eyewitnesses to corroborate the charge against the defendant, the charge cannot be made against the defendant after 30

years and cannot be sentenced therein. Therefore, the defendant should be released.

Advocate Ram Prasad Shrestha argued that in this case the matter when the defendant had entered in Nepal and through what plan when he has committed what type of evidence should be determined. However, it has not been done. Although the defendant has been charged that he had stayed in Nepal during the event, the original Guest Registration Card to be filled by the foreigner during his stay at hotel should be furnished but there is no such situation that the original copy has been furnished from the hotel. Since the defendant has come to Nepal for the first time in 2003, the statement that the defendant came to Nepal in December 1975 is false. Because no eye witness has been presented in regard to the murder of Connie Jo Bronzich, the fabricated and circumstantial evidence cannot get legal recognition in absence of direct evidence. Therefore, the defendant should be acquitted.

Advocate Lok Bhakta Rana -

The defendant should not be sentenced by applying the circumstantial evidence in absence of direct evidence. The charge made against the defendant is itself controversial. The circumstantial evidences admitted to sustain the accusation are not related to the event of the charge. As the defendant did not come to Nepal before 2003 AD, it must be proved at first that he was present here at the time of event in 1975. It cannot be charged, according to the principle of law, without establishing the fact of his arrival to Nepal. The statement of the plaintiff that the defendant stayed in the Soaltee Hotel and Malla Hotel has not been established (proved). It is because the plaintiff has not been able to present even the original Guest Registration Card of the hotel where the defendant has been claimed of being stayed. The photocopies presented as evidence without original copy cannot establish the crime and such photocopy can not take the place of the original copy. As the photocopy may be of any kind the expert should have to examine and make decision from the original copy. Due to the lack of the original copy the report of the examination prepared by the

expert based on the photocopy should not have authenticity and should not be convicted on the serious crime like murder. There is a principle of criminal justice that the benefit of doubt goes to the accused, the decision that convicted and sentenced the defendant is improper (unjust) and therefore the defendant should be acquitted.

Advocate Shakuntala Thapa

A case cannot be instituted based on the report submitted to the Home Ministry by making the investigation report on the defendant. If the defendant has come to Nepal, first of all at what date has he come to Nepal should be made clear, however, no document has been presented about it. Where are the authentic documents verifying the process to be fulfilled by the foreigners during the arrival of foreigners to Nepal at that time? Such documents verifying the authenticity of his entry to Nepal have not been presented. Thus, the prosecution's claim that the defendant had come to Nepal at the time of occurrence is false. The respondent has not been able to present any original documents as evidence on the charge sheet made against the defendant. It has been unable to state or write that the person who had stayed at Hotel Soaltee and Hotel Malla is defendant Charles Sobhraj. The claim that the person named Allen Gautier and Bintanja Henricus is Charles Sobhraj could not be and has not been proved in the world. The allegation made against the person who was not present in Nepal during the time of occurrence of crime is against the law. It has been tried to establish from the false evidences brought from outside that the defendant has committed the crime. It seems that such false documents rarely bear any evidential value. The photographs presented by the respondent have no any authenticity and it is also not clear who had taken these photographs. Further, such photograph does not bear any legal meaning because the reel of the photo was of 1975 while the photographs were of 1986. All of them are fabricated. There is no condition to accept that the person making the testimony in the court presently is the same person the Superintendent of Police Chandra Bir Rai, who investigated the crime in 2032 (1975). Because it cannot be said about the whereabout of the Superintendent of Police Chandra Bir Rai of 30 years ago who has

already been retired. An effort has been made to prove the charged offense stating that the defendant had stayed in hotel at that time by presenting the Guest Registration Card filled up by other persons. Further, in the condition that the original copy of such Guest Registration Card has not been presented and it has not been made clear from the hotel about it, question has been raised about its existence. Therefore, the charge made against the defendant has been proved to be fabricated the decisions of the original court and appellate court made without evaluation and assessment of the evidence are erroneous as per the rule of evidence and against the law and the defendant should be acquitted.

Advocate Ram Bandhu Sharma on behalf of the defendant has argued ' My party has been accused of being involved in the murder of Connie Jo Bronzich on 2032/09/08 (November 23, 1975). Nevertheless, nobody was arrested at that time belonging to that murder. The then Superintendent of Police Chandra Bir Rai had made investigation on 2033/04/20 (August 4, 1976) and submitted the report. Even in that report, nowhere the name of defendant is mentioned and nobody has been arrested. If the defendant was in Nepal he would have been arrested immediately. Since he had not been arrested, it means that the defendant had not come to Nepal before 2003. Although it is mentioned that the name and address of the defendant was found in the diary of deceased, the diary has not been enclosed in the case file and it has not been clear how the address of the defendant could be found in the diary. Likewise, the then Guest Registration Card of the Soaltee Hotel and Malla Hotel, where the defendant has been claimed to have been stayed at that time, could not be found. Although the specialist has examined the photocopies of these cards, such photocopy in absence of original copy cannot be admitted as evidence pursuant to the Section 35 of the Evidence Act. In such situation, the opinion of the specialist does not get legal validity.

In the report of the then Superintendent of Police Chandra Bir Rai, it is mentioned that the defendant murdered Henricus Bintanza in Bangkok and entered to Nepal by taking the passport of the Henricus

Bintanza. However, neither any FIR has been lodged nor any case has been filed against this defendant in Bangkok. Since there is no original copy of the Guest Registration Card submitted by the respondent and in both of the photocopies departure date is mentioned as 27th December 1975. How can a single person depart from both of these hotels in the same day? Therefore, it has been proved that these Guest Registration Cards are fabricated. The Government party/prosecution has made claimed that confession is made in India that the crime was committed in Nepal. In that case, the defendant denied every case filed against him in India. If the defendant has confessed any case the plaintiff has to submit its authentic evidence. However, the plaintiff has been unable to do so. The plaintiff has not submitted any evidence relating to crime and authentic documents. In the case filed in the court as state case (Government Case) the evidence cannot be presented without the order of the court after the institution of the case. If the evidences are presented without the order of the court such evidences and documents do not get legal validity. Since there is no eye witness and FIR has been filed without specifying, and therefore, the accusation against the defendant is purely fictitious. It has also been claimed that the modus operandi of committing murder by the defendant in other country is similar, however, it has not been explained and analyzed what type of murder was committed in foreign countries and how have these murders coincide with this crime. Although it has been claimed that the defendant had committed homicide in India and Thailand, the defendant has not been charged and convicted in homicide case in India and Thailand. The defendant who had not come to Nepal at the time of occurrence has been charged in the crime of homicide occurred 30 years ago by creating fictitious and fabricated evidence. Duplicate copy without the existence of original copy has been submitted a chain of circumstantial evidences has been created only on the basis of provocation of media and newspapers and in absence of authentic documents of the INTERPOL. Therefore, the defendant should get full acquittal from the charge made against him on the ground of fabricated facts.

Joint Government Attorney Krishna Prasad Poudel on behalf of the Government of Nepal has stated that the defendant who was involved in the homicide of the American citizen Connie Jo Bronzich, has not raised question on the fact that he had met the deceased Connie Jo Bronzich and that the death of the deceased was caused by homicide. As per the report of the specialist the signatures of that Guest Registration Card, the passport used by the defendant at that time in the name of BINTANJA HENRICUS and the signature made at the time of entry into Nepal in the name of Charles Sobhraj are similar. Therefore it has been proved from the fact that the defendant with different alias is the Charles Sobhraj who has been now arrested and serving the sentence. So far as the question of unavailability of the original copy of the Guest Registration card is concerned there is provision of destruction of old documents even in the court, the hotel may have destroyed such old documents. Apart from this the name and management of the hotel have been changed now and therefore these documents have not been found now. The specialist, while examining the documents, makes verification after taking its photo. The documents in this case are not the documents under our control but belonged to the hotel and the hotel had permitted only to take photo at that time in the process of investigation. In the situation that these documents have been accepted by the hotel that they belonged to them the documents lost or destroyed unless proved otherwise are admissible as evidence and the Section 35 (2) of the Evidence Act, 2931 is applicable in this case. It has been revealed from different media that the defendant is an international criminal and Thailand has corresponded for extradition and the defendant had absconded from the jail while he was serving sentence in India. The reporter and the driver of this have given testimony in the court pursuant to the Section 18 of the Evidence Act, 2031 showing the involvement of the defendant in the homicide and the fact of the crime has been established and the chain of circumstantial evidence has been formed by adding the evidences. Therefore, the decision of the appellate court sustaining the decision of the district court that convicted and sentenced the defendant admitting the circumstantial evidences is just and should be upheld.

Deputy Government Attorney Shree Krishna Bhattarai representing on behalf of the Government of Nepal argued that the appellant defendant has not committed crime only in Nepal. The defendant has been listed in wanted lists in the different countries. The defendant who came to Nepal and stayed in the Soaltee Hotel on 18th December 1975, is an international criminal who kills different persons in different countries and travels from one country to another using the deceased passports. In this turn, he came to Nepal using the passport of the person named Henricus Bintanja who had committed murder in Bangkok in 1975, and killed Carriere Laurent and Connie Jo Bronzich. Using the passport of the deceased Carriere Laurent, he flew to Bangkok and came back to Nepal the following day. Knowing the surveillance made over him by the police he absconded from the hotel leaving his belongings at Hotel Soaltee. He was imprisoned in India and after his release on the completion of the jail terms he went to France and came to Nepal on 1st September 2003 by carrying the passport on his own name as Charles Shobhraj and he had mentioned the address as the Oberoi Hotel which is not in existence at present. If he had came to Nepal for the first time how can he mention the name of the Oberoi Hotel? The name of the Oberoi Hotel had been changed as Crowne plaza 12 years ago. He has been arrested from the Hotel Yak and Yeti. INTERPOL has issued red corner notice in 1973 before the happening of the event of the present case; from this it has been obvious that the defendant is professional criminal who commits murder in different countries and move to other countries using the passport of the deceased.

The facts mentioned in the book entitled 'The Life and Crimes of Charles Shobhraj" which is based on his interview taken while he was serving jail term in Tihad Jail of India and the photographs of the persons killed by him should be admitted as evidence. In that book, he has confessed that he had killed Connie Jo Bronzich. He has not also denied the facts mentioned on that book. The visiting card recovered by the police during raid in the process of investigation of crime committed in Thailand and are similar to visiting cards recovered by the police during raid in the Soaltee Hotel of Nepal. As per the news published in 1976 on Bangkok Post it is mentioned that the nature of

the modus operandi of the crime relating to the killing of the person in Bangkok is similar to that of the modus operandi of the crime committed in Nepal. In the case instituted against the defendant in India, it is stated that the defendant has used different names in India, Bangkok and Nepal. He was sentenced to undergo imprisonment for 11 years in India and he had broken the jail while serving the jail term which establishes the fact that the defendant is skillful/clever professional criminal. These decisions and documents of foreign countries are admissible and the court should presume and take notice of them pursuant to Section 6 of the Evidence Act, 2031 (1974) unless proved otherwise. Whereas, the defendant has pleaded that he was not present in Nepal at the time of occurrence, after submission of the evidence by the plaintiff against him to prove his presence in Nepal, the defendant must present the proof of his alibi of his elsewhere if he was not present in Nepal. However, he has failed to do so. When the defendant takes the plea of alibi and fails to prove otherwise, he cannot get immunity from the charged offense/crime.

Whatsoever name the defendant may have given, either Allen Gautier, or Henricus Bintanza or Charles Shobhraj, it has been proved that the person with these different names is the same. It is confirmed from the opinion given by the expert that there is similarity between the signature made by this defendant on the Guest Registration Card of the Hotel Soaltee and the signature made by him in his passport brought while coming to Nepal this time. The defendant commits murder in one country and travels to another country using the deceased passport. In that country also he commits murder and travels to next country using the deceased passport and also commits criminal activities in the name of the persons killed. The facts that the defendant with different aliases is clever criminal has been proved from the books published about the defendant, decisions and the reports of the INTERPOL. No question of authenticity has been raised on the established criminality of the defendant and the defendant has also accepted the facts. Therefore, these facts are admissible as evidence in the court and are worthy to be taken as evidence and the decision of the Appellate Court to convict and sentence is just and should be sustained/ upheld.

Advocate Rajit Bhakta Pradhanang on behalf of the deceased father has argued that the defendant is not a ordinary criminal but an international criminal. The defendant is a notorious and clever criminal wherever he goes he commits heinous crime like murder there and travels using the passport of the deceased person. However, all of the crimes wherever he has committed have the same type of modus operandi. He committed the murder of the American citizen Connie Jo Bronzich on 2032/09/08 B.S. (November 23, 1975) absconded while the investigation of the case was going on. The defendant has not been sought to be arrested only in Nepal but also in all the countries where he has committed murder and also the INTERPOL has accepted him as criminal and is searching in international level. He had been arrested in India, sentenced to undergo imprisonment and after the completion of the jail term; he returned to France and again came to Nepal with the name of Charles Sobhraj. Whereas, he had come to Nepal in the name of Henricus Bintanza at the time of committing the murder of the American citizen Connie Jo Bronzich he came to Nepal this time, when he has been arrested, in the name of Charles Shobhraj. Since it has been obvious from his crimes that he makes all the plans of the crimes before committing it and commits the crime based on that series therefore both the elements of crime i.e. mens rea and actus reus consist in his crimes. If he had not committed crime in Nepal it was not necessary to initiate a case against him after 30 years alleging that he had committed murder. However, the defendant came to Nepal with different aliases and later he may have come to Nepal probably with the motive of seeking information about the crime he had committed in the past. In 1975 he came to Nepal in the name of Bintanja and moved out from Nepal in the name of Carriere Laurent. The same who came to Nepal after 30 years in the name of Charles Sobhraj and identified and arrested is the murderer of Connie Jo Bronzich. The defendant being a clever criminal who travels by committing the serious crime like murder he may have not thought that the case of the crime he had committed 30 years ago would for 30 years and may have come to seek information of the crime he had committed. He has been arrested in when he came to Nepal thinking that he may be safe in Nepal and convicted and sentenced from the decision made by the district court and the

appellate court holding him guilty as per the charge claimed. These decisions of the district court and appellate court are just and should be sustained.

Likewise, Advocate Ramesh Prasad Koirala argued that the crime committed by the defendant has been proved from his past crimes committed in different countries and the punishment by him The defendant has denied only the accusation however, he has not taken the plea that he was present elsewhere at the time of occurrence of the crime. Though he has refused the accusation, he has failed to present any evidence of it. From the statements of the person recorded during investigation, the opinion of the experts and his statement recorded in India when he was arrested in the murder case, it has been established that he had come to Nepal in 1975. From punished served by him in the murder committed in India, the different books published about his crime it cannot be maintained that the defendant is innocent and the decision of the appellate court that convicted and sentenced him is lawful and should be sustained.

Likewise, the learned legal practitioners have submitted written briefs in support of their arguments.

In the present case, prescribed for delivering judgment today, after pursuing the arguments made from the learned legal practitioners representing the appellant/defendant, Government of Nepal and scanning the written brief and the case file, the decision has to be made whether or not the decision made by the Appellate Court Patan sustaining the decision of the district court is just and whether or not the appeal of the defendant should be sustained.

To consider about the decision, in the present case Charles Shovraj alias Allen Gauthier lived with the name of Henricus Bintanja has been convicted from the Kathmadnu District court and sentenced to undergo imprisonment for life, along with the confiscation of the entire property pursuant to No. 13 (3) of the Chapter on Court Procedure of Muluki Ain in the charge of murdering CONNIE JO BRONZICH an American citizen. The Appellate Court of Patan has sustained the decision of the Kathmandu District Court. The defendant has filed an appeal in this court on the ground that he had not come to Nepal

before September 1, 2003 and denying all the evidences admitted by the court against him. He had pleaded that he had not murdered the deceased and urged for his acquittal quashing the decision of the Court of Appeal Patan, since it had admitted the evidences presented later against the basic principles of evidence and principles of fair hearing stating that the Court of Appeal has decided causing violation of justice against him.

At the night of 2032/9/7 corresponding to December 22, 1975, Allen Gauthier alias Charles Shovraj Gurumukh stayed in the name of Henricus Bintanja , Monique Leclerc alias Marie Andre Lucie Leclerc and Ajay Chaudhary in pretence of meeting Laurent Armond who had moved for Dhulikhel, brought Ms. Connie Jo Bronzich with them on the next day of the murder of Laurent Armond Carriere, killed Connie Jo Bronzich at the night of December 22, 1975 (2032/09/07) and threw the dead body, after making its face unidentifiable, in the northern part of Bhaktapur-Kathmandu Arniko Highway located in the Sinamangal Village Panchayat of Kathmandu district.

Thus, after committing killing Laurent Armond and Ms Konnie Jo on the said date and throwing the deads, Charles Shobhraj Gurumukh alias Allen Gauthier affixed his own photo in the passport of one of the murdered persons Laurent Armond Carriere. Ajay Chaudhary arranged for air ticket for Charles Shobhraj and himself and Charles Sobhraj, by making fake signature in the name of the deceased Laurent Armond flew to Bangkok on 2032/09/08 (November 23, 1975), at 11:30 and came back to Kathmandu the next day. Thereafter, one of the three culprits Monique Leclerc alias Marie Andre Lucie Leclerc who had not accompanied them came to stay once again at Soaltee Hotel with Allen Gauthier from Mall Hotel. In this way, they were staying in Hotel Soltee as innocent persons concealing the crime. The accused persons Charles Shobhraj Gurumukh alias Allen Gauthier, Monique Leclerc alias Marie Andre Lucie Leclerc staying in the name of Cocky Hemker, and Indian citizen Ajay Chaudhary after killing the above mentioned two persons, absconded from the hotel at the night of 2032/9/12/7 with intention to get rid of criminal liability leaving their clothes, suitcase and shoes in the hotel via land. After absconding in this way, it has been learnt from the

Nava Bharat Times dated 13, July 1976 that, being arrested in the accusation of committing robbery in the Ashok Hotel in India, the accused persons confessed that they had also murdered tourists in Nepal, India and other countries. Therefore, it has been established that the three persons including Charles Sobhraj have murdered Ms. Connie Jo Bronzich on the night of 2032/9/8 (December 23, 1975). Since the spot of event of the killing of Laurent Armond falls under the jurisdiction of Bhaktapur district, the case should be lodged in the Bhaktapur District Court. Therefore, the murderer of the American citizen Ms. Connie Jo Bronzich holding passport number F165439 killed in the said spot under Sinamangal of Kathmandu district, Charles Gurumukh Sovraj staying with the alias Henricus Bintanja and Marie Andre Lucie Leclerc alias Monique Leclerc stayed in the name of Cocky Hemker have been arrested in India and correspondence has been made through the Ministry of Home Panchayat on 2032/04/20 (August 4, 1976) for extradition under Extradition Act to take action on them according to Nepalese law and in case of absconded Indian citizen Ajaya Chaudhari search has been ongoing from Nepal Police and Nepal India Interpol international police. Therefore, the culprit of the charge of killing of CONNIE JO BRONCZICH namely Charles Shobhraj Gurumukh alias Alien Gauthier, Marie Andre Lucie Leclerc alias Monique Leclerc and Ajay Chaudhary have been hereby charged under No. 1 of the Chapter on Homicide of Country Code(Muluki Ain) punishable under No. 13(3) of the same Chapter with the request to initiate proceeding after their presence in the court through their extradition or their finding or arrest. It is stated in the Charge Sheet.

As the case was postponed as per the order of Kathmandu District Court dated 2034//3/14 (June 28, 1977) based on the statement of the charge sheet filed jointly by the police and prosecutor that the case should be initiated after the presence of the suspects through extradition or their presence or arrest. The case has been reopened by the order of the Kathmandu District Court dated 2060//6/30 (October 17, 2003) as per the letter of the District Government Attorney Office, Kathmandu of the same date, which stated that Charles Sobhraj Gurumukh had been arrested on 2060/16/2 from the

gate of Royal Casino, Durbarmarg and the appellant Charles Gurumukh Sobhraj had been presented in the Kathmandu District Court along with the letter of District Government Attorney Office, Kathmandu, in the case relating to the killing of Ms. Connie Jo Bronzich.

Charles Gurumukh Sobhraj in his statement before the court has stated that he knew nothing in relation to the charge relating to the murder of the American citizen Connie Jo Bronzich at night of 2032/09/07. He contended that he came to Nepal for the first time on 1st September 2003. He had been arrested on 19th September 2003 from the Royal Casino of Durbar Marg. He stated that the charge that he had killed the American citizen Connie Jo Bronzich and went to Bangkok and returned to Kathmandu the next day sticking his photo on the passport of the deceased and stayed at the Hotel Soaltee and absconded on night of 2032/9/12 from the hotel and the statement that he was arrested from Amir Hotel in charge of doing dacoit at the Ashok Hotel are all false. He stated that he had been arrested in another case from the Bikram Hotel of New Delhi on 15th July 1976 and was acquitted from the court. Regarding to the case of breaking of Tihad Jail in 1986 he was acquitted since the Government of India had withdrawn the case and he was released from jail and went to France. He pleaded that he had never used fake passport. He knowns nobody including the deceased Connie Jo Bronzich and Laurent Carriere and the persons mentioned in the file as Monique Leclerc, Henricus Bintanja and Ajay Chaudhary. He added that he had never hired a car coming to Nepal and killed anybody. He had further stated that he has come to Nepal as his French Company requesting Nepali embassy for granting visa and visa has been granted to him for the purpose of conducting research of handicrafts for T. V. Documentary. Stating so, Charles Gurumukh Sobhraj has given statement in the Kathmandu District Court completely denying the charge.

Accordingly, charge sheet has been filed on 2033/06/07 (September 23, 1976) with accusation of murdering Ms. Connie Jo Bronzich at night of 2032/09/07 (22nd December, 1975) by the defendant Charles Shobhraj alias Allen Gautier stayed in the name of Henricus Bintanja. However, the defendant was not arrested at that time and absconded

and he had later been arrested in 2060/6/2 and presented in the court on 2060/6/30 and the proceeding has been initiated. The defendant Charles Shobhraj has made statement in the court denying the charge of killing the deceased Connie Jo Bronzich stating that he had not murdered her. The dead body of American citizen Connie Jo Bronzich, the charge of whose murder has been made against the defendant, has been found in the bank of road in 2032/9/8 (23 December, 1975) in dead and burnt condition.

In the deed of the examination of the dead body it is written that in the western side of the Manahara was lying a naked dead body of woman around the age of 18 to 20 years, the body was burnt by spraying petrol. Tour penetration wound were present at the heart, the whole part of the body along with vagina burnt, the left leg tied with a rope made of cloth and small part of it was remained unburnt. Autopsy report dated 2032/09/09 (December 24, 1975) mentioned that the death is occurred by sudden shock caused by bleeding due to strike in the heart. From this it has been established that the death of the deceased is caused by homicide and thereafter the deceased body has been burnt by spraying petrol making it unidentifiable.

The Australian citizen named Kirsty Marion MacMillan who had known Connie Jo Bronzich during alive had made deed of identification by identifying her dead body. She has stated on deed "The dead body shown is of Connie Jo. I acquainted and identified. I remember the ring wearing in the finger by her. I identified her with the bracelet and earring shown to me. Connie Jo had told us about her meeting with a Vietnamese jeweler and his French spouse at the Soaltee Hotel and been to the Soaltee Hotel several times to meet them. I identified a body on 24.12.75 to be Connie Jo. There was a ring on her hand which I can remember her wearing. I was also shown a bracelet which I identified as belonging to Connie Jo. I also identified an earring which I have seen Connie Jo wear." Thus, as it is seen from the case file that the identification has been made even on the basis of the ornaments worn by the dead body, therefore, it is not necessary to make further analysis since it has been obvious that the deceased is the American citizen Connie Jo Bronzich. As it is seen from the description of the examination of the dead body that the deceased

was tied with the rope made of cloth and dragged, it indicates that the deceased was killed elsewhere and thrown at that place. Therefore, it has been obvious that wherever the deceased had been killed and thrown, her killing is homicidal.

The defendant has been charged in this case for murder of Connie Jo Bronzich also on the ground, among other things, of statement made by him when he was arrested India after he absconded from Nepal committing the offense here. However, there is completed absence of direct eye witness who has seen the crime of killing of the deceased by the defendant. The event was occurred at the night of 22nd December 1975 around the Arniko Highway on way to Bhaktapur from Kathmandu and as the homicide was taken place at solitary and lonely place at night in autumn season and there cannot be presence of eye witness and it is natural that does not exist direct evidence. However, "the death of the deceased has been caused by homicide, and the criminal committing the offense should be punished and it is the duty of the court to sentence the offender even on the ground of indirect evidence."

So much as a judge needs to be cautious during the hearing of criminal case that the innocent person should not be punished, he/she must be equally cautious on the matter that a actual criminal should not get immunity from bearing the punishment. How much cautious should a judge be while analyzing and evaluating of the evidence presented against the person accused, "he/she should be equally cautious of the fact that the victims would get justice. The fundamental goal of the justice system is to provide justice in a balanced way to both accused and victims. The judgment made by focusing only one party cannot take the form of justice." While dispensing justice in criminal cases specially in cases where the criminal has not been identified and where there is absence of direct evidence of event, the court has double responsibility of complex and difficult condition to punish the criminal and give justice to the victim by unveiling the truth on the grounds of indirect evidence including the motive, modus operandi of crime, scene of the crime, the goods recovered on the crime scene related to the crime or material evidence, past criminal history of accused and relavency of criminal act committed by him

elsewhere, his presence at the spot or surrounding areas and his behavior etc. It has been obvious in the present case too that a foreigner has been murdered and the murderer had killed the deceased at a solitary and lonely place at mid night, burnt the face and sex organ making it impossible to identify face and sex and has tried utmost to hide his own identity and evidence. “Looking at the modus operandi used while committing the crime and the nature of crime it has been obvious that the criminal has committed the crime with full caution, carefulness and in planned and organized way. In such situation, the offender has to be reached based on indirect evidences submitted by the prosecution specially the circumstantial evidence and the accused should be punished if he/she is found to be guilty.” In the present case, the district court and Appellate Court have also convicted the defendant on the basis of circumstantial evidence, it is necessary to consider whether or not those evidences are relevant and sufficient to decide offense of the appellant. Even at the time of hearing of the case in this court, the plaintiff has presented the documents received through INTERPOL, the books written in relation to the criminal activities of the defendant, D. V. D and copies of the decision made by the Indian Courts of the cases filed therein. Whereas, the learned advocates appointed on behalf the defendant have argued that there is no direct and irrefutable evidence against the defendant and the evidence presented by the plaintiff are irrelevant, meaningless and illegal. Therefore, it is necessary to address the questions of facts as well as different questions of law relating to evidence

The court needs to be cautious towards whether or not the evidence presented against the accused are sufficient to prove him/her guilty and what the legality of these evidences is. The court is equally cautious and remains cautious toward the principle that the person who has been proved guilty from direct or indirect evidence should not go unpunished. In criminal justice system the principles that 'no action shall be termed crime unless it is criminalized by the criminal law (nullum crimen sine lege), ' and an not be called a crime unless it declares any punishment (nullum crimen since poena) and that ' an act cannot be called crime unless it is punishable (nulla poena sine

lege)' are regarded as major principles. Even if the act charged against the defendant is consistent with the above mentioned principle, the defendant should not be punished unless he had committed the act specified in the charge.

The Article 24 of Interim Constitution of Nepal, 2006 has guaranteed the said principles of criminal justice as fundamental rights under the Right of Justice. Additionally, since Nepal is also the member of the United Nations, it is her obligation to be committed toward the Charter of the United Nations, Universal Declaration of Human Rights, 1948, and International Protocol on Civil and Political Rights, 1966 as well as towards the recent norms and values developed in the international level regarding independency of judiciary, human right and administration of criminal justice. It is the duty of judiciary to respect, follow and protect the matters relating to judicial proceedings, on which the state has expressed its commitment. This court has always paid due regards to the values and standards of fair hearing including rule of law, protection of fundamental human rights as well as the norms and values of fair hearing. Hence, it cannot be believed on the standard that the defendant should be held guilty only on the ground that an accusation has been made against him.

Likewise, as the life of human being is regarded unique and important as compare to other living beings, the right to life of human being has been recognized from international level. Murder of human being has been regarded as highly sensitive and the crueliest crime in comparison to other crimes. Therefore, whenever any person becomes victim of crime there will be utmost violation of sovereign right to life and there is the provision of maximum punishment for such a crime in the law of the State. The court is and will be equally cautious and will be cautious toward the responsibility that in case a criminal act of an accused has been proved by evidence he should not be go unpunished.

In the charge sheet filed against the defendant at the time of occurrence that is 2033/6/7 B. S. (September 23, 1976), it is stated that Allen Ganthier alias Charles Sobhraj who was staying in the name of Henricus Bintanja has killed Connie Jo Bronzich. Therefore, the

primary questions to be settled and relevant facts to be analyzed here are: whether the defendant Charles Sobhraj has come to Nepal with these different names, whether or not the person holding all of these names is the same, and whether or not he had met the deceased. The appellant has stated in his statement before the court that he has come to Nepal for first time on 1st September 2003 and that he did not come Nepal before and that he did not know about the murder of Connie Jo. He has also stated in the statement that the Delhi Police had arrested him on 15th July 1976 concerning the case of robbery happened in the Ashoka hotel at New Delhi and later he was acquitted. The Government of India had withdrawn the case relating to the Tihad Jail break in 1986 and he got acquittal. He has also stated that he did not know the defendants Ajay Chaudhari and Monic Le Clerc. In this way, he has accepted the fact that different cases had been filed against him in India and the prosecution has submitted various documents regarding the proceeding of the cases in the Indian court, the statement made by him before Indian magistrate, copies of the decisions regarding him as evidence.

Among them, the duly certified copy of the decision of the Supreme Court of India made in November 1993, in the case of Criminal Appeal No. 479 of 1981 of The State (Delhi Administration) Versus Charles Shobhraj alias Allen has been submitted. In it, the name of Charles Sobhraj has been spelled as Charles Sobhraj alias Allen; it has been seen from the details mentioned in the decision of the Supreme Court of India. Likewise, the legal practitioners of the defendant, with their written brief has presented the copy of the decision of the High court of Delhi made on 11 March, 1980 of the case Charles Sobhraj alias Allen versus the State of the Criminal Appeal No. 53 of 1979. In it, the name of the defendant Charles Sobhraj has been mentioned as Charles Sobhraj alias Allen. With the same legal brief the legal practitioners of the appellant have presented the copy of the statement made by Charles Sobhraj in police post in Lajpatnagar, South Delhi. In serial No. 1 and 2 of the section of name, the appellant has given the statement mentioning Charles Sobhraj alias Gautier Alain. In the same statement he had stated that 'In the month of Dec. 1975, I, Ajai, and Monique travelled from Bangkok to Kathmandu by

flight. I do not remember if I travelled in the name of Mr. Bintanja,….. I know and remember that in the hotel Soaltee Oberoi I stayed in the name of Mrs. & Mr. Bintanja with Monique. Hired and drove a white car. … an American girl has been murdered and a white car was seen at the spot and inquired us about . As inspector had told me that next day his chief may like to check up my passport and then I could go. As I was having a forged passport in the name of Bintanja, so, I along with Ajai and Monique left Kathmandu leaving some of our luggage in the hotel, by road and came to India border.

At the time when the defendant Charles Sobhraj was arrested in India and the case against him was being tried, the Government of Thailand requested the Government of India for the extradition of Charles Sobhraj stating that, the person named Allen Gautier staying at Kenit apartment of Bangkok, Thailand, with the help of Ajay Chaudhari, killed and burnt the Dutch citizen Mr. H. Bintanja and Miss Cocky Hemker who had come to stay at night of 15-16 December 1975. After two days of their killing, Allan Goutier and Monic Leclerc affixed their photos in the deceased passport respectively and absconded to Kathmandu. From the investigation carried out by the magistrate appointed by the Government of India, it had been established that the case was extraditable. Charles Sobhraj filed a writ petition in the Delhi High Court against the extradition process stating that he should not be extradited and Delhi High Court had quashed the writ petition. It has been obvious from the copy of the decision of the writ of the writ Crl. Wrti No. 224 of 1985, Charles Gurumukh Sobhraj Vs Union of India and other, submitted by the appellant lawyers with their written brief. From the copy of that decision, it has been obvious that the person named Charles Shobhraj and Allen Gautier is the same. As mentioned in that decision it has been clear that the person named Henricus Bintanja has already been killed by Allen Gautier with the help of Ajay Chaudhary in Thailand. However, it is seemed that, after his killing, the person named Henricus Bintanja came to Kathmandu by air from Bangkok on 18th December 1975 and stayed in Hotel Soaltee Oberoi. From this, it has been seen from these proceedings and decision that different criminal cases had been filed against the appellant Charles Sobhraj in the name of Allen Gautier, decisions had

been rendered, and that Charles Shobhraj and Allen Gautier is the same person.

The defendant's lawyers have argued that the defendant should not be convicted on the ground of the previously mentioned statement made by the appellant defendant in the process of legal action initiated in India. The copy of document certified by the Indian court related to the case regarding to the murder of Luke Solomon in India, has been presented by the Government of Nepal also by the defendant's lawyers in their written brief. Therefore, it does not seem that the case was fictitious. In Section 3 of the Evidence Act, 2031(1974) it is provided that ' The court may examine evidence on the fact in issue which is to be decided by it and the relevant fact thereof'. Therefore, “the court can decide whether the matters presented as evidence as per the law are relevant to this case or not.” Likewise, in Section 6 (f) of the Evidence Act it is provided that:-

> *" Any law or judicial decision printed in a book or journal and where it has been indicated that it is published by the government of a foreign country or by the official so authorized by such government, the court shall presume that such law or decision has been published correctly."*

Likewise, in the Section 15 (1) of the Evidence Act, it is provided that:-

> *"Statement of facts on the law and decision contained in the books published by the Government of Foreign State or by a person or an organization authorized by such government regarding the law or the decision of the court of that State, may be taken as evidence"*

From these legal provisions, it seems that the law has not prohibited the court from admitting the documents received form authentic bodies, relating to the proceeding of case being initiated in foreign court. Therefore, the bench cannot agree with the argument raised by the appellant's lawyers that these documents should not be admitted as evidence.

Since a deceased person cannot travel, stay and contact with the people from one place to another, it can be logically presumed that

any other person deliberately or with criminal motive came to Nepal using the nick name using the name and the passport of the said deceased and stayed at the room No. 415 of the Soaltee Hotel. Such person may have used the name, passport and identification of the person killed by him with the malafide intention of hiding one’s real identification and the evidence of criminal actions and save him from punishment. The prosecution has the stated in the present case that the person named as Allen Gautier entered to Nepal in the name of Henricus Bintanja and stayed in room No. 415 of the Hotel Soaltee and committed murder of Connie Jo. As has been obvious that Henricus Bintanja staying at said room of the Hotel Soaltee Oberoi had made signature by filling up the Guest Registration Card and as mentioned in it, he was the citizen of Holland and stayed in that Hotel from 18 to 23 December, 1975. The event of this crime was occurred at the night of 22-23 December and it has been obvious that the person called Henricus Bintanja was present in Kathmandu during the occurrence of crime. Making additional corroboration of that fact the appellant defendant has made statement before Lajpatnagar Police of Delhi in the name of GAUTHIER ALAIN Alias CHARLES SOBRAJ. Some of the related parts of the extract of the statement is as follows:

> *In the month of Dec. 1975, I, Ajai, and Monique travelled from Bangkok to Kathmandu by flight. I do not remember if I travelled in the name of Mr. Bintanja, I do not remember if she travelled in the name of a Dutch-girl. She and I stayed in Oberoi Hotel and Ajai stayed in a guest house. I know and remember that in the hotel I stayed in the name of Mrs. & Mr. Bintanja. There on the same day I asked Ajai to get one passport of one gentleman a foreigner. He brought for me one passport two three days later of our arrival in Kathmandu. After, he also brought one another woman’s and one man’s passport. Name I do not remember. I travelled on one of these passports from Kathmandu to Bangkok and Bangkok to Kathmandu. One evening (afternoon) while Monique was driving the white car in the street, a police stopped our car and asked us to drive to nearly police station. … They said that*

they stop all the white cars for checking. … They told me that before leaving Kathmandu I must inform them. At that time Ajai was at Bangkok. Next morning I along with Monique again went to police station for enquiring as to what was the matter. … On my insistence, to know, he told me that was a case of murder and an American girl has been murdered and a white car was seen at the spot. … This date in the evening Ajai came back from Bangkok. As inspector had told me that next day his chief may like to check up my passport and then I could go. As I was having a forged passport in the name of Bintanja, So, I along with Ajai and Monique left Kathmandu leaving some of our luggage in the hotel, by road and came to India border we changed in a bus to the town from where we flew for Calcutta.

That fact has been corroborated from the letter dispatched by the Interpol Wellington to Interpol Kathmandu, dated 14/10/2003, mentioning that the management of the then Hotel Soaltee had made correspondence with the Royal Netherlands Embassy, Bangkok, in connection that the person who stayed in the then Hotel Soaltee from 18-23 December, 1975 in name of Henricus Bintanja absconded from Hotel without paying the hotel charge.

The Dutch citizen named Henricus Bintanja, prior to that murder had hired and used the white Datsun car of Gorkha Travels bearing the number Ba. A. 5001 and the Dutch citizen Bintanja returned that car after that murder, and inside that car goods including black sun glasses with golden frame, jeans cap, lens cleaner and jeans pant in the bonnet were found in the car. Brother of Laurent Carrier, who was murdered in Bhaktapur, has verified the goods found in the car, during investigation, including the jeans pant and said that the goods belonged to the Carriere Laurent. Likewise, it has been confirmed from the testimony of Purna Bahadur Maharjan, the then driver of that car No. Ba. A. 5001, who has made the testimony in this court on 2063/09/17 pursuant to Section 18 of the Evidence Act, 1974 and stated that the person called as “Dutch” is Charles Shobhraj. As the person hiring the car during that event had himself introduced as

Dutch citizen named Henricus Bintanja, it is natural to address him as “Dutch”.

Likewise, the appellant/defendant Charles Shobhraj had absconded to India despite he had been kept in surveillance by the police in connection to the murder of Connie Jo and had also been instructed to be in contact with police. After his arrest in India and publication of news with his photo in the Nava Bharat Times, the then Superintendent of Police Chandra Bir Rai, who was involved in the investigation of that crime, has submitted report in the Ministry of Home Panchayat with the purpose of making correspondent with the Government of India requesting for his extradition. In the report, he has mentioned the complete details of the event and made confirmation that the person who stayed in the Soaltee Oberoi in the name of Henricus Bintanja, who was in surveillance of police with the suspect of involvement in the murder of Connie Jo, was the appellant Charles Shobhraj. Chandra Bir Rai, who had been able to identify him on time (to Charles Sobhraj) after his immediate arrest in India, following the occurrence of event in Nepal, and publication of news along with his photo, in his testimony made before the court after 34 years, has corroborated his report stating that the defendant had stayed in the Soaltee Oberoi in the name of Henricus Bintanja and was involved in the murder of Connie Jo.

If the defendant Charles Sobhraj had not committed the offense charged against him, there exists no reason to give testimony against him with specification and say that he was guilty. The charge against the appellant has been established without any doubt since the appellant himself and the legal practitioners on his behalf have not been able to prove the testimony and evidence otherwise with objective evidence or show that the persons giving testimony had any prior enmity or prejudice with the appellant. Likewise, the expert's report has shown that the signature made in the Guest Registration Card in the name of Bintanja and that of the present passport made in the name of Charles Sobhraj had common authorship. The expert has also made testimony pursuant to Section 23(7) of the Evidence Act,

2031 (1974) and corroborated that report and therefore, the fact has been further obviously proved.

The bench has to consider about the argument made by the learned legal practitioners of the appellant that the examination report made by examining the photocopy without comparing with the original copy is against the law and should not be admitted as evidence. In this regard, the Guest Registration Card filled up by Henricus Bintanja during his stay in the Hotel Soaltee Oberoi was the document under the possession and ownership of that hotel and the person Bintanja had absconded from the hotel without paying bills leaving his goods at hotel. As the hotel has been initiating action to recover the realization of dues through the embassy, therefore, it was natural for the hotel to deny to providing the Guest Registration Card to the police and it was not unusual not to enclose the card in the case file. In the context of the present case, when the said Guest Registration Card was asked from the management of the hotel, the management of the hotel responded that the management and the name of the hotel had been changed before 12 years and that Guest Registration card would have been destroyed during the time of old management. However, in the process of investigation, the photographs of such Guest Registration Card had been taken from the camera and kept secured the photograph of the signature and it's negative. Now, in the time when the defendant Charles Sobhraj has come to Nepal in 2003 with French Passport and the signature in that passport has been examined by comparing it and such act cannot be termed as unusual and otherwise. Since it is seen from the report with opinion of the handwriting specialist saying both of signatures have common authorship written by the same author and he has made testimony in the court pursuant to Section 23 (7) of the Evidence Act, 2031 and corroborated his opinion. The the signature of the passport of Charles Sobhraj has been examined by comparing with the photo of the Guest Registration Card taken from the Camera not with the photocopy of the card and therefore it is admissible as evidence pursuant to the Section 36 of the Evidence Act.

Apart from this, in the description filled up in the Office of Immigration by this appellant while his latest entry to Nepal in 2003 had mentioned his place of residence in Nepal as the Hotel Soaltee Oberoi. Prior to the visit Nepal by the appellant the management and the name of the hotel had been changed as Soaltee Hotel Crowne Plaza. In this way, whereas the appellant has mentioned that he would stay in the Soaltee Oberoi which is not in existence now but existed in 1975, it is proved that the person who stayed at Soaltee Oberoi in the name of Henricus Bintanja was Charles Shovraj. Further, the the appellant though, he had mentioned in description in the immigration that he would stay in the Soaltee Oberoi which is now changed now into Soaltee Crown Plaza he had not stayed there and stayed in the Hotel Garden. From this, even coming to Nepal this time the appellant has given false statement and his modus operandi of the past crimes has been proved. From appraisal and analysis of the above-mentioned facts, the prima facie case has been proved that the person stayed in the name of Henricus Bintanja in Hotel Soaltee Oberoi from December 18 to 23 of 1975 was Charles Sobhraj.

Now, to consider about the second relevant factwhether or not the person Henricus Bintanja had relation and contact with the deceased Connie Jo, though the body and face of Connie Jo could not be identified, going through the statement made by the Australian citizen Christie MacMillan while making identification, she has stated:-

> "*Connie Jo had said us at Soaltee Oberoi that she had met a Vietnamese jeweler and his French wife and had gone to Soaltee Oberoi many times."* In the deed she made while identifying the dead body, it is stated:-
>
> "I, *Kirsty Marion MacMillan, met Connie Jo in Pokhara on 14.12.75, travelling on bus to Kathmandu. I saw her again in Kathmandu in the Oriental Lodge. ... I saw her occasionally during the next few days. She expressed on interest in morphine and heroin and asked us to accompany her to purchase some morphine but we declined as we did not wish to become involved. The last time we saw her was on Monday 22.21.75 at a few minutes past ten ... I identified a body on*

24.12.75 to be Connie Jo. There was a ring on her hand which I can remember her wearing. I was also shown a bracelet which I identified as belonging to Connie Jo. I also identified an earring which I have seen Connie Jo wearing."

Likewise on the back side of that paper, it is also mentioned - *"She mentioned to us that she had met a Vietnamese jeweler and his friend wife who were staying at Soaltee Oberoi. I know she visited them at that hotel."*

Since it has been obvious that the appellant defendant Charles Gurumukh Shobhraj is a French citizen of Vietnamese origin and Marie Leclerc as his spouse were stayed together at the Hotel Soaltee, the statement. Therefore, the statement of Kristy Macmillion is based on fact and the defendant Charles Shobhraj had stayed in the name of Henricus Bintanja. The matters told to Christie MacMillan by the deceased before her death has been expressed by Kristy during the investigation immediately after the event and from this it is seen that the appellant had made frequently contact and meeting with the deceased Connie Jo Bronzich at the Hotel Soaltee Oberoi. The said statement of Christie MacMillan is admissible as evidence pursuant to Section 10(1) (a) of the Evidence Act, 2031 (1974). In the Section 10 of the Evidence Act, 2031 (1974) it is mentioned that:-

(1) If any of the following persons express any fact immediately or immediate before or after, regarding any act, incident or condition/situation such fact may be taken as evidence,

(a) The person who had done that act, or who had directly seen or known the act, incident or condition/situation,

According to this legal provision, the statement told by the deceased Connie Bronzich to Kristy Macmillion before she died that she used to meet with Vietnamese jeweler staying at the Hotel Soaltee, and that statement has been expressed by the Kristy before the investigating officers. Though she had not given testimony in the court because of being foreign tourist, her statement is admissible as evidence pursuant to Section 10 (1) (a). From this analysis the statement made

by the defendant in the court that he had not known Connie Jo Bronzich does not seem to be true.

Likewise, the defendant has stated that he did not know to Monique Leclarc. However, in his statement, stated above, made in Police Post of Lajpatnagar, which is enclosed in the written brief, he has stated, frequently mentioning the name of Monique Leclarc that he, Monique Leclarc and Ajay Chaudhari traveled to Kathmandu from Bangkok from flight. Likewise, while Charles Sobhraj was imprisoned in Tihad Jail, Monic Leclerc had filed a writ petition in the Supreme Court of India on behalf of Charles Sobhraj complaining that he was denied reasonable facilities and he humanely treatment and urging for making available of these facilities. The writ petition of Criminal petition No. 4305 of 1978 Charles Sobhraj through Marie Andre Leclerc Vs. The Superintendent, Central Jail, Tihad had been quashed in 31/ 8/1978 as per the decision published in AIR 1978, SC. 1514.

Likewise, Monique Leclerc arrested in the case of Luke Solomon, in her statement made in the Lajpatnagar Police Station situated in Delhi has given the detail description of the events after the meeting with Charles Sobhraj in chronological order. Some parts related to the present statement made by her in India are as follows:-

I, Alain and Ajay Chaudhary flew to Kathmandu from Bangkok in Dec.1975. Before that Alain had brought 15 passports from Ann's apartment as what he told me. … Before I flew to Kathmandu, my visa was finished and on my asking to get me visa from my embassy, he brought one passport with my photograph affixed on it and it was in the name of a Dutch girl whose name I do not remember. When we reached to Kathmandu we went to Hotel Oberoi and there Alain wrote his name as Bintanja Henricus and me as Dutch girl. Ajay stayed in some other small hotel in Kathmandu. On the same day Alain hired a private car of white color. Alain, Ajay and I were travelling in that car and when the car was parked near the temple in Kathmandu and we met one couple travelling together, they were one Canadian boy and U.S. girl. I do not

remember them. Alain and Ajay talked with them. In the night, Alain and Ajay went to see this couple. On 23rd Dec. 1975 Alain and Ajay went back to Bangkok and Alain came back to Kathmandu on 24th December1975, and Ajay I saw him on 25th in the evening at 5 p.m. around in a restaurant. … On 25th afternoon at about 1 o'clock Alain and I was going in a car when we were stopped by a policeman and taken to a police station at Kathmandu. They asked us, as where we were on Dec.22 night. I replied that from 5 p.m. of 22nd Dec., 75 to morning of 23rd Dec. 1975, we were in Oberoi Hotel. We were taken to the police station at Kathmandu as the color of the car was white and it was suspected in murder. … On 26th Dec. 1975 Alain went to the police station to the detectives about the case, as they became friendly with Alain. The same detective told us that they are looking for an Indian boy. Detective also told that so to body from the hotel had seen one Indian boy with the couple. Alain 46 *enquired as to what was the happening. We left the police station after 10 minutes and there Ajay met us in a restaurant. There Alain told Ajay that it is better for us to go away as we are having a white car and we may get trouble. On this night, Alain and I were in Oberoi Hotel on 28th Dec., 1975, Alain, Ajay and I took a private taxi, left our luggage in the hotel room and started by taxi. In the evening at about 9.30 p.m. we reached Raxaul check post at night… I was also of the view that we were suspected for two murders … So; Ajay and Alain might have committed both the murders. I could not see them doing all this, as I used to remain in the hotel room and I had sufficient time to write letters to my family.*

From this, the statement of the defendant Charles Sobhraj that he did not know Monique Leclerc and Ajay Chaudhary has been rebutted. Apart from this, in the statement it is stated that… *the defendant Charles Sobhraj stayed in Hotel Soltee Oberoi in the name of Bintanja, I… hired a car of white color and travelled... On 23 Dec. 1975, Alain and Ajay went back to Bangkok and Alain came back to Kathmandu the following day or on 24th December1975, ..the police*

inquired about the murder of Connie Jo; Ajay and Alain might have committed both the murders. Being afraid of the being entrapped by the police, absconded to India leaving some of the luggages in hotel. From this statement, the involvement of appellant/defendant Charles Sobhraj in the murder of Connie Jo has been evident.

Similarly, the documents received by Nepal Police from Interpol, received from Interpol Washington, have been presented in this court from the Office of the Attorney General in 2063/9/13, and the documents received from Interpol New Zeeland have been presented in 2064/3/5. On 2064/3/26 different documents received form Interpol Wing New Delhi and on 2065/4/22 different documents and on 2064/11/30 four DVD's have been received from New Zealand Police. Likewise, it has also been seen from the document that the description about the arrest warrant issued by the Thailand's Police 20 May 1976 in connection with the forged passport used by Allen Gauthier and the murder of the said foreign citizens in Thailand have been received from the Interpol and enclosed in the case file. Apart from this, from the documents enclosed in the case file it has been revealed that before the institution of this case, the Interpol Section of the Nepal Police had made correspondence with Interpol Sections of the police of other countries asking for documents relating to the defendant. "Interpol being the international organization of Police and recognized by the General Assembly of the United Nations established to make available of the information regarding the organized crime and the criminals at international level as well as to promote cooperation, the data provided by this organization regarding crime investigation cannot be held otherwise readily."

This appellant has given statement denying the offense and only stated that he had not come to Nepal at the time of the murder of Connie Jo. However, he had not been able to say in his statement where he was at the time of occurrence of the crime or on 2032/9/7 B.S. (22nd December, 1975) and had not presented any evidence to prove it. "Only the statement of the accused person whether confession or denial on the offense charged cannot take place of evidence on his behalf or against him. Instead that confession or denial must be corroborated by basic, factual and assertive

evidences." Court can make it as ratio if it is supported by evidence. "Denial without any evidence the statement becomes meaningless and useless and in such condition the indirect evidence collected against the defendant shall be accepted as evidence by the court" against him/her. Likewise, "if any accused pleads that he/she was elsewhere at the time that a crime was committed, the onus of proving that plea of alibi lies on the accused. Such plea of alibi if it is based on fact or corroborated by assertive or written evidence it can be admissible for the accused side. It is used as evidence against the accused if it could not be corroborated by indisputable and factual evidence." In the present case, the defendant Charles Shobhraj has only stated that he was not present in Nepal during the time of the murder of the deceased Connie Jo. However, he has not been able to say clearly and convincingly where or in which country he was present at that time. In such situation, the court cannot hold such statement of denial as admissible evidence. From the analysis made in the paragraphs above the defendant was staying in Nepal in the name of Henricus Bintanja at the time of occurrence of the murder of the present case and his plea that he was not involved in the offense and his plea of alibi has itself been rebutted.

To considering about the main question whether or not the defendant was involved in the murder of Connie Jo Bronzich at night of 22nd December 1975, the prosecution has charged that the murder of the deceased had been committed by the persons including the defendant Charles Shobhraj alias Allen Gauthier stayed in the name of Henricus Bintanja. However, the appellant has filed an appeal on the ground that the prosecution has not been able present any eyewitness, or any eye witness or direct evidence to show his involvement in the crime and the judgment of the court of appeal sustained the original decision convicting him only on the ground of circumstantial evidence. The legal practitioners of the appellant have raised this issue in their arguments and also in their written brief. Therefore, it is relevant to discuss about direct and circumstantial evidence.

Evidence means a fact which helps to prove or disprove the fact in issue of the case to be decided. Evidence is a raw material for judges or judicial authorities to find out fact. Presentation of evidences and

their analysis and evaluation help judges to find out the facts, the intention of the offender and the fact whether a courpus delicti had been committed or not. Evidences are of two types:-

(a) Direct Evidence and (b) Indirect and Circumstantial Evidence.

Direct Evidence is that which goes expressly to the very point in question and proves it. If believed without aid from inference or deductive reasoning. Eye witness of the crime of homicide and other is an example of direct evidence. Direct evidence comes under the category of determinative and powerful evidence. However, where there is an absence of direct evidence, it is tried to find out (discover) crime and criminal on the ground of circumstantial evidences.

The prosecution tries to establish and prove the guilt of the accused with the help of indirect or circumstantial facts or relevant auxiliary evidences if there is absence of direct evidence. Therefore, circumstantial evidence is called indirect evidence. "When the acts or conditions of behaviour and activities of the accused are socially linked and it suffice to draw the conclusion that a criminal act was committed and it establishes that the accused has committed an offense, such hierarchical chain of facts is called circumstantial evidence. For it every series of the fact must be relevant to each other and interrelated and it is regarded as disproved (refuted) in absence of any one of these sequences."

The principle of circumstantial evidence is based on the foundation that the witness giving testimony as direct evidence may falsify or misrepresents the fact or state untrue or false matter about event or crime however, circumstance or fact may never state false. Generally, circumstantial evidence is not termed as direct evidence. Therefore, there is a general conception that the circumstantial evidence is less important than direct evidence. However, this concept may not always be true. Certainly, the direct evidence may be comparatively considered as most powerful. However, a professional criminal does not commit crime in presence of eye witness and destructs the real evidences related to the crime, the successful administration of criminal justice is forced to be dependent on circumstantial evidence.

Therefore, the importance has been given to circumstantial evidence in the administration of criminal justice. Viewing from practical stand point it is difficult to suppress, hide or fabricate circumstantial evidence and therefore, it is more useful and reliable.

Now, it needs to be considered whether there is the existence of circumstantial evidence regarding to the claimed charge made against the appellant Charles Shobhraj of committing the murder of Connie Jo Bronzich and whether the charge against him can be sustained or not. Whether or not the decision of the Court of Appeal, convicting the defendant should be sustained?

The main charge of the prosecution against the defendant is that the Allain Ganthier alias Charles Sobhraj staying by the name of Henricus Bintanja has committed the murder of Connie Jo Bronzich. Although the appellant has denied the charge the bench has concluded from different decisions of the Indian Courts and judicial proceedings as analyzed above that the person called Allain Ganthier stayed in the name of Henricus Bintanja is the defendant Charles Sobhraj. Similarly, the prosecution has charged that the appellant had stayed in Hotel Soaltee Oberoi in the name of Henricus Bintanja and that fact has also been accepted by the appellant in the statement given before Indian authorities in the process of judicial action and its proof has been presented with the written brief presented on his behalf. Therefore, it cannot be held otherwise. From the examination of the expert and his testimony similarities have been found in signature made on the photograph of Guest Registration Card of the Soaltee Oberoi, taken at that time of investigation, and the signature of the defendant in his passport during the time of his arrival in Nepal in 2003 as well as the specimen signature taken from the defendant. Therefore, it has been established that the person staying as Bintanja Henricus in the Hotel Soaltee Oberoi is the appellant.

Accordingly, the claim of charge that Charles Shobharaj had used the white car of the Gorkha Travels bearing No. 5001 while committing the crime has also been accepted by the defendant and Monique Leclerc, who stayed along with him, in the statement given after the event before the Indian officials. The driver of that car Purna Maharjan, in his testimony, before this court has stated that the person

who hired the car called “Dutch” citizen is the appellant and the fact has been proved. The defendant who used the white car while committing the murder of Connie Jo who stayed in the Hotel Soaltee by the name of Henricus Bintanja had been suspected by the police and kept in surveillance and also instructed to inform the police while leaving hotel. However, without paying the hotel bill and moved by taxi leaving some of his luggages in the hotel. That fact has also been established from the statement made by the defendant before the Indian officials accepting the fact.

The statement made by the appellant that he did not know to Connie Jo Bronzich has also been disproved by the statement of Kristy MacMillan who had identified the dead body of Connie Jo, and stated that *“She mentioned to us that she had met a Vietnamese jeweler and his French wife who were staying at Soaltee Oberoi."* Kristy has stated immediately after the occurrence that Connie Jo had told that she had gone to Soaltee Hotel frequently to meet them. From this, it has been established that Connie Jo had met with the defendant Charles Sobhraj of the Vietnamese origin. Likewise, the plea of the defendant that he had not known to Monique Leclerc and Ajaya Chaudhary has also disproved from the statement of Monique Lecerc made before the Indian officials.

Likewise, about 34 years ago a police report with specification was made indicating that the appellant defendant Charles Shobhraj is the same person who killed American citizen Connie Jo Bronzich staying at the Hotel Soaltee Oberoi in the name of Henricus Bintanja alias Allen Gauthier on 18th December, 1975. Based on that report the charge sheet has been lodged against him. In regard to that fact, established from the investigation made before 34 years, about the appellant /defendant, Superintendent of Police Chandra Bir Rai who was immediately involved in the investigation of the case and submitted the report, making testimony before this court, has indicated that the person staying in the Hotel Soaltee Oberoi in the name of Henricus Bintanja and escaped to India in course of the investigation of the present case, is this appellant/defendant Charles Shobhraj.

In the case related to Forged Passport connected with this case, decision of the court of appeal sustaining the decision of the district

court convicting the appellant defendant on the ground that he had used the passport of Henricus Bintanja a Duch citizen, who had already been murdered, and come to Nepal from Thailand and stayed here. Criminal psychology of the criminal motivates him/her to repeat the same act whenever success is achieved in a crime committed with certain modus operandi. Likewise, the criminal, after committing the crime, has the curiosity and query to know about the activities or reactions of his/her criminal act and therefore, go to that place again. Accordingly, the appellant/ defendant has come to and gone out from Nepal and India frequently after the commission of crime and thus, the fact has been proved from it.

Thus, as discussed above, the person Allain Ganthier, stayed by the name of Henricus Bintanja, alias Charles Gurumukh Sobhraj is the same person. The above-mentioned facts of the acts and behaviors of the appellant/defendant Charles Gurumukh Sobhraj have been linked up in hierarchical chain and it has been proved from the circumstantial evidence that he had committed the murder of Connie Jo Bronzich as claimed in the charge sheet. Hence, there exists no error in the analysis of fact, evaluation of evidences, determination of crime and sentencing in the decision of the Appellate Court Patan, dated 2062/04/20. Therefore, the decision of the Court of Appeal dated 2062/4/20 sustaining the decision of the District Court Kathmandu dated 2061/04/28 that convicted appellant/defendant and sentenced him to undergo imprisonment for life along with the confiscation of the entire property pursuant to No. 13(3) of the Country Code (Muluki Ain) is herby sustained. The contention of the appellant/defendant cannot be sustained. Let the information of the decision be provided to the defendant who is under imprisonment and let the case file be handed over as per rule by removing the record of the present case from case registration book.

I concur with the above decision.

Justice Gauri Dhakal

Done on 14 Shrawan 2067 (30th July 2010).

Translated by Rewati Raj Tripathi

The ruling is based on pro choice principle, hence the autonomy of fetus over the mother is denied. It is concluded that the bearer of womb has right to carry or terminate it any stage of development to maintain her pleasure and happiness in life. Viewing through women's human right perspective, the abortion is legalized to its fullest possible extent also in Nepalese legal system.

Supreme Court, Division Bench

Hon'ble Justice Kalyan Shrestha

Hon'ble Justice Rajendra Prasad Koirala

Writ No. Wo - 0757 of the year 2063

Subject: Mandamus.

Petitioner: Laxmee Devi Dhikta, resident of Ward No. 8 Ajaimeru Village Devlopment Committee Ward No. 8, Dadeldhura district.

Vs.

Respondent: GON, Office of the Prime Minister and Council of Minister's, Sinhadarbar & others.

- **Fetus has not independent existence; its existence is confined only within the mother's womb. Suppose, if fetus has any interest, though it could not be said that such kind of interest is prevailed against mother.**
- **While, it can't be ruled out that, the claim hasn't been raised, time to time, by the husband he has the right to be a father; if so, than the wife's right to be a mother required to be addressed. If it's recognized that despite the physical risk, all of her disapprovals or adversity, if**

women are being compelled for the fulfillment of husband's desire to be a father, wife will lose control over her own life; consequently, (she) have to accept the continuity of direct or indirect subordination. While, women can't insist her husband to be a father or compelled to enter into sexual relation, likewise man too couldn't compelled woman.

- **Whether the child has to be given birth or not both kinds of decision 8 are encompassed within the broader context of reproductive health and reproductive right, and it should be recognized that the right to abortion is also incorporated under it, in the context when pregnancy has taken place but unwillingness to give birth of child because it was unwanted.**
- **Right to reproduction cannot be understood as a compulsion to enter into reproduction, and if not like to involve freedom of non-involvement to reproduction is included under the right to reproduction. Like, the right to work is recognized that it embraces the freedom of not to work, right to reproduction should be viewed accordingly.**
- **The legitimacy and relevancy of its availability of abortion service can be meaningful only if it is accessible to the people who need it and affordable as their paying capacity.**
- **The rights provided by the law are also the issue of the interest of the people, given the law does have created benefits and interests; that should be equally distributed and should be made available for equal exercise of them. To be as a right holder of the equal protection of the law meant right to have equal access and affordability of the benefit of the law to all; judicial responsibility can't be rejected for such matter.**
- **Since the abortion is a health related problem, right to health is a fundamental right of person so that it shall be**

viewed as a right to life; our constitution has recognized the right relating to social justice as well as the directive principle and policy of the state has accepted the special protection of the women's rights as a liability of the state, therefored, women's right to abortion or problems related to pregnancy cannot be separate from the public responsibility taking it as an absolutely a private problem.

- **Whereas, Constitution and prevailing laws have not extending the recognition the embryo's rights including right to life before getting birth; it seems there are no any reasons for making the issue of abortion to be as a part of the Chapter of Homicide.**
- **Since the right of abortion has come in place as a novel right; it seems contradictory and really incompatible continue to be placed as an indivisible part of the Chapter of Homicide, which is known as a part of the strict criminal law. It appears that enacting separate law is essential for abortion as a distinct and special subject being mindful of the spirit of the recently amended provision**
- **The problem of abortion should not be viewed by confining it merely as an issue of whether abortion should be permitted or not? Or whether embryo should be given birth or not? But also should be viewed as a subject of entire health related problem of the women; therefore, it appears that there is need of best system in order to provide legal remedy to address the multidimensional problems, - due to the violation of the right of abortion or due to denial to provide the service or due to provide less standard service etc. While considering on the issue of legal remedies, - punishment to the offender/s, compensation for the victim, other arrangement related to the facilities of health to the victim required to be arranged.**
- **Right relating to abortion expects definite liabilities from the state party or service providers, so that this right**

can't be viewed subject to the discretion or choice of the state.

Decision

Kalyan Shrestha J.: The brief facts of this writ petition filed under Article 32 and 107(2) of The Interim Constitution of Nepal and verdict thereupon are as follows:

The petitioners states, - we the petitioners are actively engaged in protection and promotion of women's human rights, filing the cases of public interest litigation against discriminatory law against women, protection of public interest including gender justice and protection of individual rights. Likewise, among the petitioner, I Laxmee Devi Dhikta is a woman from an extremely poor family of Dadeldhura District, backward from social awareness. In lacking of awareness, schooling or education and lacking of information about to give birth necessary number of children is one of the reproductive right of the women, I already have given birth of five children. Even after that, I became pregnant. So that, as our internal consultation about the matter of abortion, we got to know that government hospitals have been providing abortion facility legally. And, when we went to the Dadeldhura Hospital in order to abort, we were asked RS 1130/ for abortion service. Instantly I had not that amount. In this way, I was denied to use the service provided by the law, so that, now I am in the situation of about to give birth of child after bearing of unwanted pregnancy. Hence, I appear to this Court, because of the violation of the fundamental and legal rights including reproductive health provided by the prevailing law.

Article 13 of the Interim Constitution of Nepal, 2063 has guaranteed that every person shall have the right to live with dignity. Section 12 of the Civil Right Act, 2012BS (*Nagarik Adhikar Ain 2012BS*) has also stated that no one shall be deprived of his/her personal life and liberty, save in accordance with law. In this connection, Supreme Court has given its judgment in line with ensuring the right to life, in the case of *Surya Prasad Dungel* vs. *Godawari Marbles.* Due to the lack of

sufficient awareness in Nepalese societies about the right to abortion; abortion service has become inaccessible and unaffordable, and, the situation of unwanted bearing of pregnancy, and in many cases it has been the causes of death. The incidences of death of life because of unsafe abortion service and arbitrary charging expensive cost for the service by the service provider have already been come into publication. In this way, the right to live with dignity of women is being seriously violated due to the unsafe abortion. Even though, some reformative legal provisions have been made in relation to abortion by the 11th amendment of the Country Code (Muluki Ain), however, those provisions also have not been fully implemented, so that, we had requested to the concern agency for the extension of abortion service by making it affordable and accessible. Due to the inaccessible and unaffordable right to abortion, the right to live with dignity and right to self-determination of victim women has been violated.

Clause (1) of Article 13 of the Interim Constitution of Nepal, 2063 has provision the right to equality that states all citizens shall be equal before the law and no person shall be denied the equal protection of the laws. Clause (3) of the same Article has stated that the State shall not discriminate against citizens among citizens on the grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these. But, special provision shall be made for the protection, empowerment or advancement of women, *Dalits*, indigenous peoples*, Madhesi* or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated. To this end, every citizen shall not be denied to utilize the right provided by the law and constitution in any grounds or any reasons. To be deprived from utilizing the right to abortion provided by the law and constitution because of the reason of poverty is against the principle of right to equality. Most of the Nepalese women have been suffering from the problem of giving continuity of unwanted pregnancy because of being unable to abort it due to the lack of information about the legal right about abortion, being unable to pay the service charge or because of the reason of unavailability of abortion service in

concerning district. This is the suppression of the right to live with dignity, liberty and self-determination of women.

Article 1 of International Covenant on Economic, Social and Cultural Rights, 1966 has the provision in relation to the right to self-determination. And, International Covenant on Civil and Political Rights, 1966 has also guaranteed the right of self-determination. The right to abortion falls under the right to self-determination of women. Even though, right to abortion is right to self-determination of women, nevertheless, 11th amendment of the Country Code (Muluki Ain) has recognized it as the reproductive right of the women. Prevailing Nepalese laws are not sufficient to insure reproductive right of the women in conformity with the set standard of international conventions and agreements to which Nepal is a party.

The Interim Constitution of Nepal has included right to privacy as a fundamental right, and has stated that except as provided by law, the privacy of any person, his or her home, property, document, data, correspondence or matters relating to his or her character shall be inviolable. However, in Nepal's government hospital, the action of taking service delivery form by filling it with details from the women coming there seeking abortion service, and, to fix the service delivery time, to fix the specific number of quota per day, to disallow the service if the service seeker exceed the fixed numbers, to fill the form in open manner etc are resulted, not only in the violation of privacy of women, but also created the state of being denied the right to abortion within (reasonable) or lawful time period.

A study, carried out in Nepal, revealed that average fifty percent maternal deaths are caused by unsafe abortion. Therefore, abortion has been legalized in Nepal. In the situation, when available abortion service system is considered insufficient due to the distinct geographical setting of Nepal; though the law does not banned, medical abortion has been prohibited by the Self Abortion Service Procedure, 2060BS; that is against the norms and values of the law. Wherever the safe abortion service is available in some districts, it is centered only in limited urban area. The right to abortion has not been ensured for the women who dwell in the rural area due to the

lack of clear legal provisions and procedures, which lead to uncertainty of the right to abortion related with reproductive health of all women.

In this circumstances, therefore the poor women either they are compelled to give continuity their unwanted pregnancy, or forced to receive the consequences of unsafe abortion. On the other hand, the right to information enshrined by the constitution is also violated due to lack of access to have the information about legalization of abortion. Hence, it is requested to the Court to issue the order of *mandamus* in the name of Ministry of Law and Justice, to make special and comprehensive law in order to guarantee the right to safe and aaffordable abortion; to issue the order of *mandamus* in the name of Ministry of Health, to launch special awareness programmes in order to inform the general people and service providers about existing provision of the law, and, to create a special fund at the center in order to make accessible and affordable abortion service, until such law be enacted; and also, to issue the order of mandamus in the name of respondents concerning stakeholder agencies, to maintain the privacy of women who has received the abortion service, likewise, to make accessible abortion service to the general people, to determine the maximum limit of fee to be taken for the abortion service, and to provide free service to the women who are unable to pay; furthermore, to issue the order of mandamus in the name of respondents to make and implement the necessary programme in order to broaden the people's awareness. moreover, to issue an appropriate order in the name of respondents to provide necessary compensation to the petitioner Laxmee Devi Dhikta, among the petitioners; taking into account of the fact that the physical, mental and economic damages borne by her due to the violation of the constitutional and legal right.

This Court issued show cause order for serving a notice enclosing a copy of the petition in the name of respondents to submit their written reply within 15 days why an order as requested by the petitioner shall not to be issued? And, duly submit the case for hearing after

submission of written reply from the respondents or on an expiry of stipulated time.

The written reply submitted by the Office of the Prime Minister and Council of Ministers has stated that it has not been made clear in the writ petition about what actions taken by this Office has violated the Petitioners' right. The Petition filed by making Respondents to this Office without due reason and basis should be dismissed. The 11th amendment of the Country Code (Muluki Ain) has already made sufficient provision in order to make abortion systematic, respectable, and has ensured women's right. Necessary procedural arrangement for the implementation of legal provision has also been made, and Nepalese women have been receiving the service accordingly. In the context, when concerning agencies of the Nepal Government have been actively working toward implementation and cause to be implemention of this legal provision, so that no order should be issued in this respect. Though, the status of the international agreements, to which Nepal is a party, within the realm of prevailing law has been determined by the Section 9 of the Treaty Act, 2047BS, however, individual cannot directly invoke the provision of the international treaty as of right, thus, the petition lodged on by citing the provision of international treaty is not accorded with law. Likewise, this matter falls under the exclusive jurisdiction of the legislative domain that what type of law or amendment thereto is to be made or not to be made. And, this office could not regulate such matter. Hence, The petition filed by making this office as respondents without due reason and basis should be dismissed.

The written reply submitted by the Ministry of Health and Population, has stated that it has not been made clear in the writ petition about what actions taken by this Ministry has violated the petitioners' right. The rights of the petitioner have not violated by any action taken by this respondents. Hence, the baseless petition should be rejected.

The written reply submitted by the Legislature Parliament, stated that there is no reason to make this legislative parliament as respondent, this petition has no propriety, so that it is quash able at *prima facie* stage. Article 16(2) of The Interim Constitution of Nepal has included

the constitutional provisions that every citizen shall have the right to free of cost basic health services from the state, as provided in law. Thus, on account of the implement of this constitutional provision, it is inevitable to make law in order to provide basic health service to the people. The Legislative Parliament does not play proactive role through the process of making law, rather if the Nepal Government or any private member formally introduces any Bill, this constitutional body activates toward the approval of that Bill through legislative procedure. So far in this matter, the government Bill is required to be presented to define the Basic health service taking into account of the economic capacity of the state to provide the service as free of cost. Without being mindful of this very reality, the petitioner has unnecessarily made this Legislative Parliament a respondent; hence, the petition should be rejected.

The written reply submitted by the *Department of Health Service, Department of Health Service Division of Family Health* and *National AIDS and Sexual Disease Control Center* have stated that the amended No. 28b on Country Code brought by the 11th amendment has included the provision that abortion could be carried out with the consent of the pregnant woman by a qualified and registered health worker upon fulfilling the prescribed procedures. And, the procedure has been determined by the Safe Abortion Service Procedure, 2060BS. Section 14(1) of this procedure has stated that, "Health institution, doctor or health worker can receive service fee for providing safe abortion service from the person who receives the service." The purpose of authorization to provide abortion service by the qualified and enlisted health workers or health institutions as prescribed by the procedure is to make this service accessible to all general people. Therefore, it became necessary to fix the specific service fee for the government hospital. And, the fee has been fixed maximum of Rs 10,000/ including medicine and according to geographical situation. This service has been provided free of cost to the people who are unable to pay fee due to their economic condition, and, further effort will be made in order to make this service more effective. Concerning to the extension of the service, there are 359 doctors already been trained and enlisted for providing service up to

19 Chaitra, 2063BS. This service has already been extended up to 70 districts, except Rukum, Rolpa, Salyan, Terhathum and Kalikot. Likewise, for promoting public awareness, the public notice is being communicated 10 times a year through various communication media. This department is also positively thinking to create a separate fund for providing the service to the poor and unable person. The system has been made for keeping confidential of the details of the women who receive the service. Hence, the writ petition should be dismissed.

The written reply submitted by the Ministry of Local Development stated that the local bodies have been performing their activities relating to health as far as possible according to their means and resources as prescribed by the Local Self Governance Act, 2055BS. There is no reason to make this Ministry as a respondent. This petition is deserved to be rejected, so that the petition should be dismissed.

The written reply submitted by Ministry of Women, Children and Social Welfare stated that the petitioner could not explain that the petitioner's constitutional and legal right is violated due to any action or inaction of this Ministry. The statement of the petition is self-centered. Hence, it is requested that the writ petition should be dismissed.

The written reply submitted by Ministry of Law, Justice and Parliamentary Affairs stated that the provision in relation to abortion has been added and already implemented through the amendment in 28b in Chapter on Homicide of Country Code (Muluki Ain) by the 11th amendment on it. This provision verified that the reproductive right of the women is respected by the state. Furthermore, the rights of the women have been established as fundamental rights by the Article 20 of the Interim Constitution of Nepal, 2063BS. Likewise, Directive Principle, Policy and liability of the State in Part IV of the Constitution have determined range of provisions in order to protect special rights and interest of the women. In this way, varieties of legal provision are existed for addressing the issues raised by the petitioner. Hence, the claim of petitioner is not accorded with law, so that the petition is deserved to be dismissed.

While hearing of this writ petition, which is now presented before this bench after being duly enlisted in daily cause list. The learned advocates Purnaman Shakya, Prakashmani Sharma, Narendraprasad Pathak Meera Dhungana, Kabita Pandey Sabin Shrestha and Lokhari Basyal appearing on behalf of the petitioners, argued that the because of the fact that the reproductive health is a fundamental right, it is the liability of the state to bring about the necessary infrastructure and facility in order to enforce this right in practice. Though, the 11th amendment of the Chapter on Homicide in Country Code (Muluki Ain) has soften the matter of abortion, still a comprehensive legislation does not come into existence yet. Therefore, in this respect necessary order should be issued in order to make separate law. Furthermore, additional order should be issued in the name of respondent to arrange necessary manpower by allocating means and resources for safe abortion, and, to bring the abortion service up to the targeted class of people. The provision of Chapter on Homicide has made this subject as offence of criminal matter which is not compatible with modern concept. In this perspective, this subject should be viewed through the right based approach rather than the subject of traditional law. The right relating to safe abortion is more important in the country, like Nepal, because this is a social and economic right rather than civil and political. If someone is being deprived from receiving the services from using fundamental right due to the inability to pay fee, this is equal the state of denial to enforce fundamental right. Likewise, due to the lack of effective implementation of public awareness programme, women are being deprived from the right to have access to the safe abortion. And, the order also should be issued to provide necessary compensation to the petitioner Laxmee Devi Dhikta; taking into account of the fact that petitioner has been deprived from receiving the service of abortion due to the hardship of her economic condition, and suffered by the physical, mental and economic damages.

The learned Assistant Attorney General, Kumar Chudal, appearing on behalf of the respondent Government of Nepal, contended that the right to safe abortion is the important right of the women. Nepal Government is working toward this as far as possible according to

resources, means and capacity of the state. Likewise, in order to make safe abortion service effective, the Abortion Service Procedure, 2060 has already been brought and implemented. The writ could not be issued in this circumstances as requested by the petitioner, hence, this petition should be dismissed.

After having heard the pleadings of the learned legal practitioners and having observed the petition and written replies, the following questions seem to be considered, -

1. Whether the petitioners have *locus standi* to file this petition or not?
2. Whether the right to receive abortion service is a women's right or not?
3. What is the relation between abortion and other women's human rights and legal rights?
4. Whether or not the petitioners do have the right to receive the abortion service accessible and affordable?
5. Whether or not the order shall be issued to make separate law relating to abortion, as demanded by the petitioner?
6. Whether the petitioner Laxmee Devi Dhikta, among the petitioners, does have the right to get compensation or not?
7. Whether the orders shall be issued as demanded by the petitioner or not?

While considering on the first question, whether the petitioners have *Locus Standi* to file this petition? This petition has been filed jointly as a case of Public Interest Litigation under the Constitutional provision of Article 107(2) of the Interim Constitution of Nepal by various institutions, office bearers thereof and legal practitioners who are working in the field of public interest and affected person from being unable to have access to the above mentioned abortion service. This petition is found to have filed, particularlly by the president of Forum of Women Law and Development, Sapana Pradhan Malla, other office bearers and advocates; Pro - Public Institution and other advocates as well as affected person from the abortion related problem Laxmee

Devi Dhikta herself taking part to file this petition with a spectrum of demands in order to address the problems related to reproductive health, especially the problems of abortion. The advocate petitioners are seemed representing the institutions working in the field of gender justice and legal right of the women, so that, they can be viewed capable for representing the subject of the public interest, particularly in the subject of right of the women. And, petitioner Laxmee Devi Dhikta, among the petitioners, seems appeared as an affected person raising the question of her own right and interest with seeking remedy. Therefore, this petition seems to have been filed seeking to address the special problem of affected person as well as for the address of the problem of abortion of the women in totality. This court has been issuing necessary orders or directives from time to time in order to provide remedy upon the various petitions that have been filed by the petitioners showing public right and interest in a broad spectrum of existing problems in the field of women's rights, human rights and gender justice. And, because of the reason that the issue of the problem of abortion rose in this petition is not only an individual problem of any particular women, but also a common problem of the entire forks women. In this petition, it seems it is not appropriate to raise the question about petitioner's *locus standi* and capacity to represent the issue of public interest and rights.

So far as the issue concerning to the petitioner Laxmee Devi Dhikta, among the petitioners, as an affected person has claimed on behalf of her own right for the compensation showing the cause of the consequences out of the inability to pay fee for receiving abortion service, though it is not clear upto this time of the judgment of the case about her status whether she has given birth to a child or not. If she has already given birth, than the reasonableness of the order for providing abortion service will be ceased, and it cannot be ruled out that the question couldn't be raised whether the relevancy of the demand has been meaningless?

This issue is ought to be considered at first. In this petition, petitioner has demanded that the abortion service should be made effective, reliable, lawful, easy, accessible and affordable. So, it seems, here is

no specific reason that she has to explain the court about the update of her status upto the time of the judgment of this case. Even if the petitioner Laxmee Devi Dhikta have already given birth, even so, it seems no difficulty to consider on the issues demanded by her; because, this is that kind of issue when a case enters the court at once, it's probably the pregnant women will give birth in between the average time taken by the court. Whereas, the case forwards at slow pace but gestation grows very fast, so that, if the judicial remedy is denied due to the reason that the gestation is not remained as gestation, there might be created numerous situations where pregnant and suffered women may not be able to get remedy. Therefore, if the issues raised in the petition will not be addressed in totality of the context when the case enters into the court, and the effects and circumstances created at the time of delivery of judicial remedy, this seems abortion service and its corresponding legal remedies to the pregnant women is supposed to be entirely rejected, which is totally unjust.

Let us consider on the second question whether right to receive an abortion service is the right of women or not, -

Abortion means the process of a discharging the fetus from the womb of woman by intervening with artificial or external means including medical or surgery before its natural birth. Cambridge Advanced Dictionary of English Edition has defined abortion[2] as *'the intentional ending of a pregnancy usually by a medical operation'*. This is natural process that conception takes place after sexual intercourse, and after conception fetus develops regularly with developing various parts of its body in different stages, and its birth as a child after its maturity. Before that, in some situations fetus would die or sometimes it wouldn't developed or in some situations pregnant women doesn't like to give birth or by the cause of the fetus mother's life put to danger. If fetus dies before its development it is natural to remove it from the womb of woman in the course of treatment, - there is not the problem of law. But, in the case of unwanted pregnancy or in the situation

2 http://dictionary.cambridge.org/dictionary/british/abortion_1

when mother like to abort the fetus that she bears, does she can abort it at the developing stage or not? – It seems to have remained as the main disputed issue. It is recognized as a basic need in most of the justice system that fetus could be removed from the womb by medical intervention in the situation when if there is no possibility that the fetus in the womb will remain alive after its live birth, or if the physical or mental health of pregnant women will be adversely affected due to the cause of fetus in her womb. Except that, does a pregnant woman can abort the fetus in ordinary situation at her choice? To what extent time factor is relevant for that? What the law has legal provision in this regard? In this respect, the provision of number 28A and 28A in the Chapter On Homicide of Country Code (Muluki Ain) required to be observed, -

Number 28A. No one shall cause abortion upon causing coercion, threat, or by allurement of taking inconfidence in guise of offering something to a pregnant woman. In cases where a person causes abortion in that manner, the person shall be liable to the following punishment:

- *Imprisonment for a term of one year in case the fetus is upto twelve weeks 1*
- *Imprisonment for a term of three years in case the fetus is upto twenty five weeks.....1*
- *Imprisonment for a term of Five years in case the fetus is above than twenty five weeks.....1*

Number 28B. Notwithstanding anything contained in Number 28 of this Chapter, if an abortion is carried out by a qualified and registered health worker upon fulfilling the procedures as prescribed by the Government of Nepal, it shall not be deemed to be the offence of abortion, in the following circumstances:

- *If the abortion of a fetus of upto Twelve weeks is carried out with the consent of the pregnant woman ……. 1*

- *If the abortion of a fetus of upto eighteen weeks which was caused by rape or incest is carried out with the consent of the pregnant woman 2*
- *If the abortion is carried out with the consent of the pregnant woman and on the advice of an expert pursuant to the prevailing law that if abortion is not carried out, the life of such a woman may be in danger or the physical or mental health may be deteriorated or a disabled child may be born 3*

Pregnancy is viewed as the cause of origin of human being and process of continuity of its existence. From this view pregnancy is seemed as manifestation of motherhood. Protection of fetus is important, because it is the first form of life of every person. Bearing in mind about that, in one hand, some people hold the view that fetus is a life, to protect fetus is the protection of life and to kill fetus is the killing of life; on the other hand, some people hold the view that though the fetus is the natural occurrence for human life, since the existence of fetus is within the body of woman, fetus cannot be exist without mother, and, mother's health and other number of threats of life are attached with fetus, so that the fetus could not be major than protection of physical and mental health of mother. Fetus is existed because of the mother. If the right of fetus is recognized against the health and interest of mother; there would be the situation of conflict of interest between mother and fetus, and moreover, fetus supposed to be recognized as superior. Such situation is against the motherhood (Janani). It has been defended that abortion of the fetus should be recognized according to law to the desirable extent, on the basis of mother's consent, her health and including other interests, because fetus could not be protected by putting mother in an unsafe situation.

It has been classified that the people who say fetus should be protected, abortion should not be permitted are termed *pro life* and the people who say abortion should be permitted are termed *pro choice*.

In this way, the ideologies of the conscious society have been found in conflict in the form of religious, philosophical, medical system and in legal matters.

According to *Pro life's* view if abortion is legalized sexual immorality will rise. Abortion could be made as a means of family planning, the existence of human life will be in danger, state will be deviate from its job is to protect life, and because of the developing nature of the medical science pregnant women will be killed due to unsafe health,- such arguments have been put forwarded. *pro choice* put forwarded the arguments mainly that the sexual immorality has not been prevented by the criminalization of abortion; abortion helps to protect the physical and mental health of mother instead of putting future of the existence of person in danger; it is also the duty of the state to protect the mother's life as other person; abortion could be carried out in a safe manner due to the development of the medical science in recent days, so that abortion is not remained as hazardous.

It is quite natural that people have their own view about whether abortion should be permitted or not. Mainly the issue of 'from when life starts?' helps to construct the view of hard line and soft line about abortion. *Pro life* argue that the life starts immediately after conception while sex takes place; whereas, *pro choice* put their argument that life is possible only after fetus shows its capacity of being able to live out of the womb after getting birth, because there is no any recognized principle about from when life starts in the fetus, therefore, it cannot be said that life starts from the beginning.

In reality, it is hard to say from when life starts. Life gets its form along with development of fetus after conception, but, if life is supposed to be existed in every developing stages of fetus, for this, it requires scientific facts, as well as law also should have recognized that accordingly. In reality, neither science nor the law seems to have accepted the existence of life of the unborn person. Our constitution doesn't say anything about the right of the unborn child; it doesn't say anything about his/her right about constitutional, religious, right related to property and others rights.

In the case of *Roe* v. *Wade,*[3] in 1973, Supreme Court of America with widely discussing on this issue has decided that fetus cannot be recognized life.

In this context, in the case, *Christian Lawyers Association of South Africa and others* vs. *Minister of Health and Others,* filed with demanding to declare unconstitutional the *Choice of Termination of Pregnancy Act, 1966*, due to having permitted the right to abortion has violated the constitutional provision of the Article 11 *"every person shall have the right to life"*; High Court of South Africa has said, - due to the fetus cannot be treated as independent person; the provision of the Act having permitted abortion upto 3 months without any preconditions, and after that time limitation abortion is permitted on certain conditions; has not violated the constitutional provision of Article 11 of every person shall have the right to live, so that, aforementioned Act is not inconsistent with Constitution. However, it has also said, considering on the condition of the health of mother and child and future of the child, the right to decide whether should be given birth of child or not, is vested upon the pregnant woman.

In the case, *Erkentnisse and Beschluesse des Vertassunsgerichthofes* (1974) filed with demanding to declare unconstitutional the legal provision having permitted abortion upto 3 months by removing the prohibitory provision; due to the violation of the provision of right to life under European Convention on Human Rights and National Constitutional Law; Constitutional Court of Austria has decided that due to the unborn person cannot be accepted as a person, the right to life doesn't embrace the right of fetus, so that aforementioned provision was not unconstitutional.

A (child) in the developing stage within the womb (of mother) before getting birth as form of person is called fetus. It gets the status of baby or child in the condition only when it gets birth alive after attaining the natural time in the womb. If it has born as dead after attaining the age or if it has died in the course of delivery, such kind of child we could not recognize as life. Life is recognized after live birth as a form of

[3] *Roe* v. *Wade*, 410 U. S. 113(1973)

child from the womb of mother, except that other stages are stage of fetus. Even if fetus was on state of being able to alive after coming out from the womb, even though that can't be called life if it dies in the course of delivery. It is necessary to practically understand this difference.

Our constitution, laws and Acts have never mentioned that from when life begins in the fetus, and, have been made any provision for creation of any rights or protection of such rights of fetus; therefore, it seems there are no grounds that fetus can be legally recognized as a life. If the fetus is to be recognized as a life, and its existence of separate personality from the mother, - who conceive the fetus and gives a place in her womb; because of the reason one's life cannot be put in danger for another life; the situation will come even if mental and physical health of mother is in danger, autonomy of the fetus has to be recognized upto the last stage of the mother. Mother has to put up with upto the last stage for the protection of the fetus's life, even if her existence is in danger, or the treatment could be carried out for the protection of the pregnant mother as a last resort, only after ensuring the protection of the life of the fetus. In reality, it seems such kinds of arguments are not practical.

Fetus take refuge on mother. Fetus could not be recognized separate personality from mother, because it exists because of mother. The people who argue that fetus is also a life and mother should not have right to abort fetus at her choice; should have satisfactorily resolved the issue from when life begins in fetus? This, to the date, couldn't have been determined. Without any concrete grounds of Constitution, Laws or Acts in order to fix such kind of complex, scientific or philosophical believes or such a policy related issue court can't deliver new order, - from when life begins? So that, in this point, here is pertinent to understand precisely the difference between life and fetus.

It is knowledgeable that fetus has not independent existence; its existence is confined only within the womb of mother. Suppose, if fetus has any interest, it could not be said that such kind of interest is prevailed against mother though. The significance of protection of fetus is one thing, importance of fetus is also to the mother who bears

it; but the interest of mother and fetus is not separate and independent, rather it seems proper to be viewed in totality, fetus's interest is a part of the mother interest. A serious question has been rising in this discourse that the protection of fetus is important due to state has to protect its citizen, because population is essential element of the state. Taking into account such importance is reasonable too.

The principal question is that whether the mother could be compelled to conceive gestation and give birth of child upon its maturity barring her interest, happiness and health in the name of protection of fetus or not? Or whether the mother does have the right to abort fetus in any situation at her choice or not? Or she ought to have such right or not? This question is substantial. In this regard, it is found different types of societies and legal systems have attempted to address this issue from different points of view. Though it is taken as an exception, however, most of the countries or legal system have made the provision that the abortion cannot be prohibited in the situation when if the life of mother may be in danger, the fetus in the womb is become disable and seems no possibility be able to live independently after getting birth, gestation is happened caused by rape, gestation is happened in the period of infected by HIV etc. Moreover, some of the countries or legal systems have incorporated that the abortion is permitted to abort the fetus up to 3 months or twelve weeks with the consent of the pregnant women.

Though, differences have been found in different legal systems about procedure of abortion, the service provider persons or institutions, the conditions to be followed in this course of abortion of the pregnancy up to 3 months or twelve weeks. In Nepal, it should be recognized that women have got the right to abortion to the extent that a provision has been made in number 28b of the chapter No. on Homicide of Country Code (Muluki Ain) so that pregnant women can carry out abortion to abort the fetus up to twelve weeks in a safely manner as prescribed procedure. The societies, where right to abortion is recognized, are found that this helps the women to be free from unwanted pregnancy, to enjoy the life at her choice, to develop carrier, to be free from compulsion of the bearing of the unreasonable burden and to exercise

the right to self-determination. Whereas, the condition of after first 3 months or twelve weeks of the gestation, the fetus is developed and the situation is being created where it seems supposed to be able to live independently after coming out from the womb, and technically it's likely be complex and the risk is going to be raised on the health of woman from the view point of procedure of the abortion; therefore, if the intending person carry out abortion at the early stage that would be simple and less risky, and if it is done at the later stage the risk is going to be high. The situation will come where carrying of abortion service becomes impossible; except in the special situation as a last resort for saving life; so that as a balancing measure of consent, compulsion and to the extent of the protection of the gestation, state seems to have adopted the controlling legal provision for the latest stage of pregnancy. Particularly, if the fetus has developed and become able to live after coming out from the womb, fetus seems reasonable to be protected; so that, it is recognized even at the countries where abortion has been decriminalized that the women are not allowed carrying out abortion at her choice. In fact, this is recognized for the interest of both the mother and the fetus.

In reality, such sort of provision could be recognized as a right of women or not? Here, in this regard, it will be appropriate to consider this matter from the perspective of the reasonableness of this right.

Women are also the owner of human rights, from all perspectives, as like other person or men; therefore, they have the full freedoms as other do have; of equality, freedom, search for happiness of life and live with self-dignity.

The situation of our country before 11th amendment in Country Code (Muluki Ain), was that the abortion was totally prohibited and criminalized. Due to the cause of fear of punishment under the prevailing legal provision some of (women) were compelled to give continuity the pregnancy caused by rape; some of them were compelled to serve jail as a result of legal provision due to occurring abortion in order to try to hide it from social shame or if they can't continue it due to societal cause. That situation was seemed like odd or unreasonable from the view point of the provision of the standard of

international law. Though, the women are not only responsible for having gestation or cause to have gestation, but at the post gestation situation, only women were found to have borne the direct burden of the prosecution for abortion; generally, the man who cause to have gestation were not came into the boundary of the law. The burden of the guiltiness of abortion had to borne by the poor, illiterate and rural women. Though, it might be unsafe, however, victim pregnant women were being compelled to use any means of abortion as a last resort with hiding and concealing, because of the womanisation of poverty and criminalization of abortion. As a result, unsafe abortion was the main cause of high mortality rate of women in Nepal.

Nepal is known as a country where abortion is the main cause of high mortality rate of women. It has been the complex problem where abortion is criminalized. In the countries where abortion is to some extent recognized, this seems it has been existed as a major problem of women health in the world due to the lack of wide extension of the safe abortion service. The life of women and various facets of human rights have been affected by this cause, - either it may be the provision of law that criminalized abortion, or either it may be the lack of provisions of reliable abortion service. Therefore, to decriminalize abortion to the desirable extent, to protect fetus in other situation except unwanted pregnancy, to create environment of security who received abortion service etc, are important steps from the perspective of women's right.

Before to the eleventh amendment on the Country Code (Muluki Ain) the situation of women was, as mentioned above, had to borne the deprivation of basic human rights including right to life of the women, because of the criminalization of abortion to an extreme point; the eleventh amendment on the Country Code (Muluki Ain) is proved as an important milestone.

In America, in the case of Roe v. Wade, in 1973; while filed the case about the issue of criminalization of abortion in America; though, the abortion has been perceived that it finds the place of fundamental rights after the decision of the Supreme Court; however the decision of the court been criticized as it was political or legislative activism. In

our context, abortion has been recognized; by the limited legal provision though; through the eleventh amendment on the Country Code (Muluki Ain) by the mainstream political process or by the legislation; so that this issue doesn't remained as a legal issue if woman has the right to abortion or not, except academic (discussion); or now it becomes the undisputed right recognized by the law. As a result, by now, the major question is remained how to effective steps should initiate for the utilization of this right, but doesn't required to prove its reasonableness in the political process.

This right has been strongly recognized after the eleventh amendment on the Country Code (Muluki Ain) with incorporating separate provision of the right of women in Article 20 has also included right to reproductive health of women.

The provision of the Article 20 in the Constitution is follows :

Article 20: Rights of Women:

(1) No discrimination of any kind shall be made against the women by virtue of sex.

(2) Every woman shall have the right to reproductive health and reproduction.

(3) No woman shall be subjected to physical, mental or any other kind of violence; and such act shall be punishable by law.

(4) Sons and daughters shall have the equal right to ancestral property.

Reproduction is the nature of women health, - reproductive health casts impact upon women's entire life in any ways, Like, - being menstruated, being pregnant, to give birth of child, post maternity health problem, problems related to reproductive organs, being stopped of mensuration and its related problems of mental and physical health, - all problems are related with the subject of reproductive health. Reproductive health is recognized as an indivisible part of women's human rights, and it seems right to abortion has important place within it.

To see from the right perspective, reproductive health becomes important issue of women's human rights.

The principal issues of women's human rights include, - right of freedom, including right to live with dignity and right of freedoms consist within it. Right to health, right of family planning and reproductive health, right to marry with her free and full consent and establish family, right to give birth or not to give birth, if she likes to give birth, right to determine the timing and spacing of the children, - consisting of right to abortion according to law under it; right to privacy, right to equality (abibhed), right against torture, inhuman or cruel treatment or punishment, freedom from sexual violence, being benefitted from the scientific development or right to participate in research work etc.

Of them, right to self-determination has especial importance in the right to reproductive health. Under that, right to family planning, - right to use the contraceptive and right to have access to the information in relation to the family planning have fall under it; and it's recognized that women have the right to take decision about reproduction, freely without any external intervention. This means, the owner of the body of the woman is woman herself, and women have the right to take the final decision about how to utilize her own body, whether to have sexual relation or have not and to have given birth of child or not. Though, it is natural that various decisions have been taken with consent and understanding of husband in traditional marital relationship, however, this is very important that taking final decisions about to utilize own body and whether to have given birth of child or not are woman's exclusive right.

Although, in some countries, still the issues of social relations, such as woman requires consent of husband while carrying out abortion, requires consent of guardian if she is minor or require consent of spouse etc have been given the place in the law related to abortion; however, thereby the situation is created where women couldn't use their body at their choice as men are allowed to use their body as they like. While, it can't be ruled out that, time to time, the claim hasn't been raised by the husband he has the right to be a father; if so, than

the wife's right to be a mother required to be addressed. If it's recognized that despite the physical risk, all of her disapprovals or adversity, if women are being compelled for the fulfillment of husband's desire to be a father, wife will lose control over her own life; consequently, (she) have to accept the continuity of direct or indirect subordination. While, women can't insist her husband to be a father or being compelled to enter into sexual relation, likewise man too couldn't compelled woman.

If this standard wouldn't be accepted, women have to have put up with physical or sexual violence, with identifying fetus sex have to have continue pregnancy or either to abort it, have to be ready to have unwanted pregnancy or to abort intended pregnancy either, have to have genital mutilation for satisfaction, have to have apply contraceptive, have to have surrender to the intended or unintended circumstances etc. In this way, abortion is an inseparable part of the right to self-determination of women, right to self-determination has also important place regarding the right to reproductive health.

This right has been consistently developing as a vibrant school of human right jurisprudence. Either it was Teharan Conference on Human Rights, 1968 or United Nations International Conference on Population, Mexico City, 1984, or either Cairo United Nations International Conference on Population and Development, 1994, or Beijing Action 1995, - all emphasized on the reproductive health of women, particularly right about sexuality and equality based sexual relation.

Many International Declarations and Conventions including International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women and Convention on Child Rights have addressed the issue of the right to reproductive health and abortion under the women's human right in one or other way.

The issues of the life, liberty and security of the women have been addressed by the Article 3 of the Universal Declaration of

the Human Right, 1948, Article 6.1[4] and 9.1[5] of the Covenant of the Civil and Political Right, and Article 6.1[6] and 6.2[7] of the Convention on the Rights of the Child.

The issues of the right of family planning and reproductive rights have been especially addressed by the Article 10.1[8], Article 12.1[9], and Article 12.2[10] of International Covenant on Economic, Social and Cultural Rights and Article 10[11], 11.2,[12] 11.3,[13] 12.1[14] and

4 Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

5 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

6 States Parties recognize that every child has the inherent right to life.

7 States Parties shall ensure to the maximum extent possible the survival and development of the child.

8 The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

9 The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

10 The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

11 States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:
(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
(d) The same opportunities to benefit from scholarships and other study grants;

14.2[15] of the Convention on the Elimination of All Forms of Discrimination against Women. Likewise, Article, 16.1[16] of this

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
(g) The same opportunities to participate actively in sports and physical education;
(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

12 In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

13 Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

14 States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
(a) To participate in the elaboration and implementation of development planning at all levels;
(b) To have access to adequate health care facilities, including information, counselling and services in family planning;
(c) To benefit directly from social security programmes;
(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
(f) To participate in all community activities;
(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

15 States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

16 States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
(a) The same right to enter into marriage;

Convention has especially addressed the issue of the right to decide about whether or not to terminate the embryo of the womb.

Right to abortion is substantially attached with the right to Privacy. The action of abortion, even if, it is important in view of the right of self-determination of the women, however, prevailing social psychology seems unfavorable for that. And, since being pregnant or not is highly an individual matter, hence this right is also protected by the Article 17.1[17] of Covenant of Civil and Political Right.

In this way, International Conventions relating to human right seems to have been recognized the right of women including right to abortion and reproductive health. And, Nepal too has ratified and extended its support to those Conventions and Declarations. Apart from that, Interim Constitution of Nepal has provisioned the right to reproductive healt

(Mulul Ain), so that, it seems no reason here to raise the question about the recognition of this right.

The subject of pregnancy is an indivisible part of the reproductive health. Pregnancy is the specific area of women health. From the point of reproductive health, how this feature is viewed? That is the

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
(f) The same rights and responsibilities with regard to guardianship, worship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

[17] No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

spirit of the law and justice. Only women can have conception, so that women and capacity to be pregnant may seems like synonym, however, if this is viewed from the point of women's right, this feature should be looked as blend of all counts, - women's right, their necessity and contributions. If conception is the nature or subject of women, by that cause this is her right also. If women naturally do conceive does not mean she must have to become pregnant. Whatever the nature women do have, these are their rights not compulsions. If they don't have corresponding rights and necessary services, facilities and protection as a feedback for the protection of these features, exercise of these rights will be affected. The existence and development of human being is intrinsic on reproduction of the women, therefore, this is the supreme human concern and concern of all people.

If the right of reproductive health has not allowed to appropriate protection, women would have putted in the situation where they would being compelled to be pregnant and giving continuity to it. In this context, women would be transformed into a machine having compulsory duty to reproduce human being instead of being respected as an owner of the right. Even though, to be a pregnant is a sacrosanct job of humanity, however, when it has converted into compulsion instantly that would be no other worst state of burden and deprivation then other else. Where, bearer (dharak) doesn't have right to decide if it should bear or not? That would not be remained as sacred duty (dharma), but becomes slavery instead of right. Therefore, It should be recognized that women shall have the right to take final decision and implementation thereof about the matters; except of voluntary counseling or in an agreement; whether to be pregnant or not, whether the pregnancy be continued or not, or to determine the spacing of birth of children etc. If it has to be viewed from the stand point of human right, freedom of motherhood is must for the birth and development of the free child. It is thinkable fact that the source of freedom of children won't be the slavery of mother.

The child who was born due to unwanted pregnancy would be lifelong burden for women. That won't serve the interest of child and mother;

rather it would have some other social repercussions. Therefore, it becomes obvious that making pregnancy optional and applying legal and other means for the greater protection of such willful pregnancy is the first necessity of human being.

Let us consider on the third question, what is the relation between abortion with human rights and women's legal rights? It seems the plea of the petitioner Laxmee Devi Dhikta has shed light on the relation, particularly, between right to abortion and other women's human rights; in other words, how other rights are affected in absence of one.

Unless the reproductive health couldn't be made women's right; right of physical or sexual freedoms of women couldn't be ensured,- consequently being pregnant would be transformed into liability instead of her right, women have to silently tolerate the situation where abortion would criminalized even in the circumstances of the compulsive physical and other requirements, - in result unfortunate consequences could be outcome due to the inhuman approach to the women health, - that put women in the point where they would unable to appropriate utilize the rights of life and rights and benefits created by the International Treaties, Constitution and prevailing laws in a justiciable manner, with self-dignity, and with actively participating as being an educated, competent, equal and free person. Being pregnant on one's choice would be sacred humanitarian service, whereas being pregnant by compulsion would be a grave conspiracy against women.

The woman who has been compelled to be pregnant has had experience of physical and mental torture, many problems related to physical and mental health ought to have borne in every time of pregnancy during the maternity period and post maternity stage, have to have put in danger one's life, ought to have pay for maintaining own health and protection of fetus. In the same time, she may have lost her job or opportunity of earning income, by that cause her career development would be affected; nurturing of newly born child would be the great responsibility of women, and the time would come to surrender all of her rights, interests and happiness. Consequently, exercise of the rights of women have been affected including the right

to freedom (Article 12), right to equality (Article 13), right relating to health (Article 12) right relating to employment and social security (Article 18), right relating to education and culture (Article 17), right to property (Article 19). More serious impact cast upon all these rights in case there was indefinite pregnancy, and, gives rise challengeable situation in exercise of the rights including other rights, right to privacy (Article 28), right against torture (Article 26), right against exploitation (Article 29) right relating to justice (Article 24). All these rights are required to see in the context of rights of women under Article 20.

This Article has made the provision including discrimination of any kind shall not be made against the women by virtue of sex, every woman shall have the right to reproductive health and reproduction and woman shall not be subjected to physical, mental or any other kind of violence etc. Although the job of being pregnant is sacred one, however, if it has enforced by compulsion that might be converted into the cause of violence against women, that might work as a source of discrimination due to the means of right of man and liability of women. Because women are also found being classified on the basis if she has pregnant or not, so that it seems, for the emancipation from such discrimination too, women need to have the right to take final decision about pregnancy.

Clause (2) of Article 20 has mentioned that women shall have the right to reproductive health and the right to reproduction as well, so that it is necessary to understand about two distinct concepts of reproductive health and reproductive right. Reproductive health is related with the mental and physical health and social happiness of women in relation to reproduction capacity. The action plan of the ICPD (*International Conference on Population and Development*) has defined reproductive health as is; - "*reproductive health is a state of complete physical, mental and social wellbeing, not merely the absence of disease or infirmity in all matters relating to the reproductive system, to its function and process*." It means it is understood in the sense that the person shall possess the reproductive capacity, and shall have the right to take decision about whether to be involved in reproduction or not, and shall possess the right to take decision about the time and

frequency of reproduction for attaining the secured and satisfied sexual life. The issue of reproductive health and reproductive right are attached each other. The reproductive right could be truly exercised only if reproductive health is in good position, and reproductive health could be protected only if reproductive right is in intact. Article 20 has given place for this vital relation with wisdom.

It seems the right to reproduction supposed to be the right to protect reproductive health and right to take decision relating to utilize this right. The spirit of this right is to attain the highest possible sexual and reproductive health, and is to get the right to take decision about reproduction freely without external pressure. Whether the child has to be given birth or not both kinds of decisions are encompassed within the broader context of reproductive health and reproductive right, and it should be recognized that the right to abortion is also incorporated under it, in the context when pregnancy has taken place but unwillingness to give birth of child because it was unwanted. Otherwise, the right to take free decision about reproduction under the right of reproduction will be restrained; hence the right to reproduction would be meaningless from different points of view. Right to reproduction cannot be understood as a compulsion to enter into reproduction, and if not like to involve freedom of non-involvement to reproduction is included under the right to reproduction. Like, the right to work is recognized that it embraces the freedom of not to work, right to reproduction should be viewed accordingly.

Another significant aspect of reproductive health and right relating to reproduction is to provide protection from the violence against women. To compel to bear unwanted pregnancy or to compel to abort an accepted pregnancy, both are violence against women. Right to abortion under the right to reproduction includes not only the right to abort but also the right to protect pregnancy; right to abortion is used in the situation of uncomfortable or unwanted pregnancy, this is not the right that always conflict against pregnancy, therefore it is necessary that the right to abortion should be viewed by placing it within the appropriate extent.

Women are found being discriminated in different occasions in various forms, - discrimination, disqualification, boycott, social-stigmatization etc mostly due to the reason of being pregnant. Intention of violence is hidden under the root of any unreasonable discrimination. The violence against women have been found as an expression in the extreme form of rape, forceful pregnancy, forceful prevention of pregnancy or forced abortion. Therefore, it seems important of true protection of reproductive health and reproductive right if women have to be free from mental or physical or any other kinds of violence against women.

The importance of reproductive health and reproductive right is not only the subject of adult women but also the right of the women of the stage of childhood and old age. Being mindful about lifelong possible impacts upon health and other rights if pregnancy has taken place at the child age, to make adequate arrangement to protect the right relating to reproductive health and rights related to the child is the duty of the state.

The control over information relating to reproductive health about incidence of her life is particularly important in this regard, because it is the private life of woman. The separate provision of right to privacy has been inserted at Article 28 of our Constitution; this Article has mentioned that except as provided by law, the privacy of any person, his or her home, property, document, data, correspondence or matters relating to his or her character shall be inviolable.

The status of reproductive health of women or question of whether any particular woman has carried out abortion or not is to be taken as personal incident, so that except as provided by the law, like, - keeping record for administrative purpose, sharing information for the information of doctor or record, for own use of related person, for the purpose of research or cost related matters with approval etc should be kept in confidential and secured manner. Because, this Article has guaranteed the privacy also for the status of the body of person, it denotes that the reproductive health of women or the status of pregnancy or abortion seems having made inviolable. If such information were not kept as confidential, again that would restrained

to live with dignified life, that would be created violence and discrimination; therefore, there is deep relation between the provision of right relating to reproductive health and reproduction in Article 20, and right to privacy in Article 28, and, seems have been placed as complementary of each other.

In this way, it obviously appears that there has been deep relation existed between the right to abortion under the right relating to reproductive health and human rights.

Let us consider on the fourth question about whether the petitioners have the right to get abortion service accessible and affordable or not? Petitioner Laxmee Devi Dhikta has claimed that although the abortion has been legalized to some extent by the eleventh amendment on Country Code (Muluki Ain), however, while going to get this service Government Hospital of Dadeldhura had demanded 1130/-, due to inability to pay such amount she was compelled to continue pregnancy and situation has been created to be given birth of sixth child.

Keeping view on such problems, petitioners are seemed, have especially demanded the abortion service should be made affordable and accessible.

In the context of above mentioned petitioners demand, observing on the written reply from the respondents, Department of Health Service, Family Health Division as well as National AIDS and Sexual Diseases Control Centre plea in their written reply that Safe Abortion Service Procedure, 2060 has been issued in order to make effective the amended legal provision of No. 28b on the Chapter of Homicide in Country Code (Muluki Ain) that permitted abortion; the other respondents have contended that petitioners had no reason for maki

the rights and interests of petitioners etc and seem having request to dismiss this petition.

The said Service Procedure has place the provision in Section 14(1) that says health institutions, doctors or health workers can take service fee from for providing the abortion service. The reason behind

the authorization to provide abortion service by the qualified and enlisted Health workers or Health institutions as prescribed by the Procedure is to make this service accessible to all general people. It is necessary to determine the specific fee in order to provide service so that the fee is determined maximum of Rs 10,000/ including medicine cost according to geographical situation, and this service has been provided free of cost to the people who are unable to pay fee due to their economic condition, and, further effort will be made in order to make this service more effective. This service has already been extended to the 70 districts. Respondents are positively thinking to create a separate fund for providing the service to the poor women. The system has been made for keeping confidential of the details of the women who receive the service, so that, they are appeared having plea that the writ petition should be dismissed.

Many women were had been compelled to bear unsafe pregnancy due to abortion was defined as a criminal offence and had been given punishment before eleventh amendment on the Country Code (Muluki Ain). Concerned person have to say that criminalization of abortion had various consequences, like, women were found compelled to accept death due to lack of permission for abortion even in a very complex situation; due to inability to apply safe method in the course of unauthorized attempt to terminate pregnancy, some of them were killed or even though able to remain alive, they had to suffer from reproduction related diseases, and had to sustain unbearable burden in the situation of birth of disabled child. In the situation when investment in women health was not getting priority from family level to state level (they) were being compelled to bear increasing burden of the expenditure on health; and also found that the child borne by the unwanted pregnancy had to bear family or social problems. Owing to the criminalization of the abortion, able person were found to have been success to carry abortion even by going abroad; but that was not possible for unable, so that the especial impact of criminalization of abortion was cast upon unable person. Owing to criminalization, some of abortion service provider within the country had used it as a lucrative business etc.

In the given situation, though the effect of criminalization of abortion seemed more serious especially upon the women who were economically weak, illiterate and who were from the village, however, general impact of that was cast upon the whole world of women.

Currently, the No. 28b of Section on Homicide added by the eleventh amendment on Country Code (Muluki Ain) has, to some extent abortion has been legalized, and, provision of the Article 20 of the Interim Constitution of Nepal seems to have opened the door in order to address one of the main cause of the violence against women. However, the major question is about how many people of given section hence been practically benefitted people from this legal provision?

The right to health is recognized as human right. The issue of abortion is related with the right to health as well as it is taken as a right of the women. Although, the right to health is recognized as human right, it seems state has not been providing treatment for all kinds of health problem with free of cost to all people. Instead, most of the medical expenses of health treatment have been found borne by the person individually. It is found that much the countries or economies are developed better the state's investment on the sector of medical treatment and greater distribution of its benefits. If a worldwide survey on the investment on public health has to be conducted, near about 90 percent expenditure seems centered on highly developed western countries. In developing countries, particularly poor countries are found very little spending. It is the serious issue of the state policy about human right, what percent of its total domestic product should be invested on health sector. State has inherent interest and responsibility on protection and treatment of the people's health; but that's influenced by its capacity and level of development. That every state should realize progressively according to its international respo

this responsibility particularly against the backdrop of the Covenant on the Economic, Social and Cultural Rights.

The issue of availability of safe abortion and abortion service to all people is linked with including health, administration and economy; however, this cannot be set aside as a social and economic subject,

because, the right to demand of this service is rest on the right of women at Article 20 (of the Constitution) and other fundamental and legal rights of women.

General compliance and application of law is the essence of rule of law. If the law has created any right, interest or benefit that should not be limited within the particular person or class, but it is also necessary to ensure general availability for the rule of law. The main foundation of rule of law is an equality and justice. Justice is impossible without equality and equality is impossible without justice. These notions are complement each other. Though the provision of equality before the law and equal protection of law under the right to equality has been inserted in different constitutions from the past, equality has not been achieved in practice in this society divided in different classes and levels. In spite of Article 13 of the Interim constitution of Nepal has made the provision for making special arrangement for the advancement of backward classes, women or children, equality has not been achieved yet.

At this connection, this is the insightful fact that the creation of fundamental rights like equality, freedom, justice etc. in the law and constitution meant not only a declarative but also people should be able to achieve the benefits of this in practice. However, only with insertion of such provisions in law, constitution and statutes cannot be automatically generated such capacity. It is necessary to disseminate of the information of law, created necessary infrastructure for the implementation of the law, established necessary institutions, to enhance the capacity of man power or of such institution and make continue of the programmes for the distribution of service and facilities according to the need of the people by the state. On the other hand, state should also help the concerned person or community in order to attain the capacity for the enjoyment of such service and facilities of such legal rights, procedures, institutions or programmes concerning to them. The foremost responsibility of the state is to generate the capacity of the people to utilize the rights and interests according to their needs. The concept of democracy, rule of law and good governance would remain only as a myth until and unless the position of the people remained in *status quo,* which is unable to determine

their own interest, unable to receive or utilize the benefits created by the laws and unable to correctly represent their own view. It is never possible to become a rich democracy where people are illiterate, frail people and robust democracy and indifferent people and vibrant democracy. Likewise, in the situation when (people) are ignorant about minimum information of law, lack of knowledge about the existence of rights and facilities offered to them and lack of capacity including economic and knowledge to utilize that; the rule of law is impossible to attain in its ideal position. It is bitter truth that the laws and decisions, though much they are might be quite modern, scientific or intellectual, if the benefits of them were not reached effectively and broadly to the grass root level; they could not made meaningful contribution in implementation of rule of law. Therefore, it is required to infer that the structure of the rule of law is not determined by the form of laws and formation of institutions of the state, but by the effectiveness of the implementation of it, and circumstances or number of people benefitted by it.

If this is viewed from this point, the question is in its own place how much these are progressive and pragmatic, though the changes in the law in relation to the abortion and the provision in respect of reproductive right and reproductive health of women has positive orientation. Rather this, the more important issue is what the situation of its implementation is? And to what extent the person or classes of person who feel the need of abortion service have been able to utilize it?

After the changes came in the law relating to the abortion and the provision in respect of reproductive right; some of the positive attempts have been made, like training to abortion service providers, health workers and doctors, the increasing number of the service provi

Abortion Service Procedure, 2060 BS etc and to some extent the targeted class have found becoming able to receive the benefits of it.

The written reply stated above has mentioned that the provision in the Section 14(1) of Safe Service Procedure, 2060 has made the health institution, doctors or health workers entitle to receive service fee for providing abortion service from recipients of the service, and that the

reason behind the authorization to provide abortion service by the qualified and enlisted Health workers or Health institutions is to make this service accessible to all general people. The written reply has stated that determination of the specific fee for the provided service became necessary even to the government hospitals, and it has been determined maximum of Rs 10,000/ including medicine.

According to this statement, the authorization of health institutions and health workers to provide service, to authorize the government institutions as well as working at the non-government sector, to prescribe the maximum limit of the fee and restraining from taking unlimited amount for providing such service are the major efforts made by the government.

The increment in the number of the enlisted doctors and health workers and their distribution throughout the nation is necessary in order to make abortion service generally available. The service provider health institutions are required to be dispersed and decentralized instead of centralization in any one place so that maximum number of people could get benefit. Likewise, the service fee to be received from the service receiver by the government or non-government service provider for the service should be reasonable and in accordance with paying capacity. However, the written reply seems to have failed address to this issue adequately. In this regard, many questions would be raised in relation with, like; how many health institutions have been enlisted till to the date? How many health workers or doctors have been enlisted till to the date? Whether the standard training have been arranged to them or not? How many numbers of service provider institutions have been existed in which part of the entire nation? Which health institution has been providing service how much and in which place? What is the ratio of fee? What is the quality of abortion service? What is the situation of complications of post abortion? What extra arrangement, other than the health service, has been made for that purpose? What are the policy decisions on these whole issues? And, what is the monitoring structure in this regard? etc. But, none of the written replies have been found addressing on these issues altogether.

It is necessary to pay special attention that by addressing broad spectrum of measures, like by extending the service provider institutions and their services throughout the nation to the desirable extent, preparing necessary human resources in those institutions and deployed them in different places for the work, making their service reliable and standard, making demanded fee by the service provider from the receiver of the service commensurate with the quality and facilities provided by service provider while providing it, and should be made according to the paying capacity of the service receiver, by making the service procedure predetermined, should not be unnecessary time consuming and troublesome etc in reality, for whom these services are to be arranged those people should not be compelled to give up such service owing to being unable to pay fee, though how much they desire for or they need be or due to the geographical remoteness or because of the adverse procedure.

The legitimacy and relevancy of its availability of abortion service can be meaningful only if it is accessible to the people who need it and affordable as their paying capacity.

The awareness about abortion seems, to the date, been centralized in urban area particularly among the educated community. Therefore, the demand of this service and the focus point of the service provider too, seems to have on urban area whereas, the pressure of the unsafe abortion has been found in village area. Until this service centralized in urban area and could not be made affordable and broadly extended it to the village area, the stakeholders of the village people will not become under the network of this service.

So far as the issue rose in this petition relating to the service fee charged by the service provider while providing service, the limit has found fixed maximum Rs 10,000/- including medicine cost for the service as mentioned in written reply. It says, since the government as well as non-government institution can provide this service, generally service provider of government health institutions have been charging minimum price while service provider of private sector's institutions have been normally levied high price. In reality, the comments about reasonableness of its service fee could be made, only after observing the fact what type of service has been provided by which institution.

Since the health institutions including government or private sector can provide this service and can determine the fee by the concerning institution, so that the service fee has been found determined by the service provider institution according to their requirement. Whether the levied service fee of any institution is within the purchasing capacity of the concerning person or not, could be judged by taking together, - the quality of service, the service fee levied on and capacity of the consumer. The determination of such service fee seems impossible to be maintained the same price too, for all health institutions. However, the main issue is that for whom the abortion has become necessary, the system of service fee has been prevailed beyond their purchasing capacity, and the service recipient being unable to pay because of merely a high price of service fee, give up abortion service that should be taken as sheer inauspicious instead of just. It should be accepted that the targeted class could not be able to get benefits created by the law if every person who needed the abortion service had to give up the desire to receive it because only of its high price and complexity of the procedure or the situation had come to the extent of giving birth of child by making continue of such pregnancy.

In the present situation, it has not been mentioned that who has the legal responsibility to monitor whether the prescribed fee fixed by different service providers is high or not?

In this case, the petitioner Laxmee Devi Dhikta has come for the remedy showing the state of inability to pay fee fixed by the health institution that is Rs 1130/- for the service to be delivered. Health Department has contended that free service has been given to the unable party. There is no clear provision in the law that the free abortion service has been given in which situation and for what condition which is necessary. Until such kinds of basic things won't be determined, the situation would be created where customer will not come or unable to come for taking service. Unless the place, procedure and condition regarding the free service has been fixed and informed to the person intended for abortion, such abortion service can't be recognized as an accessible and affordable in favour of that class of people.

The government agency like Ministry of Health and Department of Health Service, which has the role of regulator, ought to have determined the standard of the service and just service fee to be levied by assessing the reasonableness of the service fee.

Petitioner Laxmee Devi Dhikta, among the petitioners, has made plea that she can't pay service fee. The main thing is that though the half of the total population of the world have been occupied by the women, so that by keeping in mind of women's health and reproductive health, the necessary number of the hospitals and health service center should have been established and adequate budget allocated, even though, the health center and hospitals focusing on women health have been established in very few number, most of these hospitals and health centers established in accordance with the male requirements and respective standard; and women are found compelled to receive treatment from such kinds of hospitals.

So far as the legal grounds for such service should be made affordable and according to the affording capacity of the concerning person, first of all if it has been accepted as a subject of fundamental right, this is the foremost duty of the state to give high priority for the implementation of it.

State ought to create an environment in conformity with the principle of equality before the law and equal protection of law under the Article 13, as soon as possible, where people from different places and sectors shall equally able to receive such rights, interests or facilities recognized by the law. It has been mentioned in the written reply that there were 359 doctors had been trained and enlisted up to 19th Chaitra, 2063 BS, and the service had been extended up to 70 districts except Rukum, Rolpa, Salyan, Terahthum and Kalikot. Against the past background, this should be taken as impressive one. But from the point of view of distribution and utilization of the service, it should also be considered that how many enlisted doctors or health workers have been working on each and every district? And this service has been available in how many health institutions or centers in each district? The abortion service ought to be started, without delay, in the districts which are remaining left for extension of the service.

If the data has to analyze per district how many customers are able to receive the service to the date? That will help to clear that to what extent service extension is justly distributed?

In fact, all these things are all about the job of executive agency to make the service affordable and accessible by developing policy and by implementing and monitoring it. For the court, it is impossible to engage on such kinds of routine issue related with policy and its implementation. The concern of the court is that whether the rights of the people enshrined by the constitution and law have been applied and protected or not? In the background, where rising consciousness of the people concerning to the democratic norms, fundamental and human rights; the growing expectations of the people towards the court about the exercise and protection of the rights etc because of the social and legal responsibility of the court to make exercisable of the rights provided by the law in practice, here it is required to make attempt in order to make sure the real application and compliance of rights, not merely in declaration of them. The rights provided by the law are also the issue of the interest of the people, given the law does have created benefits and interests; that should be equally distributed and should be made available for equal exercise of them. To be as a right holder of the equal protection of the law meant right to have equal access and affordability of the benefit of the law to all; judicial responsibility can't be rejected for such matter.

In this case, this petition has been filed by the petitioner Laxmee Devi Dhikta as being a poor, villagers and uninformed women, as well as, by showing the cause of the problem of inability to pay the prescribed minimum charge while going to receive abortion service to be provided by the government hospital, and having been compelled to give the pregnancy continue. This claim has not been refused by the respondents, nor has they expressed any assurance to solve her personal problem. She and other petitioners are found representing on their own and many other women having similar background. From the written reply of the Department of Health Services, it cannot be said that such classes of women have got easy access to the service and this service has been made affordable from the view point of charges fee. Law related to abortion, to establish the centers or places

where abortion service is available, flow of information about that, programme for people awareness about appropriateness of abortion, to arrange the counseling centers and counseling to be provided for the service consumers, to determine the standard for reasonable fee and monitoring of that, to arrange the help on behalf of the state in order to make able to receive free abortion service for those who need it but due to the charges of fee found unable to pay and to make the service affordable and accessible are the main pertinent issues in this regard. It appears that the written replies of the respondents did not say that this service has been made accessible by developing infrastructure in order to make exercisable of the rights provided by the law.

Since the abortion service is personally received as an individual facility, so far as the issue whether or not the state requires to arrange the abortion service to the extent of providing it as a free of cost? Since the abortion is a health related problem, right to health is a fundamental right of person so that it shall be viewed as a right to life, our constitution has recognized the right relating to social justice as well as the directive principle and policy of the state has accepted the special protection of the women's rights as a liability of the state, therefore, women's right to abortion or problems related to pregnancy cannot be separate from the public responsibility taking it as an absolutely a private problem.

Let us ponder on the fifth issue: petitioners have demanded for making separate law about abortion. In this petition, petitioners seem having request to issue an order in the name of Ministry of Law to enact clear and separate abortion law for safe and affordable abortion right by pointing out the cause of poverty and illiteracy of women and lacking of sufficiency of legal provision.

Petitioners themselves have acknowledged that they have got the right to abortion as a right of reproductive health from the eleventh amendment of the Country Code (Muluki Ain). From this, it appears that there is no devoid of law in present situation in relation to abortion right. Even though, petitioners are found having demand of separate and especial law for safe and affordable abortion right raising the question of sufficiency of the law. Therefore, due to the insufficiency of

the existing provision in relation to abortion, petitioners seem having demand the law containing the practical provision for the right to safe abortion and its affordability.

Generally, nobody could knock the door of judicial organ for demanding special law or special types of law from the state or its agencies. He/she ought to demand to the authoritative legislature. It is not appropriate to intervene by the court for making any particular type of law; because it is emanate by the political process that expressed by the representatives of the people according to law. However, in this case, petitioners are not found having request for law as a pure political demand but that claim has been put forwarded on the backdrop of the different Articles relating to fundamental rights of the Interim Constitution of Nepal. Particularly, they seem having invoked Proviso Clauses of Article 13(1) and 13(3). Clause (3) has the provision that special provision could be made for the protection, empowerment or advancement of women, *Dalits*, indigenous peoples (*Adibasi, Janajati), Madhesi* or peasants, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitate. Likewise, Article 16(2) of the Interim Constitution has included the provision that every citizen shall have the right to basic health services free of cost from the state, as provided in law, while in Article 20 has incorporated the right relating to reproductive health under the right of women, on that background, petitioners seem having claim that a separate law is not existed in order to bring those fundamental rights into the implementation level.

In this way, it has been declared by the Constitution itself that the special provision could be made in order to protect the right and interest of the women; and in the absence of necessary law equality, health and basis of the women right could not be developed and utilized; therefore the petitioners demand cannot be supposed to be as of political nature. The Interim Constitution itself has assured to make special provision by the law recognizing range of rights of women, so that it seems state has also the responsibility to make necessary law.

Regarding the demand of the petitioners for making law while viewing on the written replies, they seem having different versions.

Among the respondents, the written reply of the Legislature parliament has stated that since the Article 16 of the Interim Constitution has mentioned every citizen shall have the right to basic health services free of cost from the state, as provided in law; to this end, the written reply appears having emphasized on making law. However, due to the reason that the legislature parliament would not take proactive role in the process of making law, so that it contends this body would manage if the Bill has been formally introduced by the Government or by any private member. For providing free health service, the government Bill is required to be presented. Of course, this statement is speculative one.

Generally, government introduces the Bill before the Legislature Parliament in order to enforce its policies and programmes. Likewise any member can propose the Bill as a representative of the people. Whether the bill has introduced by the government or by a private process all are fall under the legislative process. Legislature Parliament seems not allowed, in its essential and formal process, to classify the Bills on the grounds of the process of the introduction of the Bill and the person who has presented it. Because, economic factor is involve for free health service, so that government Bill is necessary, and if this has been stated because of procedural reason; even so, that would be only a procedural matter. Since, law making function is the subject of fundamental liability of the parliament; it seems Parliament couldn't set aside its liability on any grounds. Whereas the Constitution has stated enactment of law is necessary for the enforcement of the fundamental rights, such fundamental rights could be applicable only after enactment and enforcement of such law as early as possible. After the declaration of the fundamental rights for the people by constitutional maker, exercise of such rights and right to remedy are transformed into the inherent rights of the people; and to make essential infrastructure becomes the responsibility, as an organ of the state with other organ, in concerning issue, of the Legislature Parliament too. It seems, due to the cause of either Government or Parliament whoever they may be, bearing the responsibility of making

law; by not making respective law or making delayed to this, application of the fundamental rights cannot be restrained or make inactive. Therefore, it appears that Legislature Parliament, cannot plea for escaping from the liability of the matter of making law.

While considering on the written reply of the Office of the Prime Minister and Council of Minister, it seems having request for dismissal of this petition with plea that the 11th amendment of the Country Code (Muluki Ain) has already made sufficient provision for making abortion systematic, respectable and has made the provision to make sure women's rights. Necessary procedure has already been made in order to activate legal provision, so that court need not issue order; the matter of making law and amendment thereto falls under the exclusive jurisdiction of the legislative domain; so that this office should not be made respondent because such matters could not be regulated by the Office of the Prime Minister and Council of Minister.

In fact, it creates delusion regarding the issue who has the responsibility to make law, - whereas legislature parliament submitted written reply saying that Legislature Parliament could not play proactive role in making law, government Bill is necessary to this end; while Office of the Prime Minister and Council of Minister has stated that the subject of law making is under the exclusive jurisdiction of the Legislature Parliament; it cannot regulate such matter. It has no debate on the issue that the state machinery should operate under the constitutional system. According to this, generally law making function falls under the Parliament and law enforcement function falls under the executive domain in accordance with the principle of separation of power and check and balance. Other organs also should have support for the performance of such sectorial function. Executive, by producing the Bill and Legislature by approving programme and policies of the government supports or should have support each others function. The whole state machinery has been formed in this way. In this case, both the parliament and executive have submitted their written reply in the way suppose they are getting away from the liability of making law; - it indicates the degree of sensibility of those institutions towards the fundamental rights of the citizen. It cannot be agreed with plea of both written replies of the respondents because, in reality both organs have

responsibility, jointly or separately, by producing the Bill by the executive, if it has to be submitted, as constitutional provision with detail of the possible expenses, and Legislative, by directing to the executive to submit the Bill or proposal in order to make responsible towards the rights of the people or by legislating necessary law passing through the legislative process of the submitted Bill.

So far as written reply submitted by the Ministry of Law and Justice concerning to the issue of making law as petitioners have requested, the said Ministry seems having plea not to issue any order as petitioners' claim, because the eleventh amendment on the Country Code (Muluki Ain) has recognized the right to abortion, furthermore, various laws have already been existed according to the right of women under the Article 20 of the Interim Constitution and Directive Principle, Policy and liability of the state in this regard.

From the written reply of this Ministry, there has not been mentioned any reason why separate law does not require. Nor they found making any plea that the safe and affordable abortion service has been available by the existing law as requested by the petitioners.

This meant, in this case, it is required to be considered in the totality of the claim raised by the petitioners.

Abortion was strictly criminalized before to the eleventh amendment on the Country Code (Muluki Ain), due to the prevalence of very traditional beliefs. Consequently, in that crime basically women were being tried and punished. It seems there was a situation where nature of the women to be pregnant could be said as a sort of conspiracy had been used against women.

The matter of abortion has been placed as a part of the Chapter on Homicide in the Country Code (Muluki Ain) till to the date. This seems, to have meant, that the criminalization of abortion, the fetus living in the womb is supposed to be recognized as a life. Whereas, constitution and prevailing laws have not extending the recognition the embryo's rights including right to life before getting birth; it seems there are no any reason for making the issue of abortion to be as a part of the Chapter On Homicide.

Chapter on Homicide has not defined the term life (*jyan*). After inclusion of new provision relating to abortion in No. 28b on the said Chapter after eleventh amendment, it becomes obvious that a fetus is not recognized as a life because it contains the provision that permits pregnant women to perform safe abortion of the fetus up to 12 weeks on her own choice. It seems there is no any reason to include this within the Chapter on Homicide if it is not included under the definition of life (*jyan*).

Since, the reproductive health and abortion have been accepted as a women's right in the changing context, distinct and novel vision is required for the management of these rights accordingly.

Though the traditional crimes have been compiled in Country Code (Muluki Ain) and it has been used since very long period, attempts have been made in order to modernize the of criminal law in recent days. It can be expected that this issue would be addressed if specialized Civil Procedure Code and Criminal Procedure Code has to be enacted and enforced.

In the context where the issue of abortion is emerged as a new sensitive issue with awareness of the people and correct information relating to this subject required to be disseminated to the people it seems it is not appropriate to keep this issue continue as a subject of criminal law, and keep continue as a subject under the Chapter On Homicide. Until this subject remains under the Chapter On Homicide, impression of criminalization seem would remained continue even after its decriminalization to some extent.

Moreover, in the current legal provision, No. 28b of this chapter has only a minimum provision about the condition for permission of abortion and punishment for illegal intervention on pregnancy. The issue of abortion indicates range of provisions required to be addressed as right of women, health, security, the procedure and technology of the abortion, liability and qualification of the service providers, registration and recognition of the institutions working in the field of abortion, record keeping, management and maintenance of confidentiality of the information relating to abortion, the provision regarding the service fee of the abortion, public awareness about abortion, provision about counseling about abortion, regulatory

institutions and mechanism for hearing complains and right to remedy etc of which, even minimum addresses has not been made in the law. The added No. 28a and 28b by the eleventh amendments on the current Country Code (Muluki Ain) which has very minimum provisions about crime and punishment could not possible be recognized as a separate and independent law in respect of abortion. Because of these insufficient provisions, the Safe Abortion Service Procedure 2060BS, looked to have been issued as an ad hoc arrangement in order to manage safe abortion service. In fact, the legal form of said Procedure is not clearly understood. If the present situation will go continue, it can't be said that how many other executive orders need to be issued in an ad hoc manner. In this way, with insufficient legal instruments and in an ad hoc manner, this problem could not be addressed in its totality in a sustainable way. Since the subject of reproductive health and abortion is the issue of legal right, the availability of legal and safe abortion service would be meaningful only if several programmes have brought to the people with definite legal instrument by determining the rights, liabilities and procedures. Since the right of abortion has come in place as a novel right, it looks contradictory and really incompatible continue to be placed as an indivisible part of the Chapter On Homicide, which is known as a part of the strict criminal law. It appears that enacting separate law is essential for abortion as a distinct and special subject being mindful of the spirit of the recently amended provision.

Considering on the sixth question, whether the petitioner Laxmee Devi Dhikta, among the petitioners, does have the right to get compensation or not? The petitioner Laxmee Devi Dhikta, among the petitioners, seems having request to issue an order in the name of respondents to provide necessary compensation taking into account of the physical, mental and economic damages borne by her, due to the violation of the fundamental and legal rights, because she became pregnant after given birth of 5 children due to the lacking of education and awareness and lacking of the information about the right to give birth necessary number of children is a reproductive right of the women, and when she went to the Dadeldhura hospital with husband for carrying abortion, hospital demanded Rs 1130/- for the service fee of abortion. Instantly she had not such amount, so that she was

denied to use the service provided by the law and constitution. Hence, the situation was created of giving birth of child after bearing of unwanted pregnancy.

Whereas, constitution and law have recognized the right relating to reproductive health and right to abortion under it and if someone has been compelled to continue pregnancy by restraining the exercise of this right or by depriving the service attached to this, it appears clear state of the violation of the right. In the situation of being compelled to give birth of child by giving continuity of pregnancy, it seems impossible to implement or cause to implement of specific performance in *status quo* of the violated right. In this situation, only a curative remedies would remain for the affected person of the violated right.

Compensation appears to be as one of the usual remedy, including others, regarding the impacts that cast upon concerning woman due to being compelled to bear pregnancy continue and caring and nurturing of the child.

If the service provider individuals and institutions should not be sensitive towards such rights and do not create the environment in order to be ready or ought to be ready for prompt delivery of the service, the state of the violation of this right would be wide spread and a situation would be created where women as service consumer, would be perpetually being deprived from the service, provisioned by the law. Moreover, the problem of pregnancy is not centered only on the fetus in the womb, but could be related with other mental and physical health of women. Problems would be taken place in different parts of the body of a woman due to the cause of pregnancy.

In the case, *Tysiac* vs. Poland[18], filed by *Tysiac* a citizen of Poland, showing the cause of damages, to the extent of being compelled to bear blindness due to retina of an eye of the pregnant woman damaged because she had been denied to deliver the abortion service by the government hospital of the Warsaw. European Court of Human Rights has decided that Poland had violated the right enshrined by the European Human Rights Convention due to inability

[18] *Tysiac* vs. Poland, App. No. 5410/03(2007), European Court of Human Rights.

to provide abortion service by the state and Poland has also found unable to fulfill its positive liability in favour of such service seeking woman. As well as, because time factor is very important in such type of abortion cases, timely judicial decision is required to be made, being mindful of that fact, court has also added that the necessary reforms ought to be made on procedure too. Furthermore, it has decided to issue the order to provide 25 thousands euro as relief for pains and damages borne by the woman, as well as issue the order to provide 14 thousands euro as a cost that incured during searching judicial remedy.

In Mexico, a girl child age of 13 years[19], while she went to the hospital seeking abortion service, because of being pregnant due to rape, government's health workers had denied to provide the service by showing the cause of religion and individual faith, consequently, she compelled to give birth of child. On this issue, while two human right activists from Mexico on behalf of her, and on behalf of the Centre for Reproductive Rights filed a case in Inter-American Commission on Human Rights, this dispute has been settled in compromise by accepting the liability by the Mexico government which was created due to denial of service to deliver, to provide reparation for the losses upon pregnant women, to bear the cost of the education of the child and to issue directive in order to provide abortion service for the victim women of the crime of rape.

The problem of abortion should not be viewed by confining it merely as an issue of whether abortion should be permitted or not? Or whether embryo should be given birth or not? But also should be viewed as a subject of entire health related problem of the women. Therefore, it appears that there is need of best system in order to provide legal remedy to address the multidimensional problems, due to the violation of the right of abortion or due to denial to provide the service or due to provide less standard service etc. While considering on the issue of legal remedies, punishment to the offenders, compensation for the victim, other arrangement related to the facilities of health to the victim required to be arranged. Right relating to

[19] Paulina Del Carmen Ramirez Jacinto v. Mexico, case 161-02, Report No 21/07, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.130 Doc. 22, rev.1 (2007).

abortion expects definite liabilities from the state party or service providers, so that, it seems, this right can't be viewed subject to the discretion or choice of the state.

This issue is considered especially sensitive in different system where abortion is recognized. European Court of Human Rights, Inter-American Commission on Human Rights and state courts of several European countries are found have decided to provide cash or other sorts of compensation by assessing the damages inflicted upon the women due to the cause of denial of abortion service by the responsible institutions or organs.

Regarding to this case, in the present context, these issues are seem, in absence of separate law with sufficient provision, have not been made any mere attempt to address. The question to provide compensation is remained to be unanswered in the absence of clear law and procedure. Therefore, in this regard, it seems these issues are required to be addressed particularly while making detail provision of law for abortion. It becomes the inherent liability of the state to provide remedies including compensation, on behalf of the state or service provider, considering the harms inflicted upon victim due to the cause of inability to deliver legal and qualitative abortion service. To this end, it seems that has to be addressed by making law or by providing judicial remedies too, in appropriate time.

While considering over the final question whether the orders ought to be issued as requested by the petitioner or not? That has been already discussed above while dealing with various questions. If it is considered in totality, right relating to health has been recognized as a fundamental right by the constitution, however, as an important part of it, law has not found been enacted yet keeping in the mind several problems of abortion are to be addressed. Though, limited provision about abortion has been placed in Country Code, however this appears that this law is established as a criminal law instead of bill of right of the needful and intended woman for abortion. It seems sufficient provision as a complementary of the fundamental rights have not been made for service seeking women so that they easily get the service safe, reliable, accessible and qualitative. It appears that the amendment law has not covered all the issues relating to abortion

including protection of the privacy of the record of the woman in the course of receiving abortion service or while taking judicial remedy. In current legal provision, appears many lacking, like clear determination of qualification, competency and liability of the service provider, lacking of provision for extension of the service throughout the nation for making intended women able to have access to, lacking of such a provision where service seeking women shall not be deprived from getting service even if she is not able to pay charged fee, lacking of regulation on prevailing arbitrary fee system, lacking of mechanism that based on service standard, lacking of provision for the resource to this end etc. Several traditional beliefs are holding misconceptions about abortion and due to the lacking of correct information about the nature of abortion service, its procedure, its impact and information about service provider institutions or service providers; women have been compelled to bear several unintended adverse situations. Therefore, for the sake of protecting them from such kind of situation, it seems, state is required to make and implement especial programme to disseminate information about abortion and its several aspects in order to raise public awareness.

It seems the abortion service has not been extended and decentralized in a manner so that intended and needful person across the country will be able to have access to the abortion service. Furthermore, efforts are not found have made for determination of the standard of fee for the service to be received in order to prevent prevailing diverse rate and arbitrary system of charge, and for the provision of free of cost service delivery by the public health institutions in order to get rid of the situation where people are deprived from receiving service because of only a reason of inability to pay fee. Therefore, the order of mandamus is hereby issued in the name of respondents, including Office of the Prime Minister and Council of Minister, to make necessary provision in order to maintain the p

abortion service from health institutions as well as to maintain the privacy of their identification details while receiving the judicial service.

And, the directive order is also issued in the name of respondents including Office of the Prime Minister and Council of Minister, Ministry

of Health and Population and Ministry of Law and Justice, to make necessary efforts in order to enact separate and sufficient law relating to abortion covering several aspects mentioned above and by incorporating provision of the International Human Rights Law relating to reproductive health.

On the issue that Petitioner Laxmee Devi Dhikta has requested for compensation saying that while she went to nearby hospital for taking abortion service but found unable to receive the service due to the charged fee, and compelled to bear unwanted pregnancy. If someone comes with demanding constitutionally recognized service public officers are liable to provide the service in an affordable manner, and if that right is violated and she is compelled to bear unwanted pregnancy, the situation of perpetual violation of right has been created. In this situation, although it would be reasonable to extend the legal remedy to provide compensation by assessing the damage that she/he had borne, however, in this case, it seems petitioner hasn't come up with factual evidence to this court that she was rejected to provide service, nonetheless, it is considerable that she has extended an avenues of legal remedy through this petition by representing she herself and several women having similar problem as she had. However, since she is found unable to determine the definite amount of compensation with assessing damaged; in absence of objective ground, it appears that the request of compensation is not sustained. With serving the notice of the order to the respondents, this file be handed over as per the rule.

I concur with the above decision.

Justice Rajendra Prasad Koirala

Done on the 6 Jesth, 2066 (2009, May 22)
Translated by Kamal Prasad Pokharel

Mere incorporation of legal provisions in statute without making their implementation guaranty would bear no meaning for the enjoyment of various personal rights as right to privacy, right to equal status and the rights related to social security and similar other privileges.

Supreme Court, Division Bench

Hon'ble Justice Kalyan Shrestha

Hon'ble Justice Sushila Karki

Writ No. 0287 of the year 2063

Subject:- Let an order of Mandamus including any other appropriate order or decree or notice with directive order be passed under Articles 23 and 88(2) of the Constitution of Nepal, 2047.

Petitioners: Advocate Rishi Ram Ghimire, Legal Representaive and authorized person for and on behalf of Nepal Environmental Lawyer's Association (NELA) having its registered office located at Ward No. 32, Kathmandu Metropolis, Kathmandu District & others

Vs.

Respondents: Government of Nepal, Office of the Prime Minister and council of Ministers and others

- **Just making law without any implementation is not valued. For correct implementing law, rules, direction, cultural aspects and other organizational infrastructure is needed. If there prevail such rights but are impediments on the path of exercising such rights, such act of impediments must be declared incriminated.**

- **The rights granted by the Constitution or law are the liabilities of the State. If the list of rights Without ensuring the enjoyment of rights, the act of enlisting the long list of rights in the constitution or law the State will loose its credibility to the law which may also create the anarchic situation.**
- **Therefore, a class of population in society indulges into all available benefits and remains in specific condition; and the needy and helpless class of population who needs support from the state and social system at this time of need, the class of population is deprived from all benefits, and therefore, it is not bearable from the perspective of law, justice and civilization.**
- **As there would be a possibility that openness of personal information of a person may exert harm to him, he keeps his information secret in order to be safe from such harms. If some secret matters of a person are let known to other person, the person who knows such information may control the other person. As a consequence of the same, personal freedom of a person, whose information is let known, would be infringed. Therefore, right to privacy of a person has to be protected in order to protect personal freedom of a person.**
- **The provisions of Constitution and international instruments can not come into force ipso facto. Law should be made to implement the provisions. Due to their special health condition, the discriminatory behavior of the society to them and allegations, they are unable to use the above mentioned rights. Therefore, it is seen that special legal provisions should be made to create an environment to use these rights.**
- **There are no legal provisions as to what kind of duty an HIV infected person has towards his sex partner, in the condition somebody is suspected as being infected with HIV, what right his/her sex partner has for the purpose of eradicating the doubt, if HIV is infected due to**

recklessness of health worker what kinds of rights the infected person will have for the same, what kind of criminal liability will be subjected to the health worker who recklessly infects HIV to somebody, as a health worker discloses HIV infection thereby incurring subsequent allegation and discrimination what kinds of remedies would be available for the same, what happens if an official or agency having a liability to provide public service denies such service on the ground of being HIV infection, what kind of rights may be there for HIV infected or affected person. It seems urgent that such issues should be addressed legally.

- **The government has not made proper legal provisions to stop violation of Human Rights caused by HIV/ AIDS. The government that has responsibility to make law for the protection of Human Rights of people can not exclude itself saying only that it is an exclusive right of the legislature what kind of laws should be made and when such laws should be made. The government should fulfill its liability towards people in accordance with several international instruments on Human Rights and constitution.**

Decision

Kalyan Shrestha, J: The summary of facts and issues of the writ petition filed in this court under Articles 23 and 88(2) of she Constitution of the Kingdom of Nepal, 2047 (hereinafter referred to as the "Constitution") and order passed in this respect by this Court are as follows:

The writ petitioners in their writ petition state that, among the petitioning organizations, the Nepal Environmental Lawyers' Association (NELA) is a social organization incorporated by the Advocates engaged in the field of environment and is duly registered at the District Administration Office Kathmandu of the Government of Nepal. Another petitioning organization named as Nawa Kiran Plus is

a social organization run and incorporated by the HIV/AIDS affected persons with the objectives of rendering the service of caring, treatment and nursing to the persons affected by HIV/AIDS which is duly registered at the District Administration Office Kathmandu of the Government of Nepal. In the same way, another petitioning organization is a social organization run by the women incorporated with the objectives of rendering the service of caring, treatment and nursing to the persons affected by HIV/AIDS which is duly registered at the District Administration Office Kaski of the Government of Nepal. Another petitioning organization also is as social organization incorporated with the objectives of rendering the service of caring, treatment and nursing to the persons affected by HIV/AIDS and protecting their interests. Now the petitioners feeling the necessity of a special law to address the requirements of HIV/AIDS affected people including the protection and promotion of their rights related to human rights without any discrimination, do file this public interest litigation writ petition before this revered Court for the sake of justice.

That the writ petitioners state that during the year 1981, the HIV infection was found in Los Angeles of the USA and has been spread all over the world which does not have medical treatment till this date. In Nepal, in the year 1988 four persons were found as being affected by the HIV/AIDS and the number is now increasing geometrically. As per the report of the year 2002 AD provided by World Health Organization, about 62 thousand persons in Nepal were suffering from HIV/AIDS. It is possible that this figure has crossed the number of one hundred thousand at present. According to the statistical report of July 2005 of National Aids and Sexual Disease Control Center, Teku 5,201 persons have been infected and 901 persons died of this disease. The Center has estimated that some 300 to 500 persons die of HIV/AIDS annually. It is estimated in the year 2003 that about 1,300 children were left as parentless due to HIV/AIDS.

The whole world has been affected by the HIV/AIDS. It is estimated that some 40 million people in the world are affected by HIV/AIDS and 20 millions people have lost their lives due to HIV/AIDS. In the world, 3.1 million people lost their lives only in the year 2004. Most of the

African countries are facing social, economic and human rights and national security problems due to this disease and in the Asian region too, the scenario is very terrible in many countries. It is said that if the issues relating to the HIV/AIDS is not properly and timely addressed, the African continent would be lifeless after 100 years.

In the modern day world the development is measured by the average age of longevity, per capita income and literacy rates. It is found that the matrix of development index is lowering in such countries where HIV/AIDS has been spread rapidly. Therefore, the vulnerability of the problems of HIV/AIDS is not only related with the health but also is linked with the whole development process of the nation. The HIV/AIDS has caused hindrances not only to the health related rights of the people but also to the whole socio-economic development of the country. Due to which, many persons are dying untimely and problems like poverty and starvation are emerging. Nepal also is not remaining untouched by these problems.

Since the number of patients of HIV/AIDS is increasing more and more, it needs additional arrangement in the sector of health service which requires additional financial burden and that may be increased more in the future. In case proper attention is not given on time towards this problem, it is sure that it will result to havoc. It has been a high time to formulate a systematized and planned roadmap for encountering the future problem relating to HIV/AIDS.

His Majesty's Government has included the task of controlling and preventing the HIV/AIDS and sexual diseases in its national policy giving priority and has also emphasized to run related programs in the village and regional level in collaboration with government and non-government sectors. The Government has made arrangements for counseling to the HIV/AIDS sufferers and making the blood report confidential and has taken policy for not making any discriminatory treatment to the persons on the ground of being affected by HIV/AIDS. However, due to lack of legal provision for regulating all these matters, it has not been managed effectively.

None are bound to bear discriminatory and hatred behavior for being him/herself infected by HIV/AIDS. But in our society where the majority of the population are of conservative and traditional thinking, the HIV/AIDS victims are bound to bear various types of discriminatory behaves made towards them even at the primary stage of the infection by which the victims are feeling more suffering than being suffered from the disease. In consequence whereof , the rights guaranteed by the Universal Declaration of Human Rights, the fundamental rights such as right to equality provided by Article 11, right to personal liberty provided by Article 12 of the Constitution as guaranteed to the victims of HIV/AIDS have been infringed.

Due to the lethargic nature of the respondents, the persons infected by HIV/AIDS are bound to bear the discrimination and hate only on the ground that they are infected and affected by the HIV/AIDS and hence the rights such as right to equality, right to liberty conferred to them by Articles 11 and 12 of the constitution and as right to equality, Article 12 and are also deprived from expecting the State policy for equal treatment from the State under Article 26 of the Constitution. If the revered Supreme Court does not intervene the above mentioned issues, there is no possibility that the respondents might address the problems by making appropriate legal provisions to that effect. Therefore the writ petitioners have prayed for the issuance of an order including the order of mandamus directing for immediate enactment and enforcement of necessary law for guaranteeing and respecting the right to equality and right to liberty as enshrined by the Constitution to the petitioners including the persons infected by HIV/AIDS.

This Court had passed an order on 2063/06/31 directing to issue and serve notices enclosing therewith a copy of the order in the name of the respondents, asking them to submit their affidavits within 15 days excluding the time required for journey from the date of receiving of the said notices as to why an order should not be issued as sought by the petitioners, and let the case file be presented before the Bench as per the rules granting priority status to the petition for the purpose of hearing.

The Office of the Prime Minister and Council of Ministers, a respondent, in its affidavit submitted before this Court, has stated that there is condition prevailing that may cause to bear the discrepancy to the persons infected by HIV/AIDS and therefore there is no need to make law for the control of discriminatory behavior. The Government is striving to adopt various ways for the control of the said disease. In addition, it is the exclusive power of the legislature to decide as to what legislation is to be made or amended and this office cannot regulate such subject. As the petitioners have not clearly mentioned as to what type of their rights are infringed by the action of the Office of the Prime Minister and Council of Ministers, therefore, the writ petition filed without any concrete base and reason is worthy to be dismissed. Therefore there does not exist any reason to make this office as the opposite party in the present case. Hence, let the writ petition be declared as dismissed.

In its affidavit filed before this Court, the Ministry of Health and Population has stated that it is the government to decide as to what type of law should be made in order to ensure for providing equal opportunity to its citizens. The government of Nepal from the point of view of making aware the people of the whole country especially the people of the rural area in order to ensure that none of the citizens may die from the HIV/AIDS nor to feel themselves as being hated because of being infected by HIV/AIDS and therefore the government has established a separate agency known as National AIDS and Sexual Disease Control Center for the purpose of working in this respect. It is the concern of the State not the business of the writ petitioners to decide as to what legislation is to be made or amended. In case the State feels it necessary to make a law as sought by the petitioners, it shall be done. Therefore the writ petition filed without any concrete base and reason is worthy to be dismissed, hence, let it be dismissed.

Likewise, the National AIDS and Sexual Disease Control Center, in the affidavit submitted before this Court has stated that the Clause (i) of the National Policy regarding the control of AIDS and Sexual Disease, 2052 has explicitly mentioned that only on the basis of

suffering from AIDS and sexual disease no discrimination shall be made to the persons affected by the AIDS and sexual disease. Moreover, under the heading "No discrimination to be made" No. 8 of the strategy of the said National Policy has clearly mentioned that no discrimination shall be made to the persons infected or affected by AIDS and/or sexual disease and this Center is striving to ensure the implementation of the said policy. In order to ascertain that none of the legislations or other policies of the country might not adversely affect in the task of making the AIDS and sexual disease acceptable to the society, this center has developed various programs for enhancing the capacities of such persons. Therefore the center has run various programs for building up the personalities of such persons which include to be organized themselves, to raise the level of their potentiality, leadership training, legal aid etc. It is seen necessary to run programs of multi-dimensional making coordination with various actors for the control of this disease, and therefore a high-level council has been formed. The Tenth Plan of the country has aimed to conduct curative programs effectively by expansion of the service required for diagnosis of the disease by utilizing various types of media of communication. This center is always ready to be prompt for making necessary legal frame work that may be required for providing the passing of lives of such persons with respect.

Likewise, the Ministry of Law, Justice and Parliamentary Affairs in its affidavit submitted before this court has stated that the concern and eagerness shown by the writ petitioners is admirable and it is necessary on part of the others too to show such concern and eagerness as regards the problem of a serious subject of HIV/AIDS. There is no any ambiguity that in order to get rid of the serious problem like HIV/AIDS, the constructive and cooperative role of all sectors such as the government, civil society, private sector, intellectual class, NGOs etc is necessary. The effect of AIDS may be controlled and mitigated through various programs such as enhancement of awareness programs and giving proper attention on treatment and caring of the patients infected by HIV/AIDS. Only the making of law may not resolve all problems. Law is only a means, not a panacea. The contentions of the writ petitioners that the cause

behind the deteriorating condition of the patients of AIDS is not the absence of law, therefore, the writ petition being far from the reality is dismissible, let it be declared dismissed.

In the present case docketed for today before this bench as per rules, the learned counsels including advocates Mr. Shitoshna Timilsina and Mr. Meghraj Pokharel representing the writ petitioners put their arguments that from the point of view of disaster of HIV/AIDS, Nepal is in a very risky position. If it could not be addressed timely it may take a fearful situation. One of the very much effective device to control the HIV/AIDS is to control by making law. It is a fact that the persons infected by HIV/AIDS are bound to bear the discriminatory behavior due to only being infected by HIV/AIDS in consequence whereof their right to life, right to health, right to liberty, right to education, right to employment etc are being infringed. The making of law is necessary for the purpose of protecting these rights. The government has not made any law in this regard. Therefore, the revered Court is requested to issue a directive order in the name of the government directing to make a law ensuring the persons infected by HIV/AIDS to enjoy their fundamental rights without any obstacle.

Appearing on behalf of the respondents including the Government of Nepal, Office of the Prime Minister and Council of Ministers, Learned Government Attorney Mr. Revatiraj Tripathi puts his argument that no discrimination has been made to the persons infected by HIV/AIDS for being infected. In the prevalent laws there is no any sign of discriminatory provision. It is not true that the HIV/AIDS related problems may be resolved by making law in this regard. It is the exclusive power of the legislature to decide as to what legislation is to be made or amended and therefore the court is not supposed to intervene on the business of legislature. Therefore, there is no any situation for issuance of the order as sought by the writ petitioners, and hence the writ petition is liable to be dismissed.

After making perusal of the case file and hearing the arguments presented by the learned counsels of both sides, the bench has to decide the question as to whether the order as sought by the writ petitioners should be issued or not.

It is seen that the present writ petition was registered as a case of Public Interest Litigation under Article 88(2) of the then Constitution of the Kingdom of Nepal. Among the writ petitioners the Nepal Environmental Lawyers' Association is seen to be an organization of lawyers working in the field of environment. Another petitioner Nawakiran Plus is seen as an organization run by the persons infected by HIV/AIDS and involved in the task of caring and treating the persons infected by HIV/AIDS. Similarly other petitioners too are seemed working for protection of the rights of the persons infected by HIV/AIDS. Hence the writ petitioners have shown that they have meaningful relation for seeking remedy in the interest of the persons infected by HIV/AIDS. Although the Constitution of the Kingdom of Nepal, 2047 has been replaced by the Interim Constitution of Nepal, 2063, this Court has its extraordinary jurisdiction to dispense justice in the matters as sought by the writ petitioners under Article 107 of the Constitution.

The writ petitioners have stated that a terrible problem may come in Nepal due to HIV/AIDS, therefore the petitioners have raised the issues stating that it is necessary to make a law covering various aspects relating to HIV/AIDS is necessary for controlling of HIV/AIDS. Therefore, at the outset, it is relevant to observe briefly the condition of HIV/AIDS prevalent at the present time.

While analyzing the materials relating to HIV/AIDS that is published, shows that HIV (Human Immune Deficiency Virus) destroys the immunity power and attacks human cell. The astonishing fact about this disease is that the victim's outlook is seen healthy though the virus is inside the body. The HIV/AIDS weakens the immune system due to which other viruses attack the victim easily and quickly. The condition when HIV/AIDS totally damages the immune system which leads body to suffer from other disease in a chronic way is defined as AIDS. It almost takes 7 years for HIV to get developed as AIDS. There is no cure for it. HIV gets transformed when bodily fluid comes in contact. Unhealthy sex contact, blood transformation, use of the same syringe used by the victim causes HIV to transform easily. In the same way if the operator in the operation theater uses the same instrument

to other healthy person the virus easily get transformed. The HIV mother's born baby is HIV victim too the sucking baby also gets HIV if the mother of such baby has got HIV transformed..

The conditions shown above transmits HIV while the normal day to day activities like sharing same food, using same toilet, kissing, hugging won't let the virus come in contact or does not get transformed.

Only four people where found victimized in the year 1988 in Nepal which is increasing day by day. Till the end of the year 2007 the total data collection was found quiet surprising due to the massive growth of people affected, because 10,546 people were found with the virus while 1,610 were AIDS victim. The final data seem to be 13,885 with HIV while 2,384 with AIDS. As per data provided National AIDS and Sexual Disease Control Center, AIDS infected people are from various age groups, however majority of victims are within the range of 20 to 50 years of age . The data is not fully correct because it is found many unregistered people later. National AIDS and Sexual Disease Control Center has estimated that the HIV patient to be around 70,000 while United Nation AIDS (UNAIDS) claims it to be 75,000 at the end of the year 2007 AD.

Focusing, analyzing on the virus, its heavy growth around the nation seems to be the serious matter. The economic condition of Nepal which has always motivated the Nepalese to move abroad seems to be the major reason for the virus to get transformed. The poverty line of the county is creating the problem of unemployment. People expecting bigger amount of salary in the foreign employment gets disappointed, countries like India and other gulf country is found to be the place where the virus seems to be transformed. As they are far away from their motherland, they feel insecure, lonely psychologically, which leads them to have unhealthy sex due to illiteracy. On the other hand, girls trafficking are another major cause for the virus to get transformed. Most of the illiterate people move to India for foreign employment, do not understand the value of sex and HIV and gets affected by it. Thus the virus is getting entered in Nepal. Therefore,

from the point of view of HIV/AIDS, Nepal is found to be at the highest risk..

Due to the illiteracy and ignorance prevalent in the Nepalese people the view of looking the HIV infected people is different. Due to the lack of knowledge on HIV and its infection, it is found that the sensibility to this disease that is suppose to be is not found to have been and people are not aware on the preventive measures. HIV victims are given low social status and ignored most of the time. The main reason for the people to get affected by the virus is due to the lack of knowledge about HIV, the carelessness regarding the disease, not counseling help centre even after knowing they are victimized, not using any kind of precaution etc. People blame their fate for the virus and such logic which totally seem to be foolish. The views of other factions of the society for treating the class of persons infected by HIV also are not found social. The nature of this disease, the method of viral infection spreading this disease, limits of its effect, availability of medical treatment and help and acceptance required in course of treatment, requirement of the victims and need to respect the human rights of them also are being ignored and they have been treated with discrimination. The HIV victims are ignored because the people are too much aware or can be defined as the misunderstanding with the disease. HIV does not get transformed just by sitting together but gets transformed when the body gets in contact to bodily fluid. The victims are blamed as involved in prostitution, having unnatural sexual relations, sitting together with the HIV infected persons, having drug addiction, and other people think that those who are far from these activities may be remained safe from the HIV infection. Due to such thinking the HIV infected persons are being treated discriminatorily and are looked with hatred look in the society.

The HIV affected children don't get admission, if admitted rusticated. HIV infected persons are bound to bear many discriminatory behavior from the society such as being deprived of employment and if already was employed to get the job terminated, are refused to render health services, homeless due to their disease. The social and economic consciousness if the AIDS epidemic are widely felt not only in the

health sector but also in education, industry, agriculture, transport, human recourses and economic general. Even health facilities aren't given in a correct manner. All these seem to be creating a big discrimination which questions about human right. It seems to be making a fun of the topic humanity. The victims are deprived from education health, entertainment, family help, gatherings, ancestral property and even employment. The right in their life seems to be snatched and disrespected.

Due to the view of the society looking towards the HIV infected persons and the discriminatory behavior done to them, the infected persons feel that they would be boycotted from the society and aiming to be safe from being boycotted they hesitate to open their disease and this will be a cause of infection to other person. Maximum people discriminating HIV patient exist in the society which brings a level of insecurity in them. The level of insecurity eats them too much which motivates them to hide their problems and run away from the treatment. They avoid the fact that they are HIV patients in fear of avoidance from society. Due to the society people don't want to admit that they are HIV patients. As a result they face psychological problems as they suffer from depression, anxiety and psychological disorder etc. This is affecting our county's social and economic status. The rudeness and social ignorance discourages people to talk about their problems freely which are directly affecting the nation's manpower and personal lives too.

If it is observed from the African experience which is the most affected by HIV related disease than any other nations. Due to population decrease by virtue of AIDS related disease the average age of people had come down to 40 in the South Africa a rising developing country in Africa. The reduction of population due to such reason, coming down of the average age of people's longevity and decrease of standard of living are such indicators which show the negative trend in the development index of a country. It is found that many countries have taken the problem of youth human resources affected by such disease as the misfortune of the development of the country.

HIV/AIDS is a major public health concern and cause of death in Africa. Lack of money is an obvious challenge, although a great deal of aid is distributed throughout developing countries which high HIV/AIDS rates. The decrease in population, high death rate and low status is causing a negative impact on the condition of the nation. It's the major problem for nation's development.

The victims uncertainty is creating a lot of problems. The society is helping in developing the problems more as they hide their problem and it's getting more complex every day.

Due to such reason HIV is getting more problematic and dangerous in day to day life. The disease itself is bound but the society is austere. The society behaves cold about it. The remedy for the disease is to accept the fact, live in reality and talk or share to the people about their suffering. The truth is always there so it is not worth hiding it. The society is discouraging the victims to talk about the loss freely and this is where the point gets more complex. The victim gets choked up in fear to get loss of social security. This is causing victim to run away from the problem instead fighting for it. They are in fear of being lonely and left unloved. All of the experience in life taught to one of the judge of Supreme Court in Africa named Cameroon accepted the fact that he was HIV patient. Some years ago in Japan, a candidate in the election of Diet accepted he was HIV patient who fought in an election and won it.

The experienced discusses about the fact that the people willing to talk about HIV more than the one not willing to talk, the one who want to check more than the one who don't, the facilitated place for the test rather than the no-facilitated one, the helping hand rather than ignorant one is creating the major problem which lets them to hide their problems.

The problem of HIV/AIDS is among all the people i.e. poor, rich, literate, illiterate, old, young, rural area, urban area, male, female also all caste, colour. The northern developed country has controlled the rate of the HIV patients while Asian and African countries have failed for it. The carrier of the disease is found to be men but the responsible

seems to be more in women. Therefore, women are taken as low status. The urban areas are found to be less developed which makes them more unconscious regarding treatment and the knowledge about disease. In between the lack of decentralization the problems expansion and the knowledge about the disease and its' result is also major problem. As clearly mentioned before, it is a worldwide problem.

There are a lot of reasons behind the transformation of disease as its' causes are multidimensional. Therefore it must not just be taken as sexual or health problem but social, economical, cultural as well as law's problems.

Today HIV/AIDs is around the world, it is still continuing and getting broader which can be taken as a dangerous over view. Therefore the international groups and people in a society as well as an individual must eliminate, prevent and work for the treatment. Each person working in their own field must work for it. As in the present case, this problem must be taken and viewed critically by the eyes of law and nation.

Focusing on the international law the States are defined as the people, the States are supposed to comply with the law they adopted and the State too focusing on such international law must regulate its behavior with its people. Within the country the State has to administer as per the law made by its legislature and the people must stay under such law and regulation. The State has to make and implement the law as per requirement of the society. The matters relating as to what type of law is to be made in a specific sector are such matters that are determined according to the need of the society facing problems.

All of the above discussions are to clarify and make understand about the topic HIV/AIDS. Since, HIV was found, different programs were held in the national level but the problem was still on. The affect of the program conduction was not felt. The right of the HIV/AIDS victim, the family's right, the right attitude towards the victim, the duty of the country, treatment and common factor of it which are the topic in which international level programs, declaration, treaty are being held which may be relevant for the national addressing. Such matters must

be incorporated in the national laws and the required mechanism and policy formulation may be undertaken at the national level. The main theme of the present case is to see as to whether the foregoing matters were looked for the HIV/AIDS problems or not.

Petitioners' main goal is to fight for equality, freedom, right for treatment and get rid of discrimination and blame. They want law against discrimination. The above demands are based on right to freedom, right to equality, right to health and right to constitutional remedy and therefore the petitioners are seeking the issuance of directive order in this regard.

Just making law without any implementation is not valued. For correct implementing law, rules, direction, cultural aspects and other organizational infrastructure is needed. If there prevail such rights but are impediments on the path of exercising such rights, such act of impediments must be declared incriminated. Therefore, it should be understood that the declaration of some rights and to guarantee for exercise of such rights providing necessary infrastructure are not the same thing. On the present context, in spite of prevailing the rights conferred by the Constitution, the HIV/AIDS infected persons are found to have been deprived from enjoyment of such rights and are bound to bear the discriminatory behavior being hated which has been impeded them to live the life of dignity and therefore they have filed the present writ petition. Therefore, this case filed under Article 88(2) of the then Constitution is found justiciable.

But on the context of providing remedy under the said Article 88(2), the respondents have raised various questions such as whether the law as sought by the petitioners is to be made or not, whether the issuance of order by the Court directing to make the law would be treated under justifiable jurisdiction or not, whether the making of law is necessary where other type of means are available etc.

It is the contention of the Office of the Prime-minister and Cabinet as contained in its affidavit that HIV/AIDS patients are not blamed and any kind of law is not needed. In the same way, the government has

flourished lot of ideas for the victims. Therefore, writ petition is not needed.

Likewise, the Ministry of Law, Justice and Parliamentary Affairs has contended in its affidavit submitted before this Court that emphasis should be given for enhancing the peoples' awareness and medical treatment for the purpose of tackling the HIV/AIDS related problems and just by making law won't help because law is only the means. It cannot be assumed that the conditions of the affected persons are fragile due to absence of law.

The contentions made in the foregoing affidavits stating that in Nepal, the HIV AIDs victims are not facing any problems due to the law is to be seriously considered. Before contending such matter it seems that the State has not made any survey for the status of discrimination. Moreover, it seems that the affidavits are not based on any reliable investigation or data. By the nature of job of the Office of the Prime Minister and Cabinet it is to be inferred that it does not lend its ear to hear such problems nor it is found that the respondents, prior to submitting their respective affidavits, had made some consultations with and collected the information from the stakeholders or related agencies or groups in this regard. It seems that the respondents are guided by the illusion that the respondents should not accept the fact of the petition and should reject it in writing. Thus such attitude of the responsible government agencies would promote the feeling of good governance and enhance the responsibility help the State or not.

From observation of the abovementioned affidavits many problems are found at the theoretical and practical level.

If it is assumed that the affidavit of the Office of Prime Minister and Cabinet represents the reality, this hypothesis shows that there does not prevail any reason on part of the writ petitioners to cry before the Court relating to their situation. So will be the matter of pleasure on part of the Court also if a hypothetical case is brought before the Court raising such questions of discretion and deception. If it is true, it will not be seen proper on part of the Court to expend its valuable time showing passionate interest for the sake of judicial activism. But on

the contrary, where a class of people or organization murmur that they are deprived from enjoying their constitutional and legal rights and come before the Court for enjoyment of such rights and seek for making a new law in order to remove discretion and to promote equality. In such situation where the authority says without making reliable law, institution, administration and facilities accessible to such people that the contentions of the writ petitioners are valueless, it may be inferred that the problem in question is overlooked being indifferent and non-sensible.

It is an unpleasant truth that there exists discretion at every corner of the society in Nepal although it has guaranteed right to equality. Each and every data of various sectors of Nepal amply reveal this fact. Since there is discretion in practice in presence of equality, therefore, it is being felt that there should be right to non-discrimination. To declare right to equality is one thing but it does not automatically enhance the capacity of the right-owners to exercise their rights. Usually it is seen that the strong right-owners have more capacity to have access to and to exercise their rights and therefore it is required to see the issues of exercising rights on the context of developed capacity of the citizens. In this context, attention should be given to those factors which have made the concerned sector of citizens incapable to exercise their rights or to have access to their rights and such factors may be such as prevalent biasness, prejudiced thinking and conservative sacrament, law, religion, moral, institutionalized tradition etc. Only after making evaluation of such physical and metaphysical fctors holistically the proper and appropriate position of enjoyment of some fundamental rights may be known. Without analyzing all these things, it cannot be assumed that all persons are exercising their rights without facing any interruption because such rights are enshrined in the Constitution. It is fact that it requires necessary law and institutional and physical infrastructure in order to make the circumstances comfortable for exercising the rights and in absence of such infrastructure it will be ridiculous to build a perception in favor of enjoyment of rights. Therefore it is not a big thing to mention a long list of rights in the constitution or law, but it would be a big thing if such rights are enjoyable in real life. May be the clever

politicians desire to make a long list of rights, but the responsible state mechanism should give its due consideration on the matter as to whether such rights are being made meaningful. The rights granted by the Constitution or law are the liabilities of the State. If the list of rights without ensuring the enjoyment of rights, the act of enlisting the long list of rights in the constitution or law the State will loose its credibility to the law which may also create the anarchic situation.

While considering from the eyes of the persons infected by HIV/AIDS, it is found from the information gathered from various sources that such persons are denied from getting education, employment, public utilities, hospitals and boarding in the hotels too. No arrangement is found till this date making such discrimination punishable by law nor there do any provision for indemnifying the victims for loosing chance of enjoying the rights or being deprived from getting opportunities. No strategic attempt is found made in order to raise the self-dignity of such persons. It is also not found that some special hospitals or health-centers are made to render services to such persons. Besides these, there is no any transparent mechanism devised for the purpose of ensuring that such persons are not discriminated in the society. HIV/AIDS has become a terrible ground for such persons to be socially boycotted in prevalence of the said situation; it is ridiculous to know as to how the respondents are claiming that no discrimination has been made to the persons infected by HIV/AIDS. Even at the government level it is being claimed that no discrimination has been made on the ground of infection, it would be normal for other noble – born class of people to treat the problem as no problem.

It is seen that the affidavits have taken plea that the making of law is not necessary because various attempts are being made for the control of disease. It needs both the methods, preventive and curative. It has been already mentioned in the foregoing paragraphs that the HIV/AIDS related problem must be addressed by various means such as conducting research, health care, educational, financial, social means as well as legal means. The central figure of all the said means are the persons infected by HIVAIDS and the society where such persons are living in. It would have been treated as good if the rights

and liabilities of the service providers, the rights and liabilities of the service-seekers, criteria of service conducting, rights accessible to the service providers, creation of facilities and the bases of relationship between the service providers and the service seekers were left to develop automatically. But in absence of such automatic device, naturally it is necessary to regulate such matters by developing a legal framework in this regard.

The affidavits have stated that law is not necessary because various remedial means are being adopted for control of the disease. But the fact does not show that the subject of disease controlling does not need the help of law rather it is the subject related with the health care. For the purpose of controlling the disease, in addition to the other things, law also should render its help. The patient's behavior, behavior with the patients, matters to be kept in mind at the time of treatment, medium or behavior that may transmit the disease, etc are such matters which are to be controlled by making a law. Above all, the present writ petition has pointed out for the necessity of making a law for the enforcement of the right to equality, right to liberty and right to health etc. In any events, the matter sought by the writ petitioners is basically the legal one. The fact is in itself misleading that other adopted means except the law does address the remedy as regards the enjoyment of rights by the infected people.

Ministry of Health and Population is one of the respondents to give a defending plea that the law as sought by the petitioners does not need to be made. Its logic is that it has established the National Center for AIDS and Sexual Disease Control aiming to make the people aware so that the HIV/AIDS infected might not feel themselves being hated in the society. It further says in its affidavit that making of law should not be the concern of the petitioners rather it is the concern of the State to decide what type of law is to be made. Similarly, one of the respondents the National Center for AIDS and Sexual Disease Control in its affidavit has stated that the Clause (i) of the National Policy regarding the control of AIDS and Sexual Disease, 2052 has explicitly mentioned that only on the basis of suffering from AIDS and sexual disease no discrimination shall be made to the persons affected by

the AIDS and sexual disease, under the heading "No discrimination to be made" No. 8 of the strategy of the said National Policy has clearly mentioned that no discrimination shall be made to the persons infected or affected by AIDS and/or sexual disease and the Center is striving to ensure the implementation of the said policy, in order to ascertain that none of the legislations or other policies of the country might not adversely affect in the task of making the AIDS and sexual disease acceptable to the society, this center has developed various programs for enhancing the capacities of such persons. Therefore, its affidavit further states, the center has run various programs for building up the personalities of such persons which include to be organized themselves, to raise the level of their potentiality, leadership training, legal aid etc. It is seen necessary to run programs of multi-dimensional making coordination with various actors for the control of this disease, and therefore a high-level council has been formed. It has further said that the Tenth Plan of the country has aimed to conduct curative programs effectively by expansion of the service required for diagnosis of the disease by utilizing various types of media of communication and this center is always ready to be prompt for making necessary legal frame work that may be required for providing the passing of lives of such persons with respect.

From the observation of foregoing affidavits of the respondents, it seems that the Ministry of Health and Population has contended that it had established the National Center for AIDS and Sexual Disease Control with an objective of enhancing the people's awareness on controlling the disease and it is the concern of the State to make a law. From the point of view of controlling the disease of HIV/AIDS it should be recognized that it is the duty and power of the said Ministry by virtue of having portfolio of health to formulate the policy matters in this regard. However, the question raised by in the present writ petition is not the prescribed modality for controlling the disease, but the question is as to how to control the discriminatory behavior being made towards the infected persons. The utility of health institutions or various other agencies established at present or be established in future for the purpose of controlling the disease may be at their side, but in spite of all these activities, it is the different issue as to whether

discriminatory behavior which are being shown to the infected persons or victims are controlled or not. It is found that National Center for AIDS and Sexual Disease Control is the only one agency acting as a responsible organization to address various issues concerning the HIV infected persons including their treatment, but it is also found that the said Center is not created by any law but established by an executive decision. Notwithstanding carrying on various programs and making the national policy regarding the infected persons and disease by the said Center, there does not seem any possibility to make the legal relationship between the infected persons and other organizations, communities or state mechanism through this Center. National policy is such matter that is made and implemented as per convenience of the government. But in absence of law, it does not take the place of legal document no matter it may have high importance and utility and therefore, on the basis of such policy no one may claim for exercise of his/her rights nor remedy may be given upon violating of such rights under any law. If the Center is striving to remove the discriminatory activities and enforcing the right to equality, it should be treated as a good gesture, however, it is not seen that the said Center has not been success to make any legal arrangement and to give legal certainty as per its mandate in this regard.

On the situation where a class of people infected or victimized are seeking the making of a law based on equality, freedom and health causing such infected or victimized persons from discrimination, the statement of the Ministry of Health and Population made in its affidavit that the making of law is the concern of the State not the business of the petitioners has raised a serious question. Since the infected or victimized persons themselves being incapable to make law have taken recourse of the Court for the protection of their rights. It can never be assumed that the problem related to HIV/AIDS is outside the portfolio of the Ministry of Health and Population but it is not seen that it has made law in this regard. It is also not seen that the said Ministry has taken any serious concern to address the problems of the infected persons. Moreover, the said Ministry has not recognized the concern of the petitioners. Therefore the statement of the Ministry that the demand for law is not the concern of the victims or infected is not seen

logical. As a matter of fact, the central figure of the proposed law will be the persons infected or victimized from the HIV/AIDS disease and therefore it is natural for them to show their concern in this regard. The petitioners have not challenged the concern and power of the State to make the law, but it cannot be said that the demand made by the infected or victimized persons for making a law on the subject of their concern is the concern of the State only not of the petitioners. Basically, the theme of the proposed law will be the infected or victimized persons therefore it is natural that they are directly concerned over the matter. Therefore, in spite of granting the voice of the infected or victimized positively as the assistance or relevant points for incorporation in the new legislation, the gesture shown by the Ministry of Health and Population in this regard seems that the Ministry has been unable to change its perception made towards the infected persons.

So far the question of plea taken by the Office of Prime Minister and Cabinet that it is the exclusive power of the legislature to determine as to what type of law is to be made or amended and such subject does not fall within the purview of day to day business of its office is concerned it would be appropriate to discuss over the statement of the Office of Prime Minister and Cabinet mentioned in its affidavit in order to appreciate its statement because it is the highest office of the executive wing of the State.

It is found that the then Constitution of the Kingdom of Nepal, 2047 and the prevalent Interim Constitution of Nepal, 2063 have accepted the constitutional principle of balance of powers and check and balance. As per this principle, legislative right to make legislation is the function of the legislature, implementation of such legislation is the function of the executive and to observe as to whether such implementation of such legislation has been carried on in pursuance of the legislation or not is the function of the judiciary. But within this constitutional classification made for the purpose of simplicity there are many provisions within the constitution linked with another made for the purpose of linking interrelations between them. As a matter of fact, the legislature does not function only for making the law, but it

forms and dissolves the executive, passes the budget, to consider, discuss over and accept the report of the executive and its various organs and to evaluate the propriety of appointments of various constitutional organs. But it would be difficult to demarcate the limitation of powers and responsibility of the executive. Its main responsibility is to undertake the governance of the country subject to the provisions of the constitution and the law. Consequently, the functions which do not explicitly fall within the purview of the legislature or the judiciary or other constitutional bodies, fall within the purview under the executive as the residuary power. To sign the treaty, to implement, to prepare and table the budget, to make appointments in the executive, to maintain law and order, to protect the boundary of the country, and all other acts relating with the peoples' interest and needs are to be expedited by the executive. In course of expediting all these functions, the executive has to work in compliance with the prevalent law, rules, regulations and standards set already, if any, otherwise, subject to the Constitution, it has to propose for and promulgate new legislation, to formulate policy etc. Therefore, if it feels that a complex issue such as the protection of rights and interest of HIV/AIDS infected persons arises, at that time it has to activate the prevalent law or policy, if any, for bringing into operation, and if there does not prevail any such law or policy it should make the law and table before the legislature, to make arrangement for the human resources or other resources management for the implementation of such legislation, and to transmit the information to the people with stipulated programs. These are such matters which may be realized on the basis of the basic knowledge of the governance. In case a special situation emerges, the Constitution has empowered the executive to promulgate the ordinance as per requirement.

The Office of the Prime Minister and Cabinet being at the apex level of the executive is supposed to act for eliminating the discretions on enjoyment of constitutional rights and other human rights of the infected people but in spite of so acting it is seen that it has shown its reluctance saying that the making of law is the exclusive power of the legislature.

There does not seem any hurdle or control before the Office of Prime Minister and Cabinet the opponent in the path of tabling the Bill or proposal before neither the legislature nor it is seen it has been prevented from making any other arrangement as required. Subject to the Constitution and law it is the responsibility of the State with special reference to the executive to make legislative efforts for advancement of such matters. It seems the inadequacy of the legal framework for regulating the subject as sought by the writ petitioners. The problems facing by the infected persons are not seen hypothetical rather are seen serious realistically. And from; the point of view of active system of governance it cannot be expected that such matters are left without being addressed. The executive is always supposed to be prompt for solving the problem of the nation, subject to the constitution, by making lawful coordination with other agencies of the State as per requirement. From the nature of executive, it has legislative as well as judicial responsibilities too, and sometimes, it must play the role of motivator for the activities of the governance as per requirement. The petitioners expecting such constructive role of the executive, have sought for the resolution of the problem by making a law in this regard, but ironically, the executive, by making its role narrower by itself or like ignoring the problem, has stated in its affidavit submitted before this Court that the making of law of the exclusive power of the legislature which statement is not found encouraging.

As a matter of fact it is the responsibility and duty of the State as to what type of law when is to be legislated. The legislative process from the side of the State may be started from the executive organ or from elsewhere also. However, the final authority in the legislative matter is the legislature. In practice it is seen that most of the bills are presented by the executive. Although some time some bills are tabled as the private bill but such cases are very few. Legislature itself generally does not table the Bill. Therefore, if the contention of the Office of the Prime Minister and Cabinet one of the respondents is to be followed the people should directly put their demand for a law before the legislature and the legislature is to prepare the bill and submit the same before itself. But neither there is such mechanism nor the system. Therefore, it could not be seen viable from the point of

view of constitutional or administrative working system to show reluctance on part of the respondents saying that the making is the law is the exclusive business of the legislature.

So far the question of the contention of the Ministry of Law, Justice and Parliamentary Affairs stated in its affidavit is concerned it has stated that only making of the law may not solve the problem, law is onle a means. This submission of the Ministry of Law, Justice and Parliamentary Affairs has created the situation frightening all. Law is a means to address the societal requirement. The law regulates the relationship between individual to individual, between the government and individual or other agencies.

Certainly, only making of law does not resolve all problems, the petitioners also have not taken such pleas. Making of the constitution does not mean that the governance system will automatically be good. In the same way it cannot be said that the peoples' right would not be violated because they are enshrined in the constitution. If the constitution or law is perfect and the implementation of such constitution or law also is perfect, the result would definitely be the good otherwise it could not be so expected. It is naturally expected that the law will remove the uncertainty prevailed in the society because a law is the outcome of the understanding made with the society and the law also becomes the ground of implementing such understanding. May be it will be a separate philosophical discourse to find out as to whether there is possibility of good governance or self-governance in the lawless society or not. But in the system of modern government, it is found that the government functions on the basis of law.

Therefore, the contention of the Ministry of Law and Justice stated in its affidavit that the making of law is not the panacea of all problems is unfortunate. In practice, only the law does not resolve all solutions nor would any law be completely perfect. But it is supposed that the law subject to be implemented in coordination with the relevant stakeholders may contribute on resolution of the specific problem. None of the laws may achieve its objectives wholly, however due to its legitimate expectation it is used to be expected that effective

implementation would drive the law to its goal nevertheless there may be some deficiencies on it proportionately. From this point of view also, the proposition of the Ministry of Law and Justice stated in its written response before this Court stating that law is only a means and cannot resolve the solution is unacceptable because it has ignored the necessity of law.

It is necessary to consider the necessity of law as sought by the petitioners within the contextual periphery of the rights of the HIV/AIDS infected persons.

May be in the view of the respondents the problems faced by the writ petitioners are the personal problem of persons infected by HIV/AIDS. But the writ petitioners while taking recourse of this Court have not come begging for mercy but have come for enjoyment of their constitutional rights, therefore the issue must be viewed from the point of view of right based approach. May be this problem has been considered by a faction of groups of the society from the point of view of crime control approach, therefore, it is necessary to analyze as to what would be the ground for discriminating the HIV/AIDS infected persons by the other faction of the society.

On the context of right to equality conferred by Article 13 of the Interim Constitution of Nepal, 2063, it is not found that the said constitutional provision has granted exemption to any body to treat the HIV/AIDS persons in a discriminatory manner. Human rights related jurisprudence or related international conventions have given importance focusing the self-dignity of human beings. Each and every person has the same dignity and importance. Therefore, the principle of right to equality and the related philosophy are emerged on the principle that all persons have right of self respected equally. While observing from this point of view there does not seem any reason for treating the non-infected persons respectfully in terms of the treating the HIV/AIDS infected persons on the same ground. Therefore, no one has the right to boycott or segregate from the society or control association with one class of people in the society on the basis of the control oriented outlook.

It seems that the claim made by the petitioners is based on the rights relating to equality, freedom and health. Since the petitioners have petitioned on the basis of the constitutional rights, it cannot be treated by this Court or the State voluntarily or discretionally.

Now on such condition where the petitioners themselves have shown the availability of the constitutional right, the question for enjoyment of the constitutional or fundamental right is as to whether the remedy is to be traced within the existing constitutional or legal framework or new legislation is to be made as sought by the petitioners in order to make effective atmosphere for enjoyment of the constitutional or fundamental rights as conferred by the Constitution.

It cannot be assumed that the citizens are enjoying the rights as conferred by the Constitution on the supposition that such rights are provided by the Constitution. Therefore additional legal means should be arranged for creation of the atmosphere for exercising the fundamental rights besides other means. Particularly, if considering on the context of the fundamental rights, these rights are the most important and compulsory portions of the Constitution, and it would not be deemed as exaggeration that the cornice of the constitution are the provisions relating to fundamental rights and the remedial way prescribed for exercising such rights. If the strategies and systems could not be translated into practice, the guarantee for the enjoyment of the fundamental rights could not remain bright.

Therefore, the problems faced by the writ petitioners that are affecting their fundamental and legal rights, it is necessary to address the demand put by the writ petitioners for the enjoyment of the fundamental rights guaranteed by the constitution and to save their rights from being violated and to prohibit the discriminatory treatment made to them.

Without knowing the fact as to what type of obstacle would be in exercise of the fundamental rights conferred by the Constitution to the persons infected by HIV/AIDS and what are the rights relating to such class of people, the scope and nature of the law required for the said class of people cannot be addressed. Therefore, it would be quite

relevant to keep in mind the interrelations prevailed between the nature of rights of the infected persons and those rights.

In this context, first of all it is necessary to have knowledge on specific needs and nature of various classes of people living in the society such as the class of women, males, children, elders, professionals etc.

Among the rights that are conferred to every citizens, the important rights are right to equality, right to freedom, right to health, right to employment, right to children, right to family, right to education, right to property, right to shelter, right to social security, right to justice, right to secrecy. The necessity of these rights is more important to the HIV/AIDS infected persons than the others.

Once an HIV is infected, physical capacity dwindles, stress should be given to treatment, treatment happens to be expensive, effectiveness on employment decreases, educational opportunities can not be used completely, social security becomes more urgent, more property is needed; and in the condition while these all things are denied, right of access to justice should be ensured. If we see at the chain effects on the rights of the persons infected by this disease - there would be difficulties on admission to school despite equal right to education, there would be danger of expulsion from the school even if admitted, there would be problems in social interactions; and right to education would be affected by these all reasons. If it is childhood, his rearing, medical, treatment and growth may be affected.

As education is affected, good employment can not be obtained naturally, as infection of this disease is disclosed; there would be continued threats of discontinuance of promotion in employment and dismissal from the obtained employment. In the absence of employment, income would be limited or there would not be any income. This would first affect on food and then on health. Standard health service could not be received due to lack of money. Relationship would be denied by all from health workers, students, teachers, public officers, own family members and neighbors.

This would incur additional burden to health and livelihood. The family and family property remains to be as the shelter of last resort. Considering the condition of the infected person and his control over property, conditions may be created there too whereby he would be expelled from the house and deprived of the property. Right to justice happens to be relevant in that condition. Persons of this class reach at unusual, complex and risky condition, and therefore, expect an easy condition to use their factors and resources. But due to the opinion of the family members that the infected persons would die soon and put forth an attitude that the treatment upon him would be worthless, they isolate him from house, save property and deprive him from the property even by fraud if the infected members is a fragile one. The final remedy against such treachery and mistreatment is the remedy of right to justice. But, even in the process of judicial remedy, necessary expenses would not be obtained and prolong the process if the family members are defendant.

At the time when the infected person needs factors and resources to make his remaining life respectful and less painful, there may remain an insight to prolong the judicial process so that the infected person can not use the property till his life. In this way, when the infected person needs support, help, sympathy and property at most; the infected person, at that time, is treated by his own peoples and by others too without support and thereby put him at the point of inhumane and terrified condition. He is deprived of his right to privacy and thereby threatened to his/her chastity. In this way, a person should helplessly bear chain violations of all right given by the constitution and laws. However, it is a known fact that all the rights of the infected persons were not less important than the rights of any other able or healthy persons.

Therefore, a class of population in society indulges into all available benefits and remains in specific condition; and the needy and helpless class of population who needs support from the state and social system at this time of need, the class of population is deprived from all benefits, and therefore, it is not bearable from the perspective of law, justice and civilization.

It is necessary to understand in reality how people are infected, which act is more prone to infection and what is the basis of the fear of infection. There is an opinion in society in general that this disease is infected to those who go to prostitution, unnatural sex and drug addicts. But in reality HIV can also be infected by unsafe sexual intercourse, unsafe blood donation, infected mother to child, the needle which is used in course of treatment and etcetera.

Therefore, it would be lack of wisdom to disrespect and exclude the whole affected class while targeting specific class. Evan as this disease does not transmit through touches, hug or simple social interactions, an infected person is taken as an unnecessary threat being very subtle and serious. Even those who adopt easy infection create unnecessary distance with these diseases in the name of being alert and thereby deny human relations. This attitude is neither necessary nor acceptable. People caught by this disease do not become disabled or incompetent immediately or do not die immediately.

Due to innovation of medicine, the average age of infected person is also being lengthened like other persons. It is also found that they are also contributing like other competent persons in all genres. Due to lack of right information on such condition, improper and criminal treatments are being done in society and it is found that the state also has not been able to bear it and has remained silent. Improper fear is the greatest obstacle on social interaction and the infected person need to bear its impact aspects like education, health, employment, family and social life. Therefore, impact of this disease regarding life of the people of this class and all related rights should be analyzed and it is the duty of the state to give its legal solution.

It is urgent to heed into the aspect of legal remedy of this disease since lower section of people are more affected in a society like us which is ridden with underdevelopment, lack of education and poverty. Statistics say that paternal effects are there in our society, and therefore, married women cannot fully enjoy her right to sex according to her own interest. Therefore, women are infected from men even within their home, can not go to medical examination on time due to

lack of awareness, can not do medical treatment due to poverty, and therefore, there has been some tragic events that they unexpectedly meet early death. As parent die, children become orphan, and if, they are infected too, their situation would be more miserable. If we see its vicious circle, it should be seen as a silent emergency and it should be treated accordingly.

In the context that the applicant has demanded for directives orders of the court to protect their right to equality and right to freedom by making laws since the HIV infected persons are bound to bear discriminatory treatment, it is now pertinent to consider as to what kind of rights the HIV infected persons have.

In this context, it is first expedient to consider Human Rights related provisions of international conventions. The Universal Declaration of Human Rights passed by the United Nations General Assembly on 1948 December 10 has provided for several rights for each individual including right to freedom of life and security, right to be recognized as an individual before law at all times, right to health security, right against inhumane and degrading treatment, right to movement, right to privacy, right to marriage and family, right to work, right to housing, right to information and right to social security. The International Covenant on Civil and Political Rights 1966 issued with the main objective of creating an environment of using civil and political right of an individual as well as group of people without any discrimination has also provided for the abovementioned rights and Article 26 has stated that all individuals are equal before law and are entitled to equal protection of law without any discrimination. In this respect, law prohibits any kind of discriminations and guarantees equal and effective protection to all persons against any kind of discriminations on the basis of caste, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.

The International Covenant of Economic Social and Cultural Rights 1966 has provided for several rights including Article 6 which states that each individual has a right to work that comprises of his right to choose an opportunity for the survival of his life, Article 8 which states right to open a trade union for the promotion of his economic and

social interest and thereby assemble therein, Article 9 states right to social insurance including social security, Article 10 which states a provision that a nation has to make abundant arrangements to the extent possible for security and assistance for family and dependant children for their education and rearing, Article 11 states right to food, clothing and housing, Article 12 states right to consume highest available physical and health and Article 13 states right to education.

Article 2(2) of the said Covenants state that the state parties to this Covenant guarantee enjoyment of these rights stated in this Covenants without any discrimination on the basis of caste, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the Convention on Elimination of All Forms of Discriminations against Women 1979 provides for that state parties condemn all kinds of discriminations against women and thereby agree to adopt proper policies without any delay to eliminate all kinds of discriminations against women. Article 15 of the said Convention has stated that State parties shall provide women equal treatment at par men before law and has also provided for several rights to women.

The Convention on Rights of Child 1989 has provided for several rights to children in order to provide special legal protection to children. The above stated international covenants have agreed to end all kinds of discriminations for the protection and promotion of Human Rights of an individual. Nepal has ratified the said international instruments made for the protection of Human Rights and has expressed commitment to universal values of Human Rights. In the context that Nepal has been party to international treaty and convention, a liability remains upon the government of Nepal to comply with the commitments expressed through the Conventions according to Vienna Convention on Law of Treaty 1969 and Treaty Act 2047.

Any state has its primary liability to protect its geographical boundary and maintain law and order within it. Citizens residing within certain geographical area are organized and unified with an objective of

protecting their rights and interests and thereby grant the right to the state to rule on them on the condition that the State would protect their basic rights. It is assumed that the purpose of the origin of the State is to protect the rights and interest of citizens. Therefore, Human Right of citizens is a matter to be considered in the context of their relations to he State. Therefore, a State has a liability to respect and protect inherent right of citizens like equality and freedom and also not to encroach upon the rights. Basic Human Rights of a person include several rights including right to life, right to equality, right to individual freedom, right to property, right to opinion and expression, right to publication and right to justice. It is found that Part 3 of the Interim Constitution of Nepal, 2067 (2007) provides for the fundamental rights to citizens including right to freedom, right to equality, right relating to environment and health, right to education and culture, right to employment and social security, right to property, right of women, right of social justice, right of children, right to religion, right to information, right to privacy, right relating to labor, right of constitutional remedy. These fundamental rights are to be available to all without any discrimination. It can not be said that it can not be achieved by somebody just because of being infected with HIV.

The dearest thing for human being is his life. In the condition when life is ended, other opportunities available for him would not have any meaning. Therefore, special importance is given to the security of the corpus of a person and the right to life is recognized as an inherent right. Article 12 of the Interim Constitution of Nepal provides for right to freedom, and further, Sub-article (1) states that each person shall have right to life with dignity and no laws would be made providing for capital punishment, Sub-article (2) states that personal freedom of any person shall not be infringed except otherwise stated in law, Sub-article (3) provides for freedom of expression and opinion, freedom to be assembled peacefully without any weapon, freedom of movement to any part of Nepal and freedom of residence therein, freedom to carry out profession, employment, industry and trade. These freedoms are given to make practicable the right to life with dignity. If man is not

provided with freedom to look for means of his livelihood, he can not collect necessary resources to survive; and his right to life would, ipso facto, be useless. Freedom of profession is a freedom to be engaged in a specific work regularly for livelihood, freedom of employment is to be engaged in any kind of income generating work and freedom of trade include buy and sale of goods or export or import of goods and freedom of production of a goods by an industry. Article 18 of Interim Constitution of Nepal 2063 has separately stated the right to employment that enables to be engaged in some kind of income generation by doing some work.

Similarly, another right related man's right to life with dignity is right to property. Right to property is also related to right to profession, employment, industry as well as trade. Property is necessary for livelihood. All factors and resources assigned for livelihood are property of man. Man carries out his life on the basis of these factors and resources. If the factors and resources that are remained as the basis of life are not protected, the very existence of the life of man will come to an end. Therefore, right to property is recognized as the fundamental right and thereby provided for in Article 19 of the Interim Constitution of Nepal, 2063.

Achieving education is a basic need for each person. Education occupies important contribution for the development of human personality and dignity. It plays an important role for strengthening the respect of fundamental freedoms. Besides, education is related to each and every aspect of life including employment and profession. A person who has obtained good education can live a respectful life by making his life easy and managed one. Considering this importance of education, Article 17 of the Interim Constitution of Nepal, 2063 has provided for right to education and Sub-article 17(2) states that each citizen shall have right to obtain free education from the state up to secondary level in accordance with law.

Each individual should be allowed to use the highest available physical and mental health. It is a right of each citizen to obtain basic

health facility. Basic health facility means the guarantee of service of medical doctor at the time of being sick and being taken care of the person. This right has more importance if we look it in the context of an HIV infected person. This right is provided for by Article 16 of the Interim Constitution of Nepal, 2007 as the right to environment and health and Sub-article (2) of the Article 16 states that each citizen shall have right to basic health service from the state in accordance with provision of law.

The Interim Constitution of Nepal, 2007 provides for right to equality in Article 13 and Sub-article (1) states that all citizens shall be equal before law. Anyone shall not be deprived of equal protection of law. Sub-article (2) states that no discrimination shall be made on the basis of caste, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status while using general law. Sub-article (3) states that the State shall make no discrimination among the citizens on the basis of religion, color, gender, language, origin, political or other opinion or anyone of them. It is also found there that law does not prohibit to make special arrangements for protection, empowerment or development of women, dalits, indigenous people, madheis, farmers or the class which is backwarded on economic, social and cultural point of view or children, old, disabled or incapable physically or mentally. The purpose of providing right to equality to citizens means to create a condition whereby the facilities and rights provided by the state are equally used and liabilities are also carried equally. This is a formal concept of equality.

But all people are not of equal standard and status. As some are weak than other persons for several reasons they can not use the right, privilege and liability given by the state. Therefore, equality without discrimination sometimes creates inequality. Therefore, law should, in order to wipe out such inequality, provide for special provision to create a situation in order to enable such persons who have been or remained incompetent for several reasons to become able to use rights at par with other persons. This is the intention of the proviso

clause of Article 13 (3) of the Constitution. Due to the discrimination, contempt as well as allegation that an HIV infected person has to bear with, there has been difficulty for them to live with other persons of society and to work for their own livelihood; and their specific health condition has made them unable to collect resources for their livelihood. In this meaning, special provision has to be made for the protection of right of HIV infected persons.

Privacy is inherent attitude of human being. Man does not want to make all aspects of his life open. As there would be a possibility that openness of personal information of a person may exert harm to him, he keeps his information secret in order to be safe from such harms. If some secret matters of a person are let known to other person, the person who knows such information may control the other person. As a consequence of the same, personal freedom of a person, whose information is let known would be infringed. Therefore, right to privacy of a person has to be protected in order to protect personal freedom of a person.

Article 28 of the Interim Constitution of Nepa, 2007 has guaranteed right relating to privacy stating that privacy relating to corpus, house, property, deed, data, correspondence and character of a person are inviolable. In our Nepali society, HIV infected persons are frowned upon due to lack of knowledge as well as lack of education. If it is disclosed that a person is HIV infected, he should bear discrimination and expulsion from the society. As a consequence, his several rights would be infringed, and therefore, right to privacy regarding infection has special importance. A case called Sapana Pradhan Malla vs. Government of Nepal including office of the Prime Minister has propounded a theory that if persons infected by this disease are involved in judicial proceeding and if their infected condition is demanded to put secret, such introductory information should be kept secret. There has not been development of any other jurisprudence other than this.

HIV/ AIDS is not a problem of Nepal only and it has appeared to be a global problem. This has terrified the world. Guaranteeing Human Rights to HIV infected persons also has an important role for HIV/AIDS control. From the perspective of Human Rights, there have been several global initiatives to control this.

The Second Consultation on HIV/ AIDS and Human Rights held in Geneva of Switzerland in September 1996 has identified main 17 Human Rights principles to address HIV/AIDS from the perspective of Human Rights. These principles include – non-discrimination, equal protection of law and right to equality before law, right to privacy, right of women, right of children, right to marriage and family, freedom of movement, security and freedom of person, right to education, right to use highest available standard of physical and mental health, right to claim asylum, right to use the achievements of development, right to information and expression, right of political participation, right to be assembled and open organization or institution, right to work, right against cruel inhumane or degrading treatment and right against punishment. These rights are not new rights rather these are summary of the Human Rights provided for in the international Human Rights instruments and practiced so far.

UN General Assembly, Special Session (UNGASS) 2001 has issued declaration of commitment on HIV/ AIDS. It is found that this declaration has stressed on guaranteeing human rights for controlling HIV/AIDS. The Declaration states that stigma, silence, discrimination, and denial, as well as lack of confidentiality, undermine prevention, care and treatment efforts and increase the impacts of epidemic on individuals, families communities and nations must also be addressed the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including the areas of prevention, care, support and treatment and that it reduces vulnerability of HIV/AIDS and prevents stigma and related discrimination against people living with or at risk of HIV/ AIDS.

The Declaration says that law, rules and other means should be adopted in order to end the discrimination against infected person and to ensure their Human Rights and fundamental freedom. It especially stresses on access to education, employment, paternal property, social and health service and to recognize their secrecy and privacy. In the above context, Nepal is also party to some of the international law relating to Human Rights, there is a condition that liability created out of it should be fulfilled, the infected class of Nepal also has right to meaningful practice of all these rights, this problem is silently going to be explosive in Nepal too; it is clearly felt a need of an effective law covering several basic aspects in order to make this matter a justifiable matter as such a complex matter can not be left at administrative level and it should be addressed in totality from human rights perspective too as this is a matter of Human Rights, and for the purpose of determining the responsibility not only for victim but also for victim and perpetrators both.

It is not found in Nepal till date that HIV infected people raise their issues. Therefore, it is not disclosed what kind of remedy was possible in accordance with prevalent laws. But it is found in several other jurisdictions that the limitation and extension of jurisdiction of infected people is determined. These may be considerable for the purpose of this case.

In the United States of America, in a case Thomas v. Atascadero United School District concerning expulsion of a student called Ryan from school on the ground of HIV infection, the court has protected right to education prohibiting the expulsion from the school only on the ground of HIV infection. The Court said," The overwhelming weight of medical evidence is that AIDS virus is not transmitted by human bites, even bites that break the skin. Based on the abundant medical and scientific evidence before the court, Ryan poses no risk of harm to his classmates and teachers. Any theoretical risk of transmission of the Aids virus by Ryan in connection with his attendance in regular kindergarten class is so remote that it can not form the basis for any exclusionary action by the school district.

Similarly, in a case Ray v. School District of DeSoto County concerning that HIV infected students were stopped from entering into the school, the court prohibited to stop the student to enter into the school.

It is found in the case of Chalk v. U. S District Court Central District of California concerning that HIV infected Chalk was transferred on the ground of HIV infection from his regular work of teaching deaf student and was deputed to another work, the court ordered to return him back to his previous work.

In the case of D v. United Kingdom filed against the order to depute an HIV infected citizen of St. Kitts who was reached near death to St. Kitts where the treatment was not available, the European Court said," in view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment."

In a case of Treatment Action Campaign et. Al v. Ministry of Health et al, the constitutional court of South Africa has issued several orders for the security of right of HIV infected person including the order to carry out programs of access to health service of pregnant women and their children in order to control transmission of HIV from the mother to children.

It is found in India in the case of Mr. 'X' v. Hospital 'Z' that HIV infected persons can also use human rights at par with other person. It is said, " ….. The patients suffering from the dreadful disease "AIDS" deserve full sympathy. They are entitling to all respects as human beings. Their society can not, and should not be avoided, which otherwise, would have bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them…"

It is already stated above that HIV infected and affected persons also have equal right to use the fundamental rights guaranteed by the Interim Constitution of Nepal, 2063 and the Human Rights provided for

by the International Instruments on Human Rights. The provisions of Constitution and international instruments can not come into force ipso facto. Law should be made to implement the provisions. Due to their special health condition, the discriminatory behavior of the society to them and allegations, they are unable to use the above mentioned rights. Therefore, it is seen that special legal provisions should be made to create an environment to use these rights.

In Nepal, there has not been a separate legal provision till date for the protection of rights of HIV infected persons and for the solution of problems caused by HIV/ AIDS.

If someone deliberately transmits HIV/AIDS to other person, the life of the infected person would be in danger, and thus such act should be put into the boundary of crime. Regarding deliberate transmission of HIV/AIDS, it is found in the National Code (Muluki Ain) Chapter on Rape 3 Kha " Notwithstanding anything contained in No. 3 and 3 Ka, if somebody does rape even after knowing that he is caught with Human Efficiency Syndrome Virus positive (HIV positive) , such culprit should be punished with the punishment of one year imprisonment more in addition to the punishment stated in No. 3 and 3 Ka.".

It is found that in the case of Forum for Women Law and Development as an applicant against Government of Nepal office of the Prime Minister and Council of Ministers (Supreme Court Bulletin special issue 2064 Magh) a directive to maintain privacy of party in special cases, 2064 has been issued and thereby provided for that personal introductory information of the HIV infected or affected person should be kept confidential from the very beginning of the proceeding of a case.

If somebody is HIV infected s/he has a duty not to transmit HIV to his/her husband/wife or sex partner and the sex partner of HIV infected person has a right to know about HIV of his/her sex partner in order to avoid HIV on him/her. There are no legal provisions as to what kind of duty an HIV infected person has towards his sex partner, in the condition somebody is suspected as being infected with HIV,

what right his/her sex partner has for the purpose of eradicating the doubt, if HIV is infected due to recklessness of health worker what kinds of rights the infected person will have for the same, what kind of criminal liability will be subjected to the health worker who recklessly infects HIV to somebody, as a health worker discloses HIV infection thereby incurring subsequent allegation and discrimination what kinds of remedies would be available for the same, what happens if an official or agency having a liability to provide public service denies such service on the ground of being HIV infection, what kind of rights may be there for HIV infected or affected person. It seems urgent that such issues should be addressed legally. It is not sought till date about local use and compliance of certain standard developed by United Nations including Human Rights, fundamental rights, public health, access to health sector, privacy, employment, gender equality, reproductive health, criminal law, public security and health service, right to information and need of informed consent and immigration. As this a multi-dimensional problem, it is urgent to see this in specialized manner. While making and implementing law on this, a coordinated approach should be taken and necessary competencies should be developed. Until and unless we can not assure security and justice to the right of the persons happened to be infected and victim of such infection by our or others reasons; rest of other person too till date can not expect security and good wishes from the infected persons.

While such a situation is prevailing, the government has not made proper legal provisions to stop violation of Human Rights caused by HIV/ AIDS. The government that has responsibility to make law for the protection of Human Rights of people can not exclude itself saying only that it is an exclusive right of the legislature what kind of laws should be made and when such laws should be made. The government should fulfill its liability towards people in accordance with several international instruments on Human Rights and constitution.

Even as the Human Rights of HIV/AIDS infected and affected persons becomes at par with other healthy persons, there remain discriminations on the use of their Human Rights and constitutional

rights due to the reason that such class of population is presently engulfed with such problems, and despite such situation, there have not been sufficient legal provisions to address such problems, and therefore, existence of such discriminations have deprived of public service and facility and thereby caused a lot of additional discrimination and lacking on facility to create a situation for violation of rights.

This directive order is issued in the name of opponents including Ministry of Law, Justice and Parliamentary Affairs and Ministry of Health and Population to frame sufficient legal provisions with priority and thereby submit to the Legislature Parliament without any delay comprising miscellaneous aspects of HIV/ AIDS putting the right of the affected class at the center and also consulting with the specialist and affected class and also clarifying their liability and considering the problems of the victims so as it would be necessary and proper in order to wipe out the lacking in their facilities considering miscellaneous aspects of social, economic and health related issues for the purpose of guaranteeing access to public service or facility and for prohibition to those who act discriminatory improper behaviors and for the protection of legal rights of such persons.

Let the Order be known to the opponents through the office of the Attorney General.

I concur with the above decision.

Justice Sushila Karki

Done on the 30 Baishakh 2066 (13th May, 2009).

Translated by Rudra Sharma

Reckless driving following intoxication of alcoholic substance when meted with an accident and caused the death of a person it amounts to be an act of crime of murder full of mens rea and punished underlaw accordingly.

Supreme Court,Division Bench
Hon'ble Justice Tahir Ali Ansari
Hon'ble Justice Tarka Raj Bhatta
2065-CR-0549

Case: Vehicular Manslaughter.

Appellant/defendant: Indra Prasad Khanal, a resident of Rupandehi District, Butawal Municipality, Ward No. 13, Devi Nagar.

Vs.

Respondent/plaintiff: Government of Nepal, acting on the report of Rameshwor Shrestha & others

- **In case a driver of a vehicle willfully hits a person with a view to kill him/her, then such vehicle shall remain as a murder weapon and that act cannot be termed as an accident.**
- **In order to establish recklessness as the requisite of the mens rea of crime, the defendant should have been aware of the forbidden consequences, in other words, the knowledge that a person may be killed. Here, the prior knowledge of the predictable result but not the willingness of the expected result has to be established.**
- **In several circumstances, despite doing a work in full caution and care, a forbidden outcome may arise. As there is total lack of mens rea in such act, it is taken as an**

unavoidable accident and the doer is not deemed to be blameworthy.

- **Mens rea present in the defendant determines the blameworthiness in a relative crime. Since such offences constitute many levels, in order to determine how far and on which basis the defendant of a particular incident has to be encumbered with criminal liability, it is mandatory to identify the mens rea element present in him/her and determine its degree.**
- **This defendant is a licensed person for driving vehicles and has got experience in driving as well. Hence, he is an informed person about the traffic rules, signs, contemporary situation and circumstance. As such, he should have been aware of the fact that intoxicated driving at such a speed may result in such an outcome. In such a situation, it is his responsibility to cautiously drive the vehicle in a controlled speed in full consciousness. His driving of the vehicle in an excessive speed under the influence of alcohol without any regard to the aforementioned responsibility is tantamount to his reckless driving.**

Decision

Tahir Ali Ansari, J; This case instituted in this court by way of an appeal under appealed Section 9 of the Administration of Justice Act, 1991 and the summary of the facts of the case and decision made thereto is as follows:

The report of Assistant sub-Inspector of Police (ASI) Ananda Basnet read: On the evening of 7th Kartik, 2063, a jeep with the number plate of Lu.1.Cha. 2356 hit a scooter with the number plate of Lu.4. Pa. 374 on the road of Butawal Municipality, Ward No. 5, leaving Biraj Shrestha and Rochak Maskey severely injured. They were taken to Lumbini Zonal Hospital, Butawal for medical treatment with the help of locals. The driver of the jeep was apprehended when he was dragging the scooter towards Area Police Office, Butawal and I had submitted

him. As he was under the influence of alcohol, I request for his medical check-up as well.

The report made by Police Inspector Ranjit Rathour read: On the evening of 7th Kartik, 2063, a jeep with the number plate of Lu.1.Cha. 2356 hit a scooter with the number plate of Lu.4. Pa. 374 on the road of Butawal Municipality, Ward No. 5, leaving Biraj Shrestha and Rochak Maskey severely injured. Later Rochak Maskey succumbed to the injuries while undergoing treatment. Hence, I request for legal action against the driver of the jeep Indra Prasad Khanal.

As regards this incident the report of Police Constable Ratna Lal Poudel read: Upon mechanically examining the jeep with the number plate of Lu.1.Cha. 2356 and scooter with the number plate of Lu.4.Pa.374, they were found in a dysfunctional state. The right front bumper of the jeep and its hoot covering the engine were damaged. Rest of the parts was found to be in a good condition.

The crime scene detailed report read: The road within Golpark, Butawal Municipality, Ward No. 5 with the Ratna Vidyapeeth English School to the East, the old building of Ratna Vidyapeeth English School to the West, Siddhartha Highway to its South and North, measured 20 ft. wide. Blood marks and broken glass were splattered to 5 ft. west of the median point of the road. On that very site, the jeep with the number plate of Lu.1.Cha. 2356 hit a scooter with the number plate of Lu.4. Pa. 374 with Rochak Maskey and another on board. Marks showed that the scooter was dragged for 500 yards from the incident site to the gate of Area Police Office, Butawal. The scooter dragged such was damaged beyond repair.

The First Information Report (FIR) filed by Jitendra Simangaida read: At around 6.30 pm of 7th Kartik, 2063, when my son Biraj Shrestha and his friend Rochak Maskey were heading towards Chidiyakhola on board a scooter with the number plate of Lu.4. Pa. 374 and when they reached nearly 20 metres south of Nanglo Restaurant located at Butawal Municipality, Ward No. 5, a jeep with the number plate of Lu.1.Cha. 2356 and driven recklessly by a driver under the influence of alcohol hit the scooter which was on the opposite side, leaving Biraj

Shrestha and Rochak Maskey severely injured. Later Rochak Maskey died in the course of treatment while Biraj Shrestha is in a critical condition. Hence, I request for the arrest of the jeep driver, initiate legal action against him and cost of treatment as well as compensation be recovered from the concerned party.

Likewise, the First Information Report (FIR) filed by Ramewshwor Shrestha read: At around 6.30 pm of 7th Kartik, 2063, when my son Biraj Shrestha and my niece Rochak Maskey were heading towards Chidiyakhola on board a scooter with the number plate of Lu.4. Pa. 374 and when they reached nearly 20 metres south of Nanglo Restaurant located at Butawal Municipality, Ward No. 5, a jeep with the number plate of Lu.1.Cha. 2356 and driven recklessly by a driver under the influence of alcohol hit the scooter which was on the opposite side, leaving Biraj Shrestha and Rochak Maskey severely injured. Later Rochak Maskey died in the course of treatment while Biraj Shrestha is in a critical condition. Hence, I request for the arrest of the jeep driver, initiate legal action against him under Section 161 (1) of the Vehicle and Transport Management Act, 1992 and cost of treatment as well as compensation be recovered from the concerned party.

As regards this case, the statement made by the defendant Indra Prasad Khanal before the police read: in the evening of 7th Kartik, 2063, as I was driving the jeep with the number plate of Lu.1.Cha. 2356 from Palpa Dobhan to my home and when I reached some way forward of Butawal Municipality, Ward No. 5, Golpark, there was a congregation of people playing *Deusi Bhailo.* While I tried to cross them and turned right, the scooter with the number plate of Lu.4. Pa. 374 and with Biraj Shrestha and Rochak Maskey on board, got hit by my vehicle and the scooter got stuck on the front bumper of the jeep. Both of the riders were flung off the scooter and got wounded. I dragged the scooter till the Area Police Office, Butawal. At the time of incident, I was not under the influence of alcohol. The accident led to the death of Rochak Maskey and injury of Biraj Shrestha.

The road accident report read: At around 6.30 pm of 7th Kartik, 2063, a jeep with the number plate of Lu.1.Cha. 2356 hit a scooter with the

number plate of Lu.4. Pa. 374 on the road of Butawal Municipality, Ward No. 5, leaving Biraj Shrestha dead and Rochak Maskey severely injured. The accident was triggered as the jeep driver drove the jeep through wrong direction.

The case report further read: The front of the scooter with the number plate of Lu.4. Pa. 374 was badly damaged. The chassis was dented and twisted. Signs of dragging were present in the engine. The scooter was damaged beyond repair.

The case report further read: The cremation of Rochak Maskey took place on the west banks of the Tinau rivulet at Ram Nagar Ghat of Butawal Municipality, Ward No. 4, Maina Bagar, bordering Majuwa Squatters Settlement of Ward No. 13 to the East, Parking lot of Butawal Municipality, Ward No. 4, to the West and the Tinau rivulet to the North and South.

The written statement of the injured Biraj Shrestha read: On the evening of 7th Kartik, 2063, I and Rochak Maskey were on board the scooter with the number plate of Lu.4. Pa. 374, driven by Rochak and were heading towards Siddhababa, when a jeep with the number plate of Lu.1.Cha. 2356, approaching from the wrong side, hit our vehicle. This accident led to the injury of us both and later Rochak Maskey died in the course of treatment while I am suffering from blood clotting around my head and kidney as well as a fractured femur of the right leg.

Similarly, the written statement of Jitendra Simangaida Shrestha read: I have received a sum of Rs. 50 thousand as interim medical expenses from the owner of the vehicle. It has been agreed that the medical expenses till recovery shall be borne by the vehicle owner.

The written statement made by Tara Gahatraj read: I was travelling on the jeep with the number plate of Lu.1.Cha. 2356, on the evening of 7th Kartik, 2063. The jeep was driven by Indra Prasad Khanal. When we reached some way forward of Butawal Municipality, Ward No. 5, Golpark, near the Nanglo Restaurant, there was a congregation of people playing *Deusi Bhailo.* The group was occupying some space on the road. While the driver tried to cross them and turned right, the

scooter with the number plate of Lu.4. Pa. 374, northbound, got hit by the jeep and left Biraj Shrestha injured.

Likewise, the written statement made by Prem Bahadur Chhetri read: On the evening of 7th Kartik, 2063, I was returning for home and was on board the jeep with the number plate of Lu.1.Cha. 2356. The jeep was driven by Indra Prasad Khanal. When we reached some way forward of Butawal Municipality, Ward No. 5, Golpark, near the Nanglo Restaurant, there was a congregation of people playing *Deusi Bhailo.* While the driver tried to cross them and turned right, the scooter with the number plate of Lu.4. Pa. 374, northbound, got hit by the jeep and left Rochak Maskey dead and Biraj Shrestha injured. The scooter of the number plate Lu.4. Pa. 374 was also damaged.

Likewise, the written statement made by Niranjan Prasad Shrestha read: : On the evening of 7th Kartik, 2063, when my son Rochak Maskey and Biraj Shrestha were on board the scooter, northbound, with the number plate of Lu.4. Pa. 374, the scooter was hit by the jeep, southbound, with the number plate of Lu.1.Cha. 2356, and was driven by Indra Prasad Khanal. This caused an accident and led to the death of my son Rochak Maskey.

The receipt made by Niranjan Maskey read: I have received an amount of Rs. 100 thousand on behalf of compensation and cremation expenses. I have no further claims in this regard.

The letter of Lumbini Zonal Hospital read: On 7th Kartik, 2063, Rochak Maskey was admitted at the emergency department and was referred elsewhere for further treatment.

The crime spot statement read: On the evening of 7th Kartik, 2063, Indra Prasad Khanal was driving a jeep with the number plate of Lu.1.Cha. 2356, southbound, at the southern tip of the road nearby Nanglo Restaurant, of Butawal Municipality, Ward No. 5. On the left side of the road, there was an assembly of people. Hence, he covered right side and while proceeding straight, his vehicle hit the scooter, northbound, with the number plate of Lu.4. Pa.374, and occupied by Rochak Maskey and Biraj Shrestha. This resulted in the death of

Rochak Maskey on 8th Kartik, the following day. Biraj Shrestha sustained injuries.

The charge-sheet filed before the Court read: As the son Rochak Shrestha of complainant died after being hit by the vehicle driven by the defendant Indra Prasad Khanal in a manner pursuant to Section 161 (2) of the Vehicle and Transport Management Act, 1992 it is requested that he should be punished to the maximum as per the same section.

With respect to this case, the statement made by the defendant Indra Prasad Khanal before the Court read: On the evening of 7th Kartik, 2063, I was driving a jeep with the number plate of Lu.1.Cha. 2356, southbound, returning from Dobhan after receiving *tika*, when I saw two persons on a scooter with number plate of Lu.4. Pa. 374 coming northbound towards Chidiyakhola. That scooter collided with my vehicle, the occupants were flung off the vehicle and the scooter stuck beneath my vehicle. I approached the Area Police Office, Butawal along with the vehicle. Rochak Maskey died as a result of direct hit from my vehicle. I was on my own side and was not reckless.

The statements of the witnesses from the plaintiff side, viz. Prem Bahadur Chhetri, Tara Gahatraj and complainant Rameshwor Shrestha was enclosed in the case file. The defendant failed to produce his witnesses.

The decision of Rupandehi District Court dated 13th Falgun, 2063 read: As Rochak Maskey was found to have been killed while trying to save the group playing *Deusi Bhailo*, the claim against the defendant Indra Prasad Khanal espoused in the charge-sheet, seeking punishment as per Vehicle and Transport Management Act, 1992 could not suffice. However, as the defendant has confessed that Rochak Maskey died as a result of his scooter being hit by the jeep driven by the defendant, and from the evidence enclosed in the case file it is found that the possibility of death was unforeseeable, it is concluded that the defendant shall be punished with an imprisonment of 3 months and a fine of Rs. 2 thousand only, as per Section 161 (3) of the Vehicle and Transport Management Act, 1992.

The appeal filed by the plaintiff, the Government of Nepal read: The marks of brakes found in the crime scene depict of high speed. It has been found that the defendant, while driving under the influence of alcohol, went into the opposite side and hit Rochak Maskey. Hence despite the possibility of saving of a life, the victim died as result of the hit from the vehicle driven by the defendant. Hence, it is requested that the verdict by the District Court be quashed and the defendant be punished as per the claim on charge-sheet.

To this respect, the order of Appellate Court, Butawal ordered on 18th Mangshir, 2064 that: As the original decision awarding meager punishment to the defendant may be altered in the condition that the scooter rider got killed as the jeep driven by defendant hit the scooter which was moving in its side, this case should be duly submitted after the respondent is summoned and appeared before this Court or upon expiry of time-limit to that effect.

The verdict of Appellate Court, Butawal on 6th Falgun, 2064 read: It has been clear from the body examination report and the statement of the defendant that Rochak Maskey died after being hit by the jeep driven by the defendant. The defendant while testifying before the Court has conceded that he was driving at a speed of 35 km per hour. On the medical report dated 7th Kartik, 2063, it is mentioned that though the defendant is under the influence of alcohol, he is fully conscious. It cannot be said that the driver was not reckless when he was driving at a speed of 35 km per hour in a place thronged by people and hit the scooter after turning his vehicle to the wrong side. This caused an accident and the death of scooter rider. The arguments of the appellant side that the driver was compelled to move his vehicle to the wrong side, he was fully conscious at the time of driving, and hence the original verdict should be sustained. As such, the verdict of Rupandehi District Court dated 13th Falgun, 2063 stands partly altered and the defendant shall be punished with 2 years of imprisonment as per Section 161 (2) of the Vehicle and Transport Management Act, 1992.

Responding to this decision, the appeal filed before this Court read: While the vehicle driven by me hit the scooter, I was driving

cautiously. Enduring the punishment fixed by the Rupandehi District Court does not amount that I had accepted a more serious crime. The above decision which interpreted my confession that I was driving at a speed of 35 km per hour as having committed a grave offence and imposing additional punishment on that ground is not lawful. After the accident on 7th Kartik, 2063 and upon my presence at the Area Police Office, Butawal, the medical report prepared by the doctor of Bhim Hospital establishes that I was not under the influence of alcohol. The 2nd medical report made under the influence of police and administration, though has shown me as drunk, still it has conceded that I am fully conscious. This report enclosed in the case file is dubious and partial. The verdict of the Appellate Court awarding me 2 years of imprisonment declining and without mentioning a word on the report of Bhim Hospital and relying on the 2nd report alone is flawed. On the process of advancing ahead, saving the *Bhailo* playing children on the road, I was compelled to turn a little bit to the right side whereby the scooter rider was approaching northward at speed. This resulted in a collision and the riders were flung off the vehicle. As such the verdict of the Appellate Court, Butawal on 6th Falgun, 2064 reversing the original verdict of an imprisonment of 3 months and a fine of Rs. 2 thousand only, is flawed. Hence, I urge for the repeal of the Appellate Court's verdict and the sustainment of the original decision made by Rupandehi District Court.

Responding to this move, the Court on 18th Kartik, 2067 ordered: In the situation that it has not been evidently substantiated that the accident was caused due to the recklessness of the defendant, the verdict of the Appellate Court handing the defendant 2 years of imprisonment may differ on account of assessment of evidence, the notice of cause list shall be handed over to the Office of the Attorney General (OAG) for discussion and the case be duly submitted before the bench.

In the present case duly submitted before the bench as per the cause list, learned Senior Adv. Mr. Shambhu Thapa pleaded on behalf of the appellant while learned Joint Attorney Mr. Kiran Paudel represented the government side.

The essence of the arguments presented by learned Senior Adv. Mr. Shambhu Thapa on behalf of the appellant side was: The scooter rider Rochak Maskey died in course of treatment as a result of his scooter with the number plate of Lu.4. Pa. 374 being hit by the jeep with the number plate of Lu.1.Cha. 2356, driven by the defendant, on the evening of 7th Kartik, 2063. This appellant had driven the vehicle cautiously and not recklessly. During accident, the speed of the vehicle was a normal 35 km per hour. From the case file it is seen that the defendant was not under the influence of alcohol. The scooter got hit as it came suddenly before while the driver was turning the vehicle cautiously to the other side in an attempt to save the children playing on the road during the festive season of Tihar. The deceased did not die instantaneously either. Prem Khatri on board the same jeep has testified before the Court that the speed of jeep was low and the collision occurred while trying to save the *Bhailo* playing children on the road. Likewise, Tara Gahatraj on board the same jeep has testified before the Court that the driver blew the horn, lit the sidelights and applied the brakes before collision occurred. The driver was not reckless, the vehicle was not over-speeding, and he took the vehicle to the other side just to save the children. The collision occurred while the driver was applying brakes and there is no room for recklessness. Only in the instance of recklessness does the punishment as per Section 161 (2) of the Vehicle and Transport Management Act, 1992 apply and not in other cases. As such, the verdict of the original District Court which handed over punishment as per Section 161 (3) of the Vehicle and Transport Management Act, 1992after correctly analyzing the facts should prevail and the verdict of the Appellate Court should be quashed.

The essence of the arguments presented by learned Joint Attorney Mr. Kiran Paudel representing the respondent Government side was: There is no dispute that the vehicle driven by this defendant shoved off another side and hit the scooter of the deceased. Driving a vehicle at 35 km per hour on evening at a crowded thoroughfare during festive season cannot be termed as driving at normal speed. It is a matter of common reasoning that driving a small vehicle like a jeep at that place at 35 km per hour may result in a direct hit to a person and

in his/her death. This defendant had taken undue risk and resultantly a person lost his life. This shall have to be deemed as recklessness and therefore the Appellate Court did reverse the original decision. The medical report has depicted that the defendant was under the influence of alcohol while driving. Hence, as the verdict of Appellate Court seems to be appropriate that has to be sustained.

Upon studying the case file and after listening to and considering the arguments put forth by both of the parties, it has to be decided whether the verdict of Appellate Court, Butawal on Falgun 6th, 2064 is appropriate or not and whether the appellant plea of the defendant suffices or not.

Upon considering towards the decision, the charge-sheet filed before the Court read: As the son Rochak Shrestha of complainant died after being hit by the vehicle driven by the defendant Indra Prasad Khanal in a manner pursuant to Section 161 (2) of the Vehicle and Transport Management Act, 1992 it is requested that he should be punished to the maximum as per the same section. Likewise, the decision of Rupandehi District Court read: As Rochak Maskey was found to have been killed while trying to save the group playing *Deusi Bhailo*, the claim against the defendant Indra Prasad Khanal espoused in the charge-sheet, seeking punishment as per Vehicle and Transport Management Act, 1992 could not suffice. However, as the defendant has confessed that Rochak Maskey died as a result of his scooter being hit by the jeep driven by the defendant, and from the evidence enclosed in the case file it is found that the possibility of death was unforeseeable, it is concluded that the defendant shall be punished with an imprisonment of 3 months and a fine of Rs. 2 thousand only, as per Section 161 (3) of the Vehicle and Transport Management Act, 1992. Responding on the appeal filed against this decision, the Appellate Court Butawal partly altered the verdict of Rupandehi District Court so that the defendant shall be punished with 2 years of imprisonment as per Section 161 (2) of the Vehicle and Transport Management Act, 1992.

Provisions regarding punishment owing to vehicular deaths have been provided in Section 161 of the Vehicle and Transport Management

Act, 1992. Different criminal liabilities and sentences have been incurred for different elements of the related crime in sub-Sections 1 to 3 of the same Section. Though there is no difference among these situations with respect to the criminal act and result, it seems that separate criminal liabilities and punishments have been imposed owing to the various degrees of mens rea which forms an important element of the crime. That Section has highlighted those three levels of mens rea constituting the criminal intention may be present.

Upon observing the legal provision enshrined in Section 161(1), in case someone dies due to vehicle as a result of intention to that effect, then such a death is termed as murder. Hence, using a vehicle with a criminal intention to kill a person has been understood by this sub-Section as an act of murder and has prohibited such an act. Under the mens rea, the prior knowledge of predictable result by a person of average intelligence and willingness of the expected result, both are present. Hence, this criminal act whereby the prior knowledge of predictable result and the willingness of the expected result are embedded, such an act embraces the highest degree of mens rea. In case a driver of a vehicle willfully hits a person with a view to kill him/her, then such vehicle shall remain as a murder weapon and that act cannot be termed as an accident. Therefore, law has interpreted act of this nature as a crime with a criminal intention.

Sub-Section 2 of the same Section has encapsulated the second level of mens rea known as recklessness. In order to establish recklessness as the requisite mens rea of crime, the defendant should have been aware of the forbidden consequences, in other words, the knowledge that a person may be killed. Here, the prior knowledge of the predictable result but not the willingness of the expected result has to be established. Moreover, in the instances of recklessness, the defendant apart from not expecting the result also desires that such a consequence should never arise. However, despite being aware of the probable result, not expecting the result, he/she takes inappropriate risk in continuing with the work and as a result a criminal act is committed. Mens rea as such in the form of recklessness has been put in the second level. The basis for encumbering lesser

criminal liability lies in the lack of willingness of the expected result on the defendant. However, the basis for encumbering more criminal liability than in case of negligence lies in the defendant's prior knowledge of the expected outcome.

As the third and basic level of mens rea, negligence has been placed in sub-Section 3 of the Section 161. As negligence a part of the mens rea, the defendant neither has a prior knowledge of the expected outcome, nor willingness for it. However, the act of the defendant shall be of a level lower than the standard of work done or to be done by a person of average intelligence in such similar circumstances. As a result a mishap occurs. Negligence is an act that is done in a level lower than a generally expected normal standard. As neither mens rea nor any of the elements of recklessness are present in an act of negligence, it has been provided as an offence of minimum criminal liability. In several circumstances, despite doing a work in full caution and care, a forbidden outcome may arise. As there is total lack of mens rea in such act, it is taken as an unavoidable accident and the doer is not deemed to be blameworthy.

Mens rea present in the defendant determines the blameworthiness in a relative crime. Since such offences constitute many levels, in order to determine how far and on which basis the defendant of a particular incident has to be encumbered with criminal liability, it is mandatory to identify the mens rea element present in him/her and determine its degree.

In the present case, the prosecuting side, in its charge-sheet, has claimed for punishment as per Section 161 (2) of the Vehicle and Transport Management Act, 1992. However, the Rupandehi District Court deemed it as a crime of lesser criminal liability than the claim espoused in the charge sheet and treated it as a lighter offence. Accordingly, it handed down punishment as per Section 161 (3) of the Act. Upon the appeal filed by Government of Nepal against that decision, the Appellate Court established the crime pursuant to the claim espoused in the charge sheet. This decision has been challenged and an appeal is filed before this Court. As such, it has to be decided whether the death of the deceased following the impact of

the jeep driven by the defendant against the scooter with the deceased as one of the occupants, is the outcome of a reckless act on part of the defendant or not.

The defendant has not appealed against the decision of District Court which established crime and punishment pursuant to Section 161(3) of the Vehicle and Transport Management Act, 1992. Moreover, the defendant in his statement before the Court has confessed that there was a collision between his jeep, southbound, with the number plate of Lu.1.Cha.2356 and a scooter, northbound, with the number plate of Lu.4. Pa.374. On the same occasion the defendant has conceded that he was driving at a speed of 35 km per hour. That incident occurred at the road south of Nanglo Restaurant of Butawal Municipality, Ward No. 5. At the time of accident, the children were playing *Bhailo* which signals that there was a presence of large number of people on the road. As such, that amount of speed inside urban area seemed to be excessive and not normal in itself. Besides, from the medical report of the doctor of Bhim Hospital, Bhairahawa, it has been found that the defendant has been driving the vehicle under the influence of alcohol. There is no dispute to this fact. It is a matter of general intelligence and conscience that in case a vehicle hits a person, he or she may be killed and driving the vehicle under the influence of alcohol inside the city area where a group of people have assembled to celebrate traditional festival may result in a direct hit and consequent death.

This defendant is a licensed person for driving vehicles and has got experience in driving as well. Hence, he is an informed person about the traffic rules, signs, contemporary situation and circumstance. As such, he should have been aware of the fact that intoxicated driving at such a speed may result in such an outcome. In such a situation, it is his responsibility to cautiously drive the vehicle in a controlled speed in full consciousness. His driving of the vehicle in an excessive speed under the influence of alcohol without any regard to the aforementioned responsibility is tantamount to his reckless driving. Moreover, as it is found that the jeep driven by him veered off the wrong side and hit the incoming scooter, and a person died due to the same reason, hence it is further corroborated that he recklessly drove

the vehicle without any control over its speed. At this light, one cannot agree with the arguments of the learned Senior Advocate representing the appellant side that the driver was compelled to move the vehicle to a wrong side, he drove with full caution, accident happened despite applying the brakes and that due to those reasons, the defendant should be subjected to milder punishment.

Therefore, from the aforementioned bases and reasons analyzed, the verdict of the Appellate Court of Butawal dated 6th Falgun, 2064 which partly altered the verdict of Rupandehi District Court dated 13th Falgun, 2063 so that the defendant shall be punished with 2 years of imprisonment as per Section 161 (2) of the Vehicle and Transport Management Act, 1992, since it is appropriate, stands to be upheld. The plea of the defendant fails to suffice. The case file shall be duly handed over after writing it off the registry.

I concur with the above decision.

Justice Tarka Raj Bhatta

Done on 24 Chaitra, 2067 (7th April, 2011)

Translated by Bishnu Prasad Upadhaya

The Rules applicable for resolving international commercial disputes emerged without agreement through the arbitration process can't replace or invalidate the laws of Nepal.

Supreme Court, Division Bench

Hon'ble Justice Prem Sharma

Hon'ble Justice Bharat Raj Upreti

Writ No. 3221 of the Year 2059.

Subject: - Certiorari & others

Petitioner: On behalf of Dhat Company, Manjit Singh, succeeding the case of Bakhtavir Singh.

Vs.

Respondent:Kankai Irrigation Project, Department of Irrigation & others.

- **The Rules applicable for resolving the International Commercial disputes emerged without agreements through the arbitration process cannot replace or invalidate the laws of Nepal.**
- **Since the mandatory provision made under the Arbitration Act, 2038, cannot be repelled or be made ineffective by such Rules, the award issued by the Arbitrators entertaining the belated revised claim subsequent to the first claim lodged following the onset of the arbitration process resulting in the decision in favour of granting the compensation, contradicts with the intent of the Section 11 of the Act.**
- **If a legal error is noticed in the award in contradiction to the legal provision as mention in Section 21(2) of the Act,**

the Appellate Court is not granted with the appellate jurisdiction to rectify by itself such errors on the basis of evidences thereof. So there cannot be any basis for being attracted to the provision of No.192 of Country Code (Muluki Ain).

Decision

Bharat Raj Upreti, J; :- The synopsis of the case and the order issued on the writ petition filed under Article 22, 88(2) of then constitution of Kingdom of Nepal is as under:-

The petitioner Bakhtar Singh was awarded the Contract-Agreement for the construction works under Kankai Irrigation Project signed on 4th April, 1981 and the assigned work was ordained to have been completed by 1st May, 1983 as per the contractual-agreement. Since the proposed construction work could not be accomplished as prescribed under the contract within the stipulated time, I made a formal request to extend the period of the contract. But as against my request, I, as a contracting company was rejected valid from 15th June, 1984. Therefore, I, the petitioner took recourse to arbitration as an amicable path to resolve the dispute. Majority view of the Arbitrators' award announced on 2053/7/11 was in favour of granting some amount to the claimant in addition to granting release of the Bank guarantee submitted at the outset. Not being satisfied with some aspects of the award, appealed to the Appellate Court, Patan. The Appellate Court, Patan gave judgment on 2055/10/19 and declared that the award of the Arbitrators is against the law. It stated that the claim should have been lodged immediately after the termination of the contract and on the basis of assessment made at the time of confiscation. Moreover, the award was conferred by entertaining the belated claim. The Arbitrator Act has fixed the time limit for lodging the claim and there is no legal provision to permit the filing of the revised claim after the expiry of the period fixed by law under Arbitration Act or any other prevailing laws.

The Appellate Court's action has exceeded its jurisdiction while deciding on the case and, thus, the decision was based on wrong principle. The prevailing Arbitration Act also does not authorize the Appellate court to exercise its jurisdiction by going beyond the limit in resolving the case. The Full Bench of the Supreme Court has laid down the ruling that the Court has no authority to try a suit beyond its purview of legal jurisdiction in the case and it was published in Nepal Law Journal (Ne. Ka. Pa, 2028, Vol.12 editions) Page 373. I, the petitioner and the respondents are liable to follow the condition 1.68 of the contract as per the Rules of ICC and are barred from going down to nitty-gritty of the case during the proceedings. At the same time, award made by the Arbitrators are to be deemed as final in accordance with Ruling of ICC also. The actual amount of claim is bound to increase over time as a natural process. Both parties to the suit can lodge claim and counter-claim as per Rule 16 of the I.C.C. Since the decision of the Appellate Court, Patan contradicts with the provision of Section 21(2) of Arbitration Act and the Rule of I.C.C., and I have appealed to Supreme Court against that judgment. Hence, the judgment of the Appellate Court, Patan, which is erroneous as it went beyond jurisdiction, be invalidated. An order of Mandamus be issued in the name of Appellate Court, Patan, directing it to decide the case again by assessing all necessary evidences while reviewing the errors inherent in the award of the Arbitrator passed on 2053/7/11 as per the legal provision of No.192 of the Chapter on Court Management of country code (Muluki Ain), Such being the substance of the contentions of the petitioner.

What are the basic contents of the case? Is there any ground for denying issuance of order as claimed by the petitioner? Respondents be notified seeking their written replies within 15 days from the date of receiving the order allowing for additional time required to deliver the documents. The case be submitted after receiving the written replies or upon the expiry of the time allotted, according to the rule.

The appeal of this case was lodged in accordance with law and the judgment on this case delivered as prescribed by law. There is no ground to substantiate the charge of allegation that the right of the

petitioner has been violated as laid down in Article 88(2) of the Constitution of Kingdom of Nepal. Since the petition does not merit for issuing the order of certiorari as claimed by the petitioner, the decision of the court is not likely to nullify the judgment. So it is requested that the petition be dismissed is the substance of the written reply of the Appellate Court, Patan.

While the appeal of this case is under judicial consideration of Supreme Court, the petitioner has filed the writ petition on the same issue with as intent of gaining judicial advantage in either way. So such a petition is worthy of dismissal. There is a provision of law in the Arbitration Act that the parties may file a petition to the concerned Appellate Court against the award of the Arbitrators. The Appellate Court, Patan, has delivered its judgment on the petition filed under the above-mentioned legal provisions, reverting the award of the Arbitrators. Since the Appellate Court's power of pronouncing judicially confined to limited issues as laid down in the Section 21 of Arbitration Act, it cannot extend its jurisdiction beyond the limit as described by the petitioner. Since there is a mandatory provision under the Arbitration Act as per which disputes are to be resolved at the discretion of the experts, whereas the court cannot assume the role which has been entrusted to Arbitrators. If it does, it may be unlawful or illegal. Since the petitioner himself has admitted in his petition that the Appellate Court cannot exercise the power of Arbitration Act, 2038, the decision of the Appellate Court to quash the award of the Arbitrators and directing to refer the case to the arbitration for resolving the case again by appointing the new arbitrators is legitimate. The Appellate Court has exercised its power as granted by law. So the writ petition be dismissed. Such is the substance of the joint reply received from Kankai Irrigation Project, Kankai Irrigation Development Board and the Department of Irrigation.

During the proceeding of the case, it was deemed more appropriate that the case be settled through Mediation, hence the case be sent to the Mediation Center, Supreme Court, is the order of the court.

In regard to this petition submitted seeking decision from this Bench as listed in the daily cause list, on behalf of the petitioner, learned

Senior advocate Krishna Prasad Bhandari and learned advocate Bagala Regmi have pleaded that this case come under the jurisdiction of the Appellate Court, Patan. Since it falls within the jurisdiction of Appellate Court to try the suit, it is not justifiable that the case be reverted to the arbitrators seeking revised decision. They urged that as the Appellate Court, Patan has exceeded its jurisdiction while deciding on the case, such erroneous decision be declared invalid and an order be issued to the Appellate Court, Patan to rectify its faulty decision related to resolving the dispute. Similarly, on behalf of the respondent Department of Irrigation etc, learned Joint-Attorney Yubaraj Subedi argued that the petition is lodged against this judgment of the Appellate Court, hence the same court cannot pass its judgment on the same issue once again. Thus the claim of the petition is not worthy for issuance of the court order. Moreover, the Appellate Court has quashed the award of the Arbitrators by exercising its authority granted by law and has directed to refer the case to arbitration by appointing the new Arbitrators. So the petition be dismissed being the substance of the pleading,

After listening to the arguments put forward by the learned counsels and having reviewed the case file, it became apparent that some legal questions raised by the parties were to be resolved prior to taking any decision. While quashing the award of the Arbitrators dated 2053/7/11, the Appellate Court has based its decision mainly on the act of the Arbitrators entertaining the claim lodged after the prolonged period of time and ordering to pay some amount of money claimed by the petitioner. It states that once the claim and the rejoinder have been lodged to the Arbitrators, the revised claim lodged afterward is in contradiction to the provision of Section 11 of the Arbitration Act, 2038. Apart from this, the writ petitioner argues that the claim and the counter-claim are recognized by the Rule 16 of the Arbitration Rule of I.C.C. (International Chamber of Commerce) which both parties agreed to abide by the Clause1.68 of the contract-agreement which they had jointly signed. So the revised claim lodged afterwards and the acceptance of such a claim by the Arbitrators is legitimate. Such being the case, the act of nullifying the award of the Arbitrators is not justifiable. Therefore, an order of Mandamus is issued ordering the

Appellate Court to collect the necessary evidences related to the case in question in accordance with No. 198 of Country Code (Muluki Ain) and resolve the dispute by itself. Such are the arguments of the petitioners.

Against the above perspective, it has to be resolved whether the decision made by Appellate Court on 2055/10/19 to quash the award given by Arbitrators dated 2053/7/11 should be declared invalid or not as urged by the petitioner? It is apparently clear the following legal questions need to be addressed prior to taking any decision on this issue:

a) First, whether the revised claim in arbitration which is agreed as per the clause 1.68 of the Contract-Agreement jointly signed by the parties on 4th April, 1981 in accordance with Rule 16 of ICC is lawful or not, although it was filed after the expiry of period permitted under Section 11 of the then Arbitration Act, 2038.

b) Second, whether or not the Appellate Court which has the authority of reviewing the arbitration award on the petition of the parties under Section 21 of the Arbitration Act, 2038 can collect the necessary evidences as per No. 192 of Country Code (Muluki Ain) and resolve the issue by itself?

In reckoning on the first question, it is necessary to review the legal provision under the Arbitration Act, 2038 in regard to the limitation period provided for lodging the claim to the Arbitrator in the Section 11(2) of the Act. The Act has provided that in the case of Arbitrator's name being mentioned in the Agreement it is clearly mentioned that such a claim should be lodged to the Arbitrator within three months period from the date when the dispute arisen. If the Arbitrator was appointed after the dispute was arisen the limitation period should be three months from the date of appointment of the Arbitrator. The concerned party should lodge his claim to the Arbitrator presenting the subject matter of the dispute including the details of the compensation sought from the other party. Along with that, the other party of the

dispute should submit his rejoinder presenting his case focusing on why there was the need for raising the disagreement with the claimant.

The provision made under the then Arbitration act, 2038 has underlined two states of submitting the claim to arbitrator. The claim should be lodged within three months period from the date when the dispute has arisen, if the name of the Arbitrator is already mentioned in the agreement. If the name of the arbitrator is not mentioned in the Agreement, the claim should be lodged within three months period from the date of appointment of the Arbitrator. There is no provision for inserting a separate Clause in the Agreement in regard to limitation period set for lodging claim to Arbitrator under the Section 11(1) of the Act. This legal provision is absolute in itself and cannot be repelled. The provision set out in Section 14(1) of new Arbitration Act, 2055 has further clarified on this matter. In regard to the question of lodging the claim to Arbitrator a separate arrangement can be stipulated in the Agreement as provisioned under the new Arbitration Act. But the Section 11(1) of Arbitration Act, 2038 have not recognized the term of contract in regard to the limitation period set for lodging a claim and the Act has not given authority to the parties to the contract to insert such a Clause in their Agreement.

Since the name of the Arbitrator is not mentioned in the agreement, the second state of affairs, that is, the provision for lodging the claim to an Arbitrator within three months from the date of appointment of the Arbitrator sounds to be more applicable in this case. However, there is no controversy among the parties about the beginning of the limitation period to be fixed under Section 11 of the Act subsequent to the appointment of their Arbitrators as mentioned in the Agreement as such. The claim for Rs.751,20,722.71 was lodged in 1986 after the case was referred to arbitration for the settlement of the dispute. Meanwhile, as some of the Arbitrators had quit and new Arbitrators were to be appointed to fill in the vacancy, the question arose whether the revised claim for Rs.22,39,71,624.95 could be legitimately lodged or not after the lapse of 9 years from the time of lodging the first claim addressed to the Arbitrator. The petitioner made this second claim on

the basis of Rule 16 of the ICC that was prevailing at that time relating to arbitration. The claim has to be lodged within three months from the date of appointment of the Arbitrators as per Section 11(1) of the then Arbitration Act. The appointment of the Arbitrator is deemed invalidated if the claim were not lodged within the stipulated time limit as laid down in Sub-section 11(1) of the Section 11(5) of the Act. Such being the given legal position, it is apparent that the provision of Section 11(1) is mandatory relating to the limitation period for lodging a claim. The writ petitioner has contended that a revised or a new claim can be lodged at any time during the arbitration process as long as it continues. In this connection, the legal sanctity of the Rule of ICC relating to arbitration need to be reviewed as it formed the basis for the petitioner's claim. Rule 16 of ICC relating to arbitration cannot be considered valid as Nepal Laws. The Rules applicable for resolving international commercial disputes emerged without agreement through the arbitration process cannot replace or invalidate the laws of Nepal. Since the mandatory provision made under the Arbitration Act, 2038, cannot be repelled or be made ineffective by such Rules, the award issued by the Arbitrators entertaining the belated revised claim subsequent to the first claim lodged following the onset of the arbitration process resulting in the decision in favor of granting the compensation, contradicts with the intent of the Section 11 of the Act.. Hence the decision of Appellate court to invalidate such an award is in accordance with law.

Now contemplating on the second question, it is necessary to identify the legal remedies that can be prescribed to the aggrieved party of the award under the prevailing law. Both under the then Arbitration Act, 2038 and the prevailing Arbitration Act, 2055, the decision in favour of award is to be declared null and void rather than providing any option for registering any appeal to the Appellate Court. The aggrieved party can file petition to the Appeal Court for nullifying the award. In the event of emerging circumstance that could lead to nullifying of the Arbitrator's decision related to limited period Section 21(1) and 21(2) of the then Arbitration Act, 2038 has made a provision for determining limitation period for filing such petition. In case the court encounters an error in the award of the Arbitrator, made in response to the petition

submitted to the court, the court is empowered to invalidate such award and direct to redeliver award on the dispute again. While giving such an order, the court can issue order to refer the dispute to the same Arbitrator or any other new one, considering the nature of the case. Section 21(3) of the Act contains those provisions including the dispatch of the file. If a legal error is noticed in the award in contradiction to the legal provision as mentioned in Section 21(2) of the Act, the Appellate Court is not granted with appellate jurisdiction to rectify by itself such errors on the basis of evidences thereof. So there cannot be any basis for being attracted to the provision of No.192 of the Chapter on Court Management of Country Code (Muluki Ain).

Thus, there is no ground for issuing the order of Mandamus in the name of the Appellate Court, Patan, as claimed by the petitioner, since the Appellate Court is not granted the appellate jurisdiction in regard to the award of the Arbitrator. It is clear that the writ petition in question deserves to be dismissed. So it is directed that the case file be handed over as per rule.

I concur with the above decision.

Justice Prem Sharma

Done on 4th Paush, 2066 (24th July 24).

Translated by Shyam Bahadur Pradhan

The Procedure of transfer of intellectual property is determined by the law. Such right cannot be transferred until it is handed over in accordance with the procedure prescribed therefor.

Supreme Court, Division Bench

Hon'ble Justice Prem Sharma

Hon'ble Justice Bharat Raj Upreti

Civil Appeal No. 9661, 9662 of the year 2061

Case: Illegal use of empty bottles with trademark.

Appellant: Dr.Daman Bahadur Amatya, authorized Executive Director of Mount Everest Brewery Pvt. Ltd. with its head office at Bhrikuti Mandap, Ward No. 31, Kathmandu Metropolitan City (KMC), district Kathmandu.

Vs.

Respondent: Department of Industries, Government of Nepal & others.

Appellant: Prem Dhoj Thapa, Director authorized on behalf of United Brewery Nepal Pvt. Ltd., with its Head Office in Ward No. 8, Hetaunda Municipality, district Makawanpur

Vs.

Respondent: GON, Department of Industry Kathmandu.

- **Beer in itself is a beverage. However, the bottles in which beer is canned, is not a foodstuff, nor a beverage. Due to the difference in the making process of each of these or their nature, it cannot be imagined that the nature of**

bottle manufacturing plant and the company or firm that produces beer, wine, whisky, etc. are one and the same.

- **The manufacturer of industrial goods acquires two kinds of proprietary rights upon the items that it produces. The right of physical ownership over such produced article is the first right. Similarly, the trademark or design used to differentiate between the goods so produced and those of other contesting manufacturers is regarded as the second significant right pertaining to intellectual or industrial property. Out of these two rights, the nature of each is different on its own. Hence, the procedure of sale or transfer of each of these rights is also different. The transfer of right of physical ownership over such industrial products is resulted through general sale and purchase. However, the procedure of transfer of intellectual properties such as the trademark or design used on such products is determined by the law. In the absence of that procedure, such right cannot be transferred and until the right is handed over as per the said procedure, the ownership of trademark and other intellectual property shall rest on its legitimate owner.**
- **After the sale of products, the right of physical ownership over such stuff transfers to the buyer. However, the intellectual property right of the manufacturer over that product is not transferred to the buyer via its sale. Such a right continues to rest with its producer.**
- **The buyer shall enjoy no right or ownership over the trademark embossed on the beer bottle, in other words, over the intellectual or industrial property as such. Upon consumption of the beer filled, the buyer gaining physical ownership over the bottle may break it, destroy, and mould it to any other form and to make a new bottle out of it. Moreover, such empty bottles may be bought for objectives other than to refill the beer produced by other rival industries. However, since the trademark labelled on such bottle is a intellectual and industrial property, and**

not a physical holding, the buyer of such bottle does not gain any kind of right over such intellectual and industrial property. And, he or she cannot use the bottle or wrapper with trademark affixed on it to pack other goods of identical nature or to use it in violation of the right of trademark owner or to use it in a way so as to mislead general consumers.

- **There is no room for debate or doubt that when the other contestant uses the trade mark registered in any person's name and affixed on a wrapper or bottle in an unauthorized manner, it shall cause to the misleading of the consumers. In case a benefit of doubt emerges in such a scenario, the benefit goes to the trademark owner and not to the other competitors.**

Decision

Bharat Raj Uprety, J; The brief facts of this case presented, consequent upon an application to this Court seeking review of case as per Section 12(1)(a) of the Administration of Justice Act, 1991, against the decision of Appellate Court, Patan, date 8th Ashadh, 2061 are as follows:

In the empty bottles wherein the initials of Tuborg Beer produced by this Pvt. Ltd. and Gorkha Brewery are embossed, Mount Everest Brewery with its head office at Bina Chambers, Bhrikuti Mandap, KMC and factory at Bharatpur Municipality, Chitawan, has been refilling its products San Miguel Beer and Golden tiger Beer. Likewise, United Brewery, with its head office and manufacturing plant at Hetauda Industrial Area, is also refilling its product Kalyani Black Label Beer. As such, it is evident that they have been selling and distributing their products in a way that is denting our products and identity as well. Consequent to that, Gorkha Brewery on Chaitra 18th Chaitra, 2059 corresponded to Department of Industries to the effect that an order be issued forbearing the production and sales by falsely claiming to be its product from that day itself and to notify Inland Revenue Department also for enforcement.

'We are not using the brand, label and bottle registered in any other's name and it is not required as well. Since the size, type, colour and quantity are the same and since the price of bottle is also levied already from the consumer, a stand of this nature is irrelevant. After the factory sells the bottle too, it has no right over it. The buyer may use it in any way as he or she likes. There is no ownership of the factory over it. In case the other breweries are not entitled to reuse the bottle, the consumer may have to throw or break the empty bottle. The current practice of reusing the empty bottle by all breweries by affixing their own brand label and providing the consumers with their products is practical in actuality. Hence the current provision of reusing all types of bottles that are available in the market requires to be sustained.' The joint letter written to Department of Industries by Mount Everest Brewery Pvt. Ltd and United Brewery Pvt. Ltd on 20th Chaitra, 2059 read as above.

They were not present in the meeting called. The reply of 4 beer companies was not in consonance with the law and practices of industrial property. As such, the Department of Industries, on 12th Baisakh, 2060 rendered a decision whereby requiring the use of respective bottles produced by respective companies. This had to be complied within 1 month in case of export and within the last day of 2060 Jestha, as for others.

Section 16(2) of the Patent, Design and Trademark Act, 1965 forbears the use of trademark registered with any person without obtaining a written consent from such person or to duplicate and use it in a manner so as to disillusion the general public. Such a practice results in the damage of repute for trademarks of both the companies as well as delusion in general consumers. Hence, since it is expedient to restrict such practice in the days to come, it is obvious that an attempt was made to summon all the companies in the Department for negotiations. For all the 5 beer manufacturing industries, it was laid down that they use their own respective bottles for filling purposes within 1 month for export considerations and within the last day of 2060 Jestha, as for others. They were also required to make the necessary arrangements in this regard and to exchange among themselves in case they possess bottles with someone else's

trademark and names. The decision to this effect was made on 12th Baisakh, 2060 by the Department. The Department also wrote to Mount Everest Brewery Pvt. Ltd and United Brewery Pvt. Ltd that in case of non-compliance to the above decision, legal action shall be pursued.

'We are not content with the decision of the Department on 12th Baisakh, 2060. The beer producers including the appellant do register only the label of beer as trademark, as per the law. However, the bottles in which beer is filled are sold in the open market and such empty bottles are bought from the open market itself. Every producer buys whichever bottles available in the market and sells in the market, with the price of bottle well included. After sale of this kind, the bottles are sold from level to level starting from the original buyer. Finally, any of the producers buy bottles of any producers from persons other than the producer itself. Upon such a commodity, the decision of 12th Baisakh, 2060 that such bottles are the products of the beer manufacturer and that Section 16(2) of the Patent, Design and Trademark Act, 1965 do apply therein is flawed and we seek its revocation'. The letter of appeal from Mount Everest Brewery Pvt. Ltd on 22nd Jestha, 2060.

'We are not content with the decision of Department of Industries made on 12th Baisakh, 2060 (25th April, 2003). According to the definition made by Section 2(C) of the Patent, Design and Trademark Act, 1965, a trademark is a word, sign or picture or a combination of these, used by any firm, company or person, to differentiate between the articles or services produced by one manufacturer from those produced by the other. In contrast to that clear legal provision, the respondents have laid claims to the bottles sold along with the beer, after such a long time has elapsed. By exerting undue pressure on its rival industries and their products, the decision of 12th Baisakh, 2060 was made. Hence, we seek its abrogation and dispensation of justice.' The letter of appeal to the Appellate Court, Patan submitted by United Brewery Pvt. Ltd on 22nd Jestha, 2060 read as such.

The decision of Appellate Court, Patan made on 8th Ashar, 2061 ratifying the decision of Department of Industries that restricted the

reuse of bottle with the mark of one company for filling up liquor by another beer company in a sense that it seems to be appropriate.

'In the beer produced and sold by other companies, as in the case of the appellant company, the wrapper bearing the trademark and the bottle of the beer (container) are two different entities. Hence, the trademark is limited to the words and pictures engraved in the wrapper. Since none of the companies manufacture bottles, mostly the bottles being Indian products, beer along with the bottles being sold in the open market, the company retrieving them back through consumers or junk item vendors, the trademark of a Nepalese beer producing company does not register and apply on the bottles of foreign origin, as per the laws; and the bottles are not made by the respondent company either. On all these grounds, only by embossing the initials of Tuborg on the bottle, it does not amount to the beer bottle being registered as a trademark. But the decision treating the bottle as a trademark in itself is contrary to the legal provisions enshrined in Sections 2(C) and 16(2) of the Patent, Design and Trademark Act, 1965. In this decision a serious flaw has occurred in the legal question of Section 12(1) (A) of the Administration of Justice Act, 1991 and an interpretative question has also been included. Therefore, we request for the review of that case'. The application submitted by Mount Everest Brewery Pvt. Ltd on 2nd Bhadra, 2061 before this Court read as such.

Any prevalent laws pertaining to trademark cannot recognize the trademark of one producer over the product of another producer neither can it establish the trade mark as an asset and enable the functioning of right to legal protection, as an impossible legal privilege. The Appellate Court, Patan has decided over an issue not claimed by the producer by presuming that both the beer and bottle are being produced by Gorkha Brewery and as such it has procured trademark right over the bottle as well. As such, an interpretative question has been included with respect to Sections 2(C) and 16(2) of the Patent, Design and Trademark Act, 1965. Therefore, we request for the review of that case as per Section 12(1) (A) (B) of the Administration of Justice Act, 1991'. The application submitted by United Brewery Nepal Pvt. Ltd on 2nd Bhadra, 2061 before this Court read as such.

Upon looking through the application and decision file any of the beer manufacturing companies, along with the appellant included, are found not to have registered the trademark of beer bottles. Since in the situation that none of the trademark of beer bottles was registered in the name of beer producers, the decision of Department of Industries requiring the producers to use their own respective bottles seems to be in contravention with Sections 2(c),16, 17 and 18 of Patent, Design and Trademark Act, 1965. Hence, permission for review of case has been granted on the basis of Section 12(1)(A) of the Administration of Justice Act, 1991, as per the order of 28th Baisakh, 2062.

In the present case duly submitted after being included in daily cause list, upon studying whole of the case file including the appeal, the appellant side was represented by learned Senior advocates Mr. Badri Bahadur Karki and Mr. Laxmee Bahadur Nirala, learned advocates Mr. Narendra Kumar Joshi, Mr. Prakash KC, Mr. Megh Raj Paudel, and Mr. Bishnu Prasad Baskota. They argued that the wrapper in which the trademark is used and the bottle of beer are two different entities, and the trademark is limited to the marked paper, words and picture only. No company of Nepal manufactures the beer bottles. The used bottles are openly available in the market, they are bought from the open market, and after beer is filled up, they are sold with the price of bottle well included. Hence, on such bottles, though the initials of Tuborg are embossed, it cannot be said that the beer bottle in itself is registered as a trademark. In this light, the decisions of Department of Industries and Appellate Court, Patan, maintaining that both the beer and bottles are manufactured by Gorkha Brewery and as such it has retained its right over the bottle as well, is flawed. On the other hand, Mr. Krishna Prasad Paudel, learned Joint Attorney, who was present on behalf of the respondent Department of Industries, argued that on a bottle embossed by one company, when another company sticks its label and sells it in the market, that shall result in delusion among the consumers, it is inappropriate according to the tenets of trademark also, and from a practice like that, the reputation of trademarks of both the companies shall be dampened. Therefore, it is requested that the decision of Department of Industries and the verdict of Appellate Court, Patan, vindicating that decision be upheld. Moreover, Senior

advocate Mr. Harihar Dahal and learned advocate Mr. Keshab Bhattarai pleaded that the respondent companies have been filling beer in our bottles wherein the brand and seal of our company are marked. They are selling these in the local market as well as exporting them to India. As such, they are denting our product and identity. Hence, the stand of the appellant should not be upheld.

Upon considering the arguments presented by legal practitioners from both sides and after studying the documents and proof in case file, it needed to be decided whether the claim of the appellant is appropriate or not.

Upon mulling towards decision, Gorkha Brewery Pvt. Ltd in its letter to Department of Industries had requested for prohibition in refilling their own beer in the empty bottles bearing the initials of Tuborg Beer, Carlsberg beer and Gorkha Brewery, by other breweries i,e. United Brewery Nepal Pvt. Ltd, Himalayan Brewery Pvt. Ltd, Everest Brewery Pvt. Ltd, Sungold Brewery Pvt. Ltd, thereby dampening our own product and identity. In this regard, the letters of the appellants also were submitted in the Department of Industries. The Department decided on 12th Baisakh, 2060 that the beer industries shall use their own respective bottles for refilling beer. Discontent on that decision, the appellants moved to Appellate Court, Patan upon which the Court decided to uphold the decision of Department of Industries. Consequently, the appellants moved to this Court seeking to rescind both the decisions of Department of Industries and Appellate Court, Patan and to protect the interests of beer production as well as of consumers on the ground that those decisions are contravening to Sections 2(C) and 16(2) of Patent, Design and Trademark Act, 1965.

The Gorkha Brewery Pvt. Ltd and these appellants United Brewery Nepal Pvt. and Mount Everest Brewery Pvt. Ltd, after obtaining their respective trademarks according to Patent, Design and Trademark Act, 1965, have been producing beer, selling and distributing it. There is no doubt on the fact that Gorkha Brewery Pvt. Ltd has been producing and selling beer of Carlsberg and Tuborg brand and the Tuborg beer is canned in a bottle wherein the initials of Tuborg and a logo bearing these letters are embossed and thus presented before the consumers. Upon the very same empty bottles, United Brewery

Nepal Pvt. Ltd, Himalayan Brewery Pvt. Ltd, Everest Brewery Pvt. Ltd and Sungold Brewery Pvt. Ltd have been refilling their own beer and being brought to the market. This dispute has emerged following the application submitted by Gorkha Brewery Pvt. Ltd to Department of Industries requesting for prohibition in refilling their own beer in the empty bottles bearing the initials of Tuborg Beer, Carlsberg beer and Gorkha Brewery, by other breweries as such which is said to be affecting its products and identity. There is also no discord on the fact that on the bottles emptied after consumption, and bearing the initials of Tuborg Beer along with its logo, other companies including the appellants have been refilling their own produced beer and selling them, after buying such empty bottles.

In the context of above facts and reality, the issue to be decided seems to be the decision of 12th Baisakh, 2060 by Department of Industries, requiring the beer industries to use their own respective bottles for refilling beer is appropriate or not. Prior to reaching a decision, the following three questions need to be sorted out:

a) Whether the bottle for packing beer or any other beverage, as per the prevailing laws, is a trademark or a commodity to be registered as a trade mark or not?

b) For the purpose of obtaining trademark rights, whether the trade mark owner itself is required to prepare the trade mark affixed wrapper or trademark embossed bottle or not?

c) Under the Sections 2(C) and 16(2) of Patent, Design and Trademark Act, 1965, whether the trademark owner or legitimate user of such trademark has the right to restrain other contesting industries in using the empty bottles with trademark attached or not? And what is the domain of rights entrusted upon him or her regarding the use of such trademark?

For dealing with the first question, we need to analyze the legal provision enshrined in Sections 2(C) of Patent, Design and Trademark Act, 1965. Therein, the term 'trademark' has been defined. Accordingly, 'A trademark is a word, sign or picture or a combination

of these, used by any firm, company or person, to differentiate between the articles or services produced by one manufacturer from those produced by the other'. A bottle meant for packing beer or other beverage cannot be a trademark in itself. It is an item made of lead or glass. As per the above definition, the beer filling bottle cannot be a trademark in itself. However, in such item or in bottle if there is affixed a trademark bearing a word, sign or picture or a combination of these in the wrapper and inside it if a producer fills its products (e.g. beer, wine, whisky, oil or other liquid stuff), packs or stores them, or if in the bottle itself, any word, sign or picture or a combination of these or a logo is embossed, then its legal recognition and consequences shall differ. This way, any word, sign or picture or a combination of these embossed in the bottle, then, this cannot be regarded as the trademark. Since a bottle is only a container for packing liquid substances, this is not a thing meant for direct consumption by a consumer. Hence, an empty bottle to pack beer, wine, whisky or other liquid stuff is not an entity to be registered as a distinct trademark. However, in case beer or any liquid stuff produced by a manufacturer is filled inside a bottle on which any word, sign or picture or a combination of these are embossed, then that bottle may be used as a trademark to familiarize that product amongst the consumers. Additionally, any bottle may be developed to an exclusive design and such design may carry its own distinct values and standards also. However, that design cannot be construed as the trademark within the ambits of Patent, Design and Trademark Act. At least the design of the bottle may be registered as per Sections 2 (B) and 12 of that Act. The present dispute does not relate to the design of bottle rather it deals with the question of infringement of trademark rights. Since the empty bottle in itself cannot be registered as a trademark, the opinion of Hon'ble judges granting review of case on the ground that the bottle was not registered as trademark, could not be agreed upon.

The claim and stand of the appellants and the legal counsels representing the appellants is that since Gorkha Brewery Pvt. Ltd does not manufacture bottles with the Tuborg trademark, after the sale of beer-filled bottles, the Company shall have no right over the use of such bottles. Pertaining to this, the second question needs to be scrutinized. The second question needs to be analyzed at the context

of the first question itself. As mentioned in the above chapters, the empty bottle meant to pack beer, wine, whisky, brandy and other liquor are not the articles to be registered as trademark but as designs only. However, even in such empty bottles, any company may emboss a trademark containing a word, sign or picture or a combination of these, in order for distinguishing the beer or any liquid stuff produced by it from those produced by others. It is not mandatory that the bottles bearing the embossed trademark of a company or firm needs to be manufactured by the same beer production company. Beer in itself is a beverage. However, the bottles in which beer is canned, is not a foodstuff, nor a beverage. Due to the difference in the making process of each of these or their nature, it cannot be imagined that the nature of bottle manufacturing plant and the company or firm that produces beer, wine, whisky, etc. are one and the same. This is a matter of general intelligence. In the same manner, a company producing food stuff and another one manufacturing packing wrapper for these food stuffs also may not be the same and this may not be possible practically also. The commercial practice of producing trademarked wrapper or trademark-embossed bottle by other manufacturers upon the request of the trademark owner or user, is gaining momentum. The industries producing such wrapper, bottle and containers are functioning as separate exclusive industries. This has become a matter of general intelligence, commercial practice and usage. Here, Gorkha Brewery Pvt. Ltd. has not been manufacturing in itself, the registered and authorized trademark (Tuborg letters and picture) embossed bottles in order for reaching out the beer produced by it, among the consumers. However, on this basis alone, filling of beer by the appellant and other companies in the bottles meant to distinguish the product of Gorkha Brewery from other products by embossing Tuborg trademark on it, and claiming that over such trademark-engraved bottles, Gorkha Brewery can exercise no right, this stance cannot be agreed upon.

Now the third question that needs to be resolved is what is the limitation of rights possessed by an owner of a trademark or its legitimate user? For this we need to delve into the provision, spirit and meaning stipulated in Sections 2(C) and 16(2) of Patent, Design and Trademark Act, 1965. Section 2(C) of the Act defines trademark as a

word, sign or picture or a combination of these, used by any firm, company or person, to differentiate between the articles or services produced by one manufacturer from those produced by the other'. Likewise, Section 16(2) of the Act forbears the use of trademark registered with any person without obtaining a written consent from such person or to duplicate and use it in a manner so as to disillusion the general public. The provision in that Section 16(2) accords two tier protections to the owner of the registered trademark or its legitimate user. The first right is to prevent the use of trademark without acquiring prior written consent from the owner of trademark. The second important right relates to the capacity of barring the duplication and use of such trademark. In other words, for conserving the rights of the legitimate owner of trademark, Section 16(2) provides for restriction in the unauthorized use of any trademark or in its duplication or illicit use of trademark in any manner so as to disillusion the public.

The stance of the appellants is that once the beer produced by Gorkha Brewery Pvt. Ltd and packed in Tuborg trademark engraved bottles is sold to the consumers, then the right of Gorkha Brewery over that trademark shall cease to exist and the right to use that bottle shall transfer ipso facto to the buyer of the bottle. Contemplating on that, it needs to be analyzed how many types of rights are acquired by the producer of food stuff or liquor which is packed in trademark embossed wrapper or bottle as regards the trademark engraved wrapper or bottle? The manufacturer of industrial goods acquires two kinds of proprietary rights upon the items that it produces. The right of physical ownership over such produced article is the first right. Similarly, the trademark or design used to differentiate between the goods such produced and those of other contesting manufacturers is regarded as the second significant right pertaining to intellectual or industrial property. Out of these two rights, the nature of each is different on its own. Hence, the procedure of sale or transfer of each of these rights is also different. The transfer of right of physical ownership over such industrial products is resulted through general sale and purchase. However, the procedure of transfer of intellectual properties such as the trademark or design used on such products is determined by the law. In the absence of that procedure, such right

cannot be transferred and until the right is handed over as per the said procedure, the ownership of trademark and other intellectual property shall reside with its legitimate owner.

After the sale of products by any person, firm or company, the right of physical ownership over such stuff transfers to the buyer. However, the right of intellectual property of the manufacturer over that product is not transferred to the buyer via its sale. Such a right continues to rest with its producer. Therefore, upon deciding on this dispute, it needs to be contemplated on what type of right does the consumer acquires upon buying the beer or other beverage filled in bottles on which trademark is embossed of any company; and what is the extent of such right? For instance, the consumer upon purchasing the beer canned in bottles on which the Tuborg trademark is embossed, he or she possesses the right to consume the beer contained in that bottle and attains physical ownership over the beer-filled bottle. However, the buyer shall enjoy no right or ownership over the trademark embossed on the beer bottle, in other words, over the intellectual or industrial property as such. Upon consumption of the beer filled, the buyer gaining physical ownership over the bottle may break it, destroy, and mould it to any other form and to make a new bottle out of it. Moreover, such empty bottles may be bought for objectives other than to refill the beer produced by other rival industries. However since the trademark embedded on such bottle is an intellectual and industrial property, and not a physical holding, the buyer of such bottle does not gain any kind of right over such intellectual and industrial property. And, he or she cannot use the bottle or wrapper with trademark affixed on it to pack other goods of identical nature or to use it in violation of the right of trademark owner or to use it in a way so as to mislead general consumers. Such type of malpractice is forbidden by Section 16 of Patent, Design and Trademark Act, 1965. There is no scope of discord in this aspect. There is no room for debate or doubt that when the other contestant uses the trade mark registered in any person's name and affixed on a wrapper or bottle in an unauthorized manner, it shall cause to the misleading of the consumers. In case a benefit of doubt emerges in such a scenario, the benefit goes to the trademark owner and not to the other competitors. This has developed as a recognized principle.

On the basis of analysis to all three of the questions above, we need to think about the appropriateness of the Department of Industries' decision of 12th Baisakh, 2060 and the verdict of Appellate Court, Patan vindicating that decision. As such, the act of industries including the appellants of refilling their own produced beer in the empty bottles embossed with the Tuborg trademark and the act of selling them has violated the trademark rights inherited in the Tuborg Trademark being authorized to use by respondent Gorkha Brewery Pvt. Ltd and this has resulted in the breach of Section 16(2) of Patent, Design and Trademark Act, 1965. Hence, the decision made by Department of Industries on 12th Baisakh, 2060 requiring all the beer production companies to use their own respective bottles and the consequent verdict of Appellate Court, Patan endorsing that decision has been found to be appropriate and is thus approved. The stand and claim of the appellants does not suffice. It is ordered that the case file be duly submitted to the Records Section after writing off from the registry.

I concur with the above decision.

Justice Prem Sharma

Done on this day of 26th Magh, 2066 (9th February, 2010)

Translated by Narayan Sharma

The unregistered household deed will have no effect in regard to title transfer nor the right over the shareable property deemed to be relinquished.

Supreme Court, Division Bench
Hon'ble Justice Avadhesh Kumar Yadav
Hon'ble Justice Prakash Osti
CI- 6304, 6527 of 2057 BS

Case: Partition and its enjoyment.

Appellant/Defendant: Jhigmi Palbar Bista et.al,resident of Lho-Manthang VDC, Ward No.1, district Mustang, zone Dhawalagiri.

Vs.

Respondent/Plaintiff: Ms. Karsang Lawang, succeeding the case after the death of Ms. Diki Dolkar Bista, with the permanent address as above and currently residing at Kathmandu Metropolitan City (KMC), Ward No. 2, district Kathmandu, zone Bagmati.

Appellant/Plaintiff: Ms. Karsang Lawang, succeeding the case after the demise of Ms. Diki Dolkar Bista, with permanent address of Lho-Manthang VDC, Ward No. 1, district Mustang, zone Dhawalagiri and currently residing at Kathmandu Metropolitan City (KMC), Ward No. 2, district Kathmandu, zone Bagmati.

Vs.

Respondent Defendant: Mr. Jhigmi Palbar Bista et.al, resident of Lho-Manthang VDC, Ward No. 1, district Mustang, zone Dhawalagiri and currently residing at Bauddha, Chuchche Pati, Kathmandu Metropolitan City (KMC), Ward No. 7, district Kathmandu, zone Bagmati.

- **The Court shall have to be very cautious while determining whether a household unregistered deed is enforced or not. In the absence of irrefutable proof, a conclusion should not be derived on presumption that partition has come into effect by applying No. 30 of Chapter on Partition of the Country Code (Muluki Ain).**
- **To establish that partition has taken effect, the property according to the partition deed should be appropriated almost equal among the beneficiaries of partition and transfer of ownership, alienation of earlier name and sale should have been performed.**
- **Even the head of the family does not have the right to abandon the right of property of other parceners other than his/her without their consent. It shall not be judicious to interpret that after the head relinquishes his/her property, the right of his/her successors also shall be eliminated.**
- **Since partition of a religious place leads to its elimination, such religious places are not entitled for partition.**
- **As monastery is a religious place it is meant for public use. Everybody can perform religious worship as per their religious creed. Hence, it shall not be judicious to divide the centre of human faith and impact on religion and culture as a result.**
- **The property registered in the name of a specific person shall have to be deemed as private property. Unless proved to be gained from self-earning, the property registered in a private name, even if it is a palace, it shall not be construed that the right over property has been relinquished as law has not treated it as an exclusive property.**
- **Even if it is a historical monument, the place used for residence may not be said to be immune from partition.**

- **It shall be contrary to the Constitution and laws to assert that a person who has earned an exclusive stature than an ordinary Nepalese Citizen, he or she can exercise privileges over ancestral property.**
- **The historical, cultural and archaeological position of the palace should be maintained as per the prevailing laws and the property should be partitioned.**

Decision

Prakash Osti, j; The brief facts and decision of the present case which comes under the jurisdiction of this Court as per Section 9 of Administration of Justice Act, 1991, following the appeals of both the plaintiff and defendant against the decision of Appellate Court, Baglung made on 18th Baisakh, 2057, are as follows:

The letter of complaint from the plaintiff of 12th Ashar, 2052 read as follows: Among the three sons of my late father in-law, the then king of Mustang, Mr. Ongal Jimba Palwar, are the eldest Mr. Angun Bangdi Nyangbo Palbar, my husband and the then king of Mustang, the middle one, Mr. Charang Syaptung Bista Awatari Lama and the younger Mr. Jhigmi Palbar Bista, the current king of Mustang. I am the wife of the eldest son, the then king. My husband died in 2015 BS and the middle brother in law became a monk by abdicating conjugal life as per Buddhist religion and he has been overseeing the Charang monastery. He now cannot return back to conjugal life. My younger brother in-law Mr. Jhigmi Palbar Bista, the current king of Mustang, banished me, a helpless widow and my two daughters Ms. Chhimi Dolkar and Ms. Karsang Lawang from the palace. I requested him 'you stay at the palace being a king but you also provide us with some housing and land sufficient for our livelihood'. But he retorted 'I shall not give you anything. I have given all of my property in the name of my wife Whitul Palbar Bista and my foster son Jhigmi Singi Palbar Bista and others. You now own no property'. Upon this, I am compelled to register this letter of complaint. Among the coparceners, I am the beneficiary deriving the right from the eldest son. Since the middle son has abdicated conjugal life, he is not entitled to share of

property as per No. 9 of Partition on Country Code (Muluki Ain). Hence, the defendant youngest son, the current king of Mustang and I are the two candidates for share of property. As the property which I was entitled to receive, is being kept under the name of defendant Whitul Palbar Bista, Jhigmi Singi Palbar Bista and others, I request for the appropriation and enjoyment of one share of property from the total two shares. I also request to establish the preceding date of this letter of complaint as the date of separation and to demand the inventory of all properties from the defendants.

Reacting to the plaint, the collective statement of defense from the defendants made 27th Bhadra, 2052 read as follows: After the death of husband of plaintiff in 2015 BS, a unregistered (household) partition deed (Gharsarko) between me, Jhigmi Palbar Bista and the respondent was executed, the property partitioned and we two have been staying separate since then. We have also registered the property attained by means of the deed and have been enjoying, selling or disposing those properties as per our will. Of the lands in possession of the respondent, she has transferred several lands in her ownership while many of them have been registered in the names of her two daughters Chhimi Dolkar and Karsang Lawang. This is also clear on looking at the Inventory No. 7 (Phanthbari) of the respondent. In this situation, the household partition deed holds legal recognition as per No. 30 on Partition of Country Code (Muluki Ain). Though the original name of the respondent is Dhikilha she has sued in the name of Diki Dolkar which represents malice on her part. The husband of respondent never became the king of Mustang. The name of the middle brother in law of the respondent is Thukden Gyacho Bista. He has not performed Bijaya Hom (a religious rite) nor has shaved his head. Several legal principles have been espoused by the Supreme Court on different dates underlining that before the date of 27th Paush, 2034, if a household partition deed is executed after appropriating property equal among the stakeholders and if any of the candidates takes his or her share of property, alienation of earlier name has been done and has been enjoying or transacting that property, then it shall establish that a valid partition has taken place. Hence, we seek for relief from the false claims of the respondent.

Regarding this, an order was issued: to draw Inventory No. 7 of plaintiff Diki Dolkar Palbar and her daughters Chhimi Dolkar, Kesang Lawang and of the defendant the Mustang king Jigmi Parbal Bista from the Land Revenue Office, order the defendant to furnish the original deed of household partition dated 10th Paush, 2017 and to make the plaintiff identification of it as per No. 78 of Court Management and summon the middle son Charang Syantung Lama mentioned in the letters of complaint and defence as per No. 139 on Court Management of Country Code (Muluki Ain).

The statement given by Thukden Gyacho Bista also known as (aka) Charang Syantung Lama summoned to the Court as per No. 139 of Court Management on 16th Paush, 2052 read as follows: We are three brothers. The eldest brother died before he could become king. I am the middle son. I perform worships in Charang Monastery and stay there in the trust land of the same monastery. My younger brother is the king of Mustang. After the death of my elder brother, a partition has taken place between the plaintiff and the defendant, the king of Mustang. I have received religious items and a paddy field at Dhaba, Charang to sustain worshipping. Since I am a monk (Lama), I do not require my share of property. However, I am a monk and not a hermit. I have a son from my elder wife and one daughter from the younger spouse. I have got what I deserved. I have nothing more to receive.

The statement recorded by the witness of defendant Mr. Karma Wangdi Gurung on 11th Ashwin, 2053 read as follows: The plaintiff has received her share and has been staying separately. However, I could not specify the date. The plaintiff was living at Lho-Manthang and the defendant at Thingar.

The statement recorded by Mr. Chakra Bahadur Bhattachan on 11th Ashwin, 2053 read as follows: The partition deed dated 10th Paush, 2017 was written by me. There has been a partition between the plaintiff and defendant and have since been separated. In the deed, it was provided that the loans of plaintiff shall be borne by the defendant and the defendant in turn shall receive lands commensurate with the loan.

The statement recorded by Mr. Subarna Kumar Bista on 11th Ashwin, 2053 read as follows: The plaintiff should get her share of property. There isn't any land, house in her name. She has not received her share as yet. The defendant has not given her share. The plaintiff has neither bought nor sold her share. There was no partition in 2017 BS.

The statement recorded by Mr. Pema Rinjing Bista on 11th Ashwin, 2053 read as follows: The plaintiff should get her share of property. She has not received her share as yet. The defendant has not given her share. There was no partition in 2017 BS. She has not yet received house or land.

On this, the Court ordered on 16th Paush, 2052 to put Thukden Gyacho Bista also known as (aka) Charang Syantung Lama on a due date for presence as he seemed to be one of the principal actors.

The order of Court on 22nd Ashar, 2054 pertaining to this case read as follows: There is no ambiguity as to the fact that plaintiff Diki Dolkar is eligible for share. Plaintiff has requested for her share of partition. The defendant claimed that she has already received her share of property. When the Court asked to submit the original of household partition deed and to fulfill the process on No. 78 of Court Management Chapter of Country Code (Muluki Ain), the defendant could not submit the original and instead produced its photocopy stating that the original could not be found. From other documents and papers such as registration, alienation of name and transfer of ownership, it could not be substantially proved that the plaintiff has received her share. Hence, the Court declares that the date preceding to the date of filing letter of complaint as the date of separation and orders for the submission of all inventories of movable and immovable property from all the coparceners from the plaintiffs and defendants side as per Nos. 20, 21, 22 and 23 on Partition in the of Country Code (Muluki Ain).

At this, the plaintiff Diki Dolkar submitted an inventory asserting that there is no any movable or immovable property in her name and that she has not concealed any of her assets. The attorney of the plaintiff seems to have submitted additional inventory of the defendants'

property by post. The defendants also have duly presented their inventories.

On this, the Court ordered to disclose in writing, the identity and relationship of the persons stated on the written document translated into Nepali and submitted by the defendants as per the order of Court on 6th Bhadra, 2056 viz. Queen of Marang Palace, Chhyama Dheki Dholkar, daughter Kalsang Lawang and son-in-law Kalsang and daughter Chhime Dolkar, as required by No. 133 of Court Management.

At this, the defendant's attorney declared in writing on 9th Ashwin, 2056 as per No. 133 of Court Management that the Queen of Marang Palace is the plaintiff Diki Dolkar Palbar. Chhyama Dheki Dholkar is also from her side. Kalsang Lawang is the younger daughter of plaintiff herself. Kalsang is the familiar name of Kesang Namgyal, the husband of younger daughter. Chhimi Dolkar is the elder daughter of the plaintiff. Of the persons receiving land from the respondent, Marang Wangdi Rapke and few others are still alive.

As the case filed in the District Court of Mustang can be decided by the Appellate Court, Baglung as well, the Supreme Court on 12th Kartik, 2056 ordered for the transfer of the partition case from District Court of Mustang, wherein the plaintiff and defendant being Diki Dolkar and Mustang king Jhigmi Palbar Bista respectively, to be adjudicated by Appellate Court, Baglung to conclude the remaining processes and settle the case and forwarded a photocopy of that order.

On this, as the Supreme Court on 12th Kartik, 2056 ordered for the transfer of the partition case from District Court of Mustang, wherein the plaintiff and defendant being Diki Dolkar and Mustang king Jhigmi Palbar Bista respectively, to be adjudicated by Appellate Court, Baglung to conclude the remaining processes and settle the case and as the Appellate Court, Baglung, vide its letter with the Ref. No. 691, dated 1st Mangshir, 2056 and along with the photocopy of Supreme Court's order well attached, asked for the said arrangement, the District Court on 6th Mangsir, 2056 ordered for the writing off the

registry of this case, the defendant in date with this Court be given the date for presence of Appellate Court, Baglung and the case file be forwarded to Appellate Court, Baglung for further proceedings.

The Appellate Court, Baglung on 22nd Falgun, 2056 ruled as such: There is no doubt that the two daughters of plaintiff are Chhimi Dolkar and Kalsang Lawang. In the photocopy of the household partition deed, lands were seen allocated to the plaintiff and her daughter(s). Further, it is seen from the letter of Land Revenue Office that Inventory No. 7 was filled by Chhimi Dolkar and Kalsang Lawang. From the photocopy of land ownership certificate derived from Land Revenue Office, in the statement of Page No. 935, subscribed to Chhimi Dolkar Bista, land of the plot No. 5, amounting to 115-8-0-3 in area and its ceiling was set at 96 in ropani measurement; and the land of plot No. 78, totaling 19-8-0 in area was registered in the name of her son Nang Chung Bista and the earlier entry was dismissed, as per the decision of that Office dated 11th Mangsir, 2038. Moreover, in the proof index, a name of Jhigmi Parbal Bista was mentioned and some lands were found to be registered in the names of Karsang Lawang, Lawang Tharchin Bista, et.al and some lands were also sold to different persons via promissory deed. Hence, the Court orders the Land Revenue Office to submit the decision of Mangsir 11th, 2038 (26th November, 1981) and to present the basis of registration while surveying was undertaken in the lands of Chhimi Dolkar Bista, et.al. The Court also rules the defendants to furnish proof of land acquisition by royal decree (Hukum Pramangi). Upon receipt of these testimonials, the case should be duly submitted to the Bench.

The initial verdict of Appellate Court, Baglung dated 18th Baisakh, 2057 reads: As per the shareholders, there are three living coparceners, and the plaintiff has claimed in the letter of complaint that since the middle brother Charang Syantung Lama is a Buddhist monk, he is not entitled to proprietary rights. When the Court contacted him through No. 139 of Court Management, he asserted that the sister-in-law has got her share and that he has also received some land and religious items, so, he shall not claim over his share. However, his wife and children are in his custody. Even if the father

relinquishes his claim over share, nothing can be ruled for wife and children from this case file as the Court shall only speak out when they move the Court. As such, the plaintiff and the Mustang king Jhigmi Palbar Bista, after excluding Thukden Gyacho Bista aka Charang Syantung Lama, these two only stand as the coparceners of share over property. As there is no legal deed of partition between the plaintiff and Jhigmi Palbar Bista and partition is not also shown by other proof and conduct, the plaintiff is entitled to receive one part of the total two parts of property from the defendant. As the plaintiff herself has mentioned in the letter of complaint that, 'you stay at the palace being a king but you also provide us with some housing and land sufficient for our livelihood', the Mustang Palace situated in Lho-Manthang VDC-1(d), plot No. 3 and the house built on plot No. 18 of the same VDC which is also shown in Inventory of the Mustang king dated 25th Falgun, 2054, the Palace and the surrounding house shall not be appropriate for partition as they bear historical significance. As the land and house of KMC, Ward No. 7, plot No. 7, is attained by the Mustang king through conditional gift-deed; it is also not feasible for partition. Similarly, the monastery built in plot No. 591 at Charang VDC-1(b), which is mentioned in the Inventory submitted by one of the defendants Jhigmi Singi Plabar Bista, is a religious place of worship and as per the legal provision of Section 6 of the Abolition of Princely States Act 2017; it is also not entitled for partition. Therefore, the Court decides that apart from the above restricted properties, the plaintiff is entitled to get one portion of share from the two portions of all other lands and houses mentioned in the Inventory.

Reacting to the above decision, the joint letter of appeal filed by the defendants read as follows: The daughters of respondent, Chhimi Dolkar and Kalsang Lawang have filed the Inventory no. 7 after Land Reforms came into effect in 2024. These properties are the ancestral properties of the share of respondent. In the power of attorney given to Lopsang Bista by the respondent's younger daughter on 18th Bhadra, 2039, there is a mention of: the land of mother Dhikilha in my name. This fact is recently revealed to us and be introduced as an evidence. The lands stated in Inventory No. 7 are being surveyed in the name of respondent's daughters. It is seen that land amounting to

an area of 19-8-0-3 has been registered in the name of Nangchung Bista, the son of Chhimi Dolkar, out of the total land area of 115-8-0-3, belonging to plot No. 5. We seek that the source of movable and immovable property be ascertained after summoning these registered holders. The Appellate Court ordered for the proof of registration but its verdict has come before it could be submitted. If the partition deed of 10th Paush, 2017 observed, it has been clearly mentioned the property as plaintiff's and her daughter's share. As the sons-in-law of the respondent have no ancestral property in Nepal, no question arises as to the husband's property of the daughters. Primarily, if the source of registration of immovable properties as mentioned in the land ownership certificates is investigated, the actual facts shall surface. As the partition deed dated 10th Paush, 2017 has been submitted to the Royal Palace while presenting a letter of request, the photocopy of that deed may be summoned. Mr. Thukden Gyacho, who was put to date by the Court as per No. 139 of Court Management, has not submitted his inventory. In this context, the verdict has come even without fulfilling the procedures of Nos. 20, 21 and 22 of the Partition. Thukden Gyacho cannot be omitted from the list of coparceners of share. Even he has not claimed for share, his family cannot be rendered as without share. The expression ' Though the father has relinquished his claim for share' in the verdict of the Appellate Court is unlawful. The verdict is silent on whether he actually has obtained his share of property or not. In order to establish the fact that the respondent has obtained her share and sold or disposed it in several manners, we have submitted 28 units of documents duly translated from the Tibetan language into Nepali as per the order and included them in the case file, which are grossly neglected. Hence, due to the above reasons, the verdict of Appellate Court, Baglung dated 18th Baisakh, 2057 is legally flawed and as such we request for the repeal of that verdict and want that matters be disposed according to the letter of defence.

On the other hand, the letter of appeal of the plaintiff read as follows:

The decision not to partition the Mustang Palace, another land of plot No. 18 and the surrounding house and stable as they bear historical

significance is flawed. That property is being enjoyed by my father-in-law, husband and respondent brother-in-law since long and to say that I, as an aspirant, am not entitled to its share is irrelevant. As all the members of the Mustang King's family are common citizens, they are not granted any privilege by the existent laws. The property which is in the name of one aspirant cannot be said not to be obtained by another aspirant. There is no reason why I cannot get my share from the house and land of plot No. 18. I have not relinquished my claim over the house and land of plot No. 18 and nor have given the respondent a free ride over that. The verdict has misinterpreted my stand and even the defendant could not say that this is a place of historical importance and thus immune from partition. The basis to declare the land and monastery built in the land of plot No. 591, located at Charang VDC-1(b) is also flawed. If the aspirant of share was not to receive any share from that, then it should have been shown as a public or government-owned property. It has been said that I could not gain my share on the basis of Section 6 of the Abolition of Princely States Act, 2017. The Mustang king is not the one to be awarded the title of king through that Act. Hence, the verdict is flawed. If the land of plot No. 7, situated at KMC, Ward No. 7 has been received by the respondent as a gift, then the house is built using the property of which I am also the aspirant. Hence in no way I can be denied from its share. Hence I request to ratify the decision to the limit of providing my share and repeal it to the limit of disallowing me from the share and I shall be provided with the share as per the plaintiff's claim.

On this, the (Supreme) Court ruled on 27th Shrawan, 2061 that: The appealing defendant and the respondent plaintiff have time and again submitted the photocopy of partition deed dated 10th Paush, 2017 upon presenting letter of request before the then His Majesty the King. As they have taken a stand in the appeal that the photocopy of that deed along with the letter of request be drawn from the Royal Palace and produced in the Court as an evidence, the Court rules for the submission of the photocopy of that deed along with the letter of request after ascertaining in writing from the defendant as per No. 133 of Court Management, in which department of the Royal Palace was it submitted.

On 7th Ashwin, 2061 the attorney of defendant declared in writing that the photocopy of that deed dated 10th Paush, 2017 along with the letter of request is in the department of the then Principal Secretary of the Royal Palace, Mir Subba Pashupati Bhakta Maharjan.

In this course, the order of this Court dated 5th Ashwin, 2062 read: As the defendant has taken the stand in letter of defence that the plaintiff has received her share of land and kept it in the names of her daughters and have sold and disposed them off, hence, share should not be provided to her. The documentary evidence furnished from the Land Revenue Office also corroborated this fact. As conclusion can be reached after probing the indicted person from the intents of both plaintiff and defendant, the addresses of Chhimi Dolkar and Karsang Lawang should be asked and revealed from the plaintiff and defendant in writing according to No. 133 of Court Management and they have to be summoned to the Court as per No. 139 of Court Management. Moreover, they have to be probed on what is the process and source of land acquired under their names and their responses be duly submitted before the Court.

Pursuant to the order of Court dated 5th Ashwin, 2062 a notice was served to Chhimi Dolkar as per No. 139 of Court Management and affixed in her house premises and the notice served in the name of Karsang Lawang resulted in the information that she had sold her house and moved elsewhere. In the case of Karsang Lawang, she seemed to have succeeded the case of Diki Dolkar with the number Civil Appeal No.6527, her notice has to be served to her attorney according to No. 110(6) of Court Management. In the case of Chhimi Dolkar, the procedure laid down in Rule 104(f) of Supreme Court Regulations, 2049 shas to be fulfilled. As appeals from both the sides have been filed, both the parties should be informed about the appeal from each other's side.

The attorney of Karsang Lawang, Mr. Tanka Hari Dahal, according to No. 139 of Court Management gave a statement before the Court on 14th Ashwin, 2064 which read: The daughter of appealing plaintiff Karsang Lawang has been staying for the last 2 or 3 years in the USA after selling off her place of residence here in Nepal. As she has

appointed me her attorney since past, I have been representing her in the case proceedings. I could not produce her before the Court. The plaintiff has never taken her share. All the property in the name of plaintiff's daughter is the property earned through family income. I am not in a position to tell how and at what date that property was acquired since I could not maintain contact with the actor.

Subsequently, the Court ordered on 26th Jestha, 2066 that since the case, by its nature and subject, seems to be appropriate to be solved through mediation, it should be send to the Mediation Centre of Supreme Court as per Rule 65(d) of Supreme Court Regulations, 2049.

Further, the Court ruled on 19th Paush, 2066 that: Since the attorney of Karsang Lawang, probed according to No. 139 of Court Management, has expressed his inability to disclose the full details of property as contact with the actor could not be established, he should be made to disclose the details after duly contacting with the actor also explaining why the contact could not be established.

The attorney of Karsang Lawang, Mr.Tanka Hari Dahal, in a written statement before the Court dated 27th Paush, 2066 said: Since a long time, no contact of mine and of my legal practitioner could be established with Karsang Lawang. She has been residing in the USA. The party has not contacted me ever since and even upon correspondence, no reply could be gained. As such, I was unable to furnish the details as demanded by the respected Court.

In the present case duly submitted as per the cause-list the initial case-file and record file including the letter of appeal were studied. The following legal practitioners representing the plaintiff and defendant sides chiefly argued as below:

Representing the appellant plaintiff, Senior Advocate Mr. Harihar Dahal argued that the stand of appeal has rested in the property which the Appellate Court, Baglung deemed to be not sharable and not on the right over property that has been deemed to be sharable. In no manner it is revealed that the Mustang Palace which stands at plot No. 18 is an archaeological treasure and hence not fit for

appropriation by share. There is also no land ownership certificate in the name of that Palace. As the Abolition of Princely States Act, 2017 has slashed the privileges and immunities of the former kings; the defendant has only been accorded the titular status of a king. In case of Mustang Palace, the plaintiff has not abdicated her right of claim. It is only mentioned that the king only may live in that Palace.

When the defendants were asked to produce the original of the so called partition deed executed in 2017 BS, they could not present it. The witness Chakra Bahadur Bhattachan who is supposed to be the writer of the deed has recorded his statement in the Court that as he has not executed the partition he could not say who got what much of property. The plaintiff can get a share from the land of plot No.7, Kathmandu, which is said to be not sharable, as it was bought from the money provided by the then His Majesty's Government and the house was built using ancestral property. As such, he advocated that the decision to the effect of providing the plaintiff with her right of share be retained and the decision to the effect of not providing the plaintiff with her right of share be repealed to that extent. Similarly, Advocate Matrika Niraula argued that the stand of defendants rests in the household partition deed executed in 2017 BS and that the plaintiff has already taken her share of property. However, they could not prove the claim by submitting any paper or evidence that would depict that the plaintiff has, in fact, received her share. For the purpose of No. 30 of Partition, the partition of share should be established by sale or other disposal of the property by plaintiff or defendant. However, nothing of this sort is witnessed here. Only by the reason of property being in the name of her daughters, the plaintiff should not be deprived of a fundamental right as share over property. This is not authorized legally. The monastery of plot No. 591 does not bear exclusive historical significance and the decision of Appellate Court, Baglung not to partition the Mustang Palace of plot No. 18 and the land and house of plot No. 7 of Kathmandu is flawed. Hence, the decision needs to be repealed to that extent and a fresh verdict be issued allowing the partition on part of the plaintiff.

Representing the defendant side, Advocate Mr. Lok Bhakta Rana argued that a household partition deed was executed between the plaintiff and the defendant way back in 2017 BS and according to that, the plaintiff registered her share of property as well as transferred her right. The inventories of the land are also filled up separately. As the plaintiff had more property than the ceiling, the excess property was kept in the names of grandsons. Pursuant to No. 30 of Partition in Country Code, the partition deed is proved by the sale and disposal of property. When this Court ruled to provide the source of property in the names of plaintiff's daughters, their inability to do so further corroborates the fact that the property is ancestral one. The No.7 inventory as per the partition deed is also filled separately. Several lands of the plaintiff are found to be sold out. Hence, the verdict of Appellate Court, Baglung to further replenish share to the plaintiff who has already taken her share of property needs to be annulled to that limit and matters should be disposed as per the stands made in the appeal. Likewise, Advocate Mr. Shambhu Thapa pleaded that the plaintiff has kept the property of her share in the names of her daughters and not in her name. As the daughters could not disclose the source of their property, when asked by this Court, their act serves as evidence against them, pursuant to Section 7 of the Evidence Act, 2031. The chief intent of No. 30 of Partition is the separation of registered use of property and transfer of ownership from one person to the other. Here, there is a situation of transfer of proprietary rights from the plaintiff to her daughters. Some property is also sold out as revealed by the documents in Tibetan language. Hence, even as the plaintiff seems to have received her part of share, the verdict of Appellate Court, Baglung to further replenish one share out of the total two shares, is flawed. Therefore, I seek for the annulment of that verdict and matters should be disposed as per the stands made in the appeal.

After also listening to the arguments made by the learned legal practitioners representing both the plaintiff and defendant, in order to reach a conclusion in this dispute as to whether the decision of Appellate Court, Baglung is appropriate or not, the analysis of the following questions is necessary:

1) Following No. 30 of Partition, whether it can be maintained here that a partition has been done between the plaintiff and the defendant or not.
2) In case it cannot be presumed that an effective partition has taken place, then how many shall the coparceners be maintained; two or three?
3) In case it is declared that partition has not taken place, in such situation, are the following properties entitled for partition?

    a) Charang Monastery of Mustang and the related property
    b) The land and house at Bauddha, Kathmandu
    c) The Mustang Palace at Lho-Manthang and the associated property.

While focusing on the above questions and considering on the decision, the plaintiff says that she has not been given her share of property whereas the defendant claims that through a household partition deed of 10th Paush, 2017, there has been a separate record and enjoyment of one's own property, and sale and disposal also have been done in individual basis. Therefore, the first decisive question of this case seems to ascertain whether there has been a partition between the plaintiff and defendant on the basis of conduct and proof as in the context of No. 30 of Partition. The 7th amendment of 27th Paush, 2034 to the Chapter of Partition in the Country Code established the norm that prior to the amendment, partition may be legally recognized if it is shown by conduct and evidence as such. The long exercise of that norm has been practiced by us and our Courts. The Court has voiced its opinion on Decision No. 8227, Page No. 1525, Ne.Ka.Pa 2066 by incorporating all types of representative interpretations made in the context of the revised No. 30 of Partition. In that decision, it has been said that: In order to determine conduct and proof, the property has to be almost equally divided, dismissal of earlier entry be made after receiving one's own share and the sale

and disposal of one's own share of property should have happened. These elements are considered as the criteria to determine as such.

The decision further reads: Indeed, for the purpose and application of No. 30 of Partition, the nature of dispute, property and the conduct of plaintiff and defendant are the determining factors. This law has not provided for the certain basis of partition to be assumed from conduct of proof, but has only prescribed the periphery of some determining factors. By being inside the same periphery, the justice giver has to derive a judicious conclusion by evaluating the situation and evidence of each case. The next chapter of the same decision speaks: The medium for acceptance by the aspirant to share that partition has taken place from conduct and proof are: written documents, mutual behavior, mutual transaction, separate places of residence and the unnatural interval of time. The existence of one or more of these elements satisfies the need of No. 30 of Partition. The more the evidence corroborates these elements, the more the Court shall be competent in trusting that partition has taken place from conduct and proof.

Upon studying the controversy in the light of legal provision espoused in No. 30 of Partition and its interpretation, first of all, the photocopy of a household partition deed of 10th Paush, 2017 is submitted by the defendants to prove their arguments. As the plaintiff has discarded the photocopy and its matter, firstly the validity of this document of 2017 BS needs to be examined. Despite repeated calls from the Court, the defendant failed to produce the original version of the deed which was pointed by the defendant to establish that a partition has indeed taken place. Only on the basis of photocopy, it is not appropriate to confirm that document. Moreover, the defendant also has failed to submit reliable basis to show that the deed has, in fact, been executed. Further, even on studying the translated versions of Tibetan documents, there is no room to interpret that in 2017 BS, the plaintiff and defendant executed a partition of their property in almost equal basis, have dismissed their earlier entries and have dealt with accordingly.

The Court shall have to be very cautious while determining whether a household deed is enforced or not. In the absence of irrefutable proof, a conclusion should not be derived on presumption that partition has come into effect by applying No. 30 of Partition. No land is registered in the name of plaintiff. It shall not be judicious to assume on the basis of land being registered in the daughters' names, that the rationale of NO.30 has been fulfilled. Equality or almost equality in appropriation is the first prerequisite of No. 30 of Partition. The criteria determined by this law shall have to be supported by conduct. In order to establish that a separation has taken place from the family business, the partitioned property has to be shared among the coparceners equally or almost equally. Besides transfer of ownership, dismissal of entry, sale and other transaction should be taken place. However, nothing of sort seems to have happened. The defendants have failed to submit the papers testifying the dismissal of previous entry of the property gained by the plaintiff through household partition.

The stand in letter of defence revolves around the event that the properties said to be gained by the plaintiff as her share have been registered in the names of her daughters, Chhimi Dolkar and Karsang and that they have sold and disposed off their property. Here, the status of equality in partition has not been established nor the relationship of these properties with the ancestral property of plaintiff or defendant has been established. As per Section 27(2) of Evidence Act, 2031 the burden of proof to prove the statement of the defendant that the property received through partition is the source of their properties rests with the defendant side itself. From the case file and other documents, it is not established that the lands transferred by any means from the plaintiff are the very same lands in the names of daughters. Through the letter of Land Revenue Office of 13th Mangsir, 2052, it is clear that no land in the name of plaintiff is registered and the Inventory No. 7 is also not filled up.

In the situation that there is no legal document of partition between the plaintiff and defendant, and that no mutual sale or other transaction has taken place, delimiting the right of share, so fundamental a right, solely on the basis of filling up of Schedule Form No. 1 and 7 for the

purpose of Land Reforms Act, 2021, shall not be judicious. In this regard, a principle has also been expounded in Decision No. 7205, Page No. 292, Ne.Ka.Pa 2060. This principle also finds relevance in the present dispute.

As there is no authentic value of the household partition deed of 2017 BS, which lacks its original version, and since the Schedule No.1 and 7 enclosed in the case-file do not provide for corroboratory evidence, it shall not be judicious to deprive the plaintiff of a right as fundamental as the right of share. Hence, as it seemed that no partition has ever taken place between the plaintiff and defendant, the plaintiff is eligible to claim her share of property.

On considering how many are the coparceners to share among the plaintiff and defendant, the appellant claim has laid down that there are three living candidates eligible for partition rights. The plaintiff has claimed in letter of complaint that since the middle brother Charang Syantung is a Buddhist monk, he is not entitled to receive his share and as such there are only two rightful seekers of share, viz. one, the Mustang king Jhigmi Palbar Bista and the other, herself. On probing according to No. 139 of the Court Management, Charang Syantung, staying in Charang Monastery had given a statement that since he has received some lands and religious items, he shall not lay claim to his share over property. From his same statement, it became evident that he has two wives and children. On this, the Appellate Court, Baglung decided that even if the father relinquishes his claim over share, nothing can be ruled for wife and children from this case file as the Court shall only speak out when they move the Court. As such, the plaintiff and the Mustang king Jhigmi Palbar Bista, after excluding Thukden Gyacho Bista aka Charang Syantung Lama, these two only stand as the coparceners of share over property.

From his same statement, it became evident that the middle brother in-law of plaintiff, Charang Syantung aka Thukden Gyacho has two wives and children. This fact has not been refuted by the plaintiff. The parties to a case also have definite duties towards dispensation of justice. After letters of complaint and defence have been introduced, the plaintiff who is affected by a hostile fact in the case-file has to

promptly refute that fact through an application upon being probed under No. 139 of Court Management. Otherwise, at least the plaintiff should have presented that the fact as false while filing appeal in this Court. But none of these have happened. The Court shall not lose its time probing after undisputed facts. Hence, there is no option than to accept the fact that there are two wives and one son, one daughter of the middle brother Thukden Gyacho.

There lies an underlying right of all the right-holders over property. Unless otherwise proved, in the husband's property a wife shall have underlying right in the same manner the sons, daughters and other heirs have an underlying right over the property of father and mother. The expression of Thukden Gyacho, turned into a monk, that he does not want property shall attract to his case alone. Even the head of the family does not have the right to abandon the right of property of other successors other than his/her without their consent. It shall not be judicious to interpret that after the head relinquishes his/her property, the right of his/her successors also shall be eliminated. Hence it shall not be judicious to interpret from the statement of middle brother-in-law of the plaintiff that the family tree as a whole is deprived of the right to share in property, to establish that there are only two coparceners of share and to say that it shall be thought over if a case is filed in future. As the right of plaintiff of this partition case is limited to one-thirds of the total property available for partition, it cannot be assumed that she has a locus-standi to claim a bigger share.

Besides, in No. 9 on Partition in Country Code, there is a legal provision that one who shaves his/her head and performs Bijaya Hom (a religious rite), he/she shall not be entitled to share in property. The fact is undisputedly established that Thukchen Gyacho Bista did not do as such rather he became a Buddhist monk. Being a monk does not equal to shaving head and performing Bijaya Hom. A principle in this regard has been espoused in Decision No. 2295, Page No. 243, Ne.Ka.Pa 2042. In that case, even if Thukden rejects his share of property, since he has wives and children, his entire family tree shall be deprived of right to share, but this shall not increase the status of the plaintiff to acquire property more than her right. As such, the family

tree of middle brother-in-law should have been maintained as one of the coparceners of share, but in not doing so, the verdict seems to be inappropriate till that extent. In this case, three coparceners of share have been confirmed and one thirds of the share shall be gained by the plaintiff.

Now, let us consider whether all the property mentioned in the Inventory is open for partition or which of the property may not be partitioned. The monastery built in the plot No. 591, situated at Charang VDC-1(b), Mustang, and which is disclosed in the Inventory submitted by one of the defendants Jhigmi Singi Palbar Bista, seems to be a religious site. As such the legal provision of Section 6 in Abolition of Princely States Act, 2017 shall attract, which reads: If the kings or chieftains dissolved according to this Act or by the consent of such king or chieftain, other persons so wish, they may conduct worship, prayers or trust functions by establishing or not establishing any temple or shrine, then the king receiving livelihood allowance as per Section 4 may bear the cost from the revenue of land or other source of income. If they don’t wish as such, they have to inform the (then) His Majesty's Government (HMG) in advance and the HMG shall conduct the worship and prayers as usual bearing the cost from Royal Trust. In the light of this legal provision the religious sites such as temples, monasteries et.al cannot be abolished. Since partition of a religious place leads to its elimination, such religious places are not entitled for sale or partition. In the same vein, the Appellate Court, Baglung seems to have classified it in the nature of non-sharable property.

The land of plot No. 591 where the monastery stands is identified as a monastery at the very stage of land survey. If that was to be used as a private property, it should have been certainly registered in a person's name. As monastery is a religious place it is meant for public use. Everybody can perform religious worship as per their religious creed. Hence, it shall not be judicious to divide the centre of human faith and impact on religion and culture as a result. The monastery being built on plot No. 591 is a fact that is not disputed by the plaintiff and the defendant alike. The plaintiff also can use the place of religious

worship for religious purposes under the rules and regulations of that monastery. Therefore, to partition the monastery shall not be appropriate from the perspective of law, society, culture and religion alike. Hence, the verdict of Appellate Court, Baglung not allowing the partition of a religious site of public nature, seems to be flawless.

On considering the stand of the appellant to partition the land and house of plot No. 7 at KMC-7, the fact has been so found that the land was bought from the money released by the then HMG, Ministry of Home following a royal decree, after the Mustang King who was staying in a rented accommodation submitted a letter of request on 8th Chaitra, 2031 before the then King of Nepal under the condition that the defendant could not sell it to otherwise till his life. The fact that the land is not an ancestral property is undisputed. The defendant who has the title of Mustang King was provided a land bought from the state fund and as such there is no situation where it can be partitioned among other coparceners of share. The plaintiff could not show the basis which could indicate that ancestral property was used to build the house thereon. The liability to prove that which of the ancestral property was sold or invested in erecting the house rests with the plaintiff. The plaintiff could not confirm proof or evidence which would suggest that her investment or contribution is also utilized in the house built on the land bought by the then government to the Mustang King. Hence, the verdict of Appellate Court deciding the land and house to be non-sharable seems to be befitting.

On the land at plot No. 3, Lho-Manthang-1, and the Palace built thereon, and the house built on plot No. 18 of the same VDC, the Appellate Court, Baglung concluded that: As the plaintiff herself has mentioned in the letter of complaint that, 'you stay at the palace being a king but you also provide us with some housing and land sufficient for our livelihood', the Mustang Palace situated in Lho-Manthang VDC-1(d), plot No. 3 and the house built on plot No. 18 of the same VDC which is also shown in Inventory of the Mustang king dated 25th Falgun, 2054, the Palace and the surrounding house shall not be appropriate for partition as they bear historical significance. At this premise, there is no doubt that the Mustang Place and houses built on

plot No. 3 and 18 are ancestral properties. While surveying was conducted, they were purely registered in the name of Jhigmi Plabar Bista as shown by the photocopies of field book and land ownership certificate enclosed in the case-file. The property registered in the name of a specific person shall have to be deemed as private property. Unless proved to be gained from self-earning, the property registered in a private name, even if it is a palace, it shall not be construed that the right over property has been relinquished as law has not treated it as an exclusive property. The claim made in letter of complaint and the statement there-in do not infer that the plaintiff has relinquished her right over that property. Even if it is a historical monument, the place used for residence may not be said to be immune from partition. The prevailing Nepalese laws have made ample arrangements for conserving the historicalness of the Palace. There is no need to doubt that the Ancient Monuments Protection Act, 2013 shall be observed. As there is no denial to the petitioner's claim that their ancestors were Mustang Kings, the then king and husband of the plaintiff died in 2015 BS, since the middle son became a monk, the younger son became the king and Jhigmi Palbar Bista who became a king in that situation deserves preferential treatment. It shall be contrary to the Constitution and laws to assert that a person who has earned an exclusive stature than an ordinary Nepalese Citizen, he can exercise privileges over ancestral property. Hence, as the property of the plot Nos. 3 and 18 is a family property, it shall be open to partition between the plaintiff and the defendant. The decision of the Appellate Court, Baglung negating this position does not seem to be appropriate. However, from the evidences attached with the case-file, the Mustang Palace seems to have borne historicity significance. There is a general consent between the plaintiff and defendant regarding this fact. Hence, it shall be expedient to conserve the historical and cultural heritages of this kind. The interests of both the sides shall be promoted from the conservation of Palace. Hence, it is decided that the historical, cultural and archaeological position of the palace should be maintained as per the prevailing laws and the property should be partitioned.

Therefore, from the bases and evidences analyzed as above, partition does not seem to have taken place between the plaintiff and defendant before. The decision of Appellate Court, Baglung retaining two persons as coparceners to share of property, excluding the middle brother-in-law does not seem befitting and as such three coparceners to share have been established from the plaintiff and defendant side. Therefore, the plaintiff is entitled to receive one-thirds of the total three portions. As regards the non-partition of the Palace and property of plot Nos. 3 and 18 of Mustang, the decision of Appellate Court, Baglung to that effect seems to be inappropriate. Hence, one thirds of that property shall be obtained by the plaintiff in condition that the historical, cultural and archaeological status of that Palace shall be conserved as per the laws. The property including the monastery on plot No. 591 at Charang -1(b), Mustang, and the land and house on plot No. 7 at KMC-7 stands to be non-sharable. Excluding those properties all other properties shall be open for partition. The verdict of Appellate Court, Baglung till that extent seems to be befitting and its total verdict is partially overruled. The claim of the defendant that the plaintiff is not eligible for share as she has already got her part and the stand of the plaintiff that all of the property should be open for partition, both these claims do not hold ground. As regards other matters, do as follows:

Particulars

As written in the decision section, the initial verdict is partially overruled and three coparceners to share over property have been established. Hence, barring the monastery on plot No. 591 at Charang -1(b), Mustang, and the land and house on plot No. 7 at KMC-7, the plaintiff is entitled to have one-thirds share of all the properties mentioned in the inventories submitted by the defendants. In case the plaintiff applies within the time-frame stipulated in the law, the District Court of Mustang, after charging the necessary fees, shall execute the partition as such. This matter shall be corresponded to the District Court of Mustang.

As the plaintiff could not receive half of the property as her share as claimed previously, she is entitled to receive one-thirds of the sum stated in the Inventory which means out of the total sum of Rs. 3,45,690, she shall receive Rs. 1,15,230. As she seems to have deposited Rs. 7054 as court fee (Rs. 100 while filing the initial letter of complaint and Rs. 6954 as per the inventory), the court fee of the sum of shares that she is entitled to which equals Rs. 3274 shall have to be reimbursed from the defendant side. On that, the defendants while filing appeal on 30th Shrawan, 2057, have deposited Rs. 2520.97 as earnest money vide receipt No. 42979. In case the plaintiff applies as per the law for reimbursement as such, she shall be reimbursed from that earnest money without being charged and the remaining Rs. 753.03 shall also be reimbursed from the defendants, without being charged, in case the plaintiff applies as per the law for reimbursement as such. This matter shall be corresponded to the District Court of Mustang.

In case the wives and offspring of Thukden Gyacho Bista (who has been decided as one of the coparceners to the share over property) or other heirs apply to the Court seeking partition of their share, the District Court of Mustang after levying the necessary fees shall execute partition as such. This matter shall be corresponded to the District Court of Mustang.

The case file shall be duly handed over after writing it off the registry.

I concur with the above decision.

Justice Avadhesh Kumar Yadav

Done on the day of 4th Falgun, 2066 (16th February, 2010)

Translated by Gayatri Prasad Regmi

Mere pronouncement of verdict is not sufficient to satisfy the plea of the real justice seeker. It is the duty of law court to materialize the judgment is practical term.

Supreme Court, Division Bench

Hon'ble Justice Rajendra Kumar Bhandari

Hon'ble Justice Pawan Kumar Ojha

Criminal Appeal No. 2551 of the year 2058

Case: Rape.

Appellant /Plaintiff: Government of Nepal by the first information of Tek Bahadur Khada

Vs.

Defendant/ Plaintiff: Swasti Baral, resident of Triveni V.D.C. ward No.3 of Udayapur District

- **Only the testimony of witness which is supported by established facts could be accepted as a basis for evidence.**
- **The expertise knowledge should be applied only for making the judicial process scientific, real and easy, but not towards hindering or deceiving the justice.**
- **Being hostile to the one's own version of examination report could never possess evidentiary value.**
- **Since the rape is a heinous crime, it is not justifiable to say that the defendant shall be acquitted only on the basis of minor differences in between the testimony of victim and other persons giving statement during investigation.**

- **Very essentially, the satisfaction of justice could be attained only when the essence of the judgments could be consumed. In any nature of cases, it becomes the main duty of the court to be active and to provide the result of judgment to the petitioner of justice inaccordance with the letter and spirit of law. The duty of the enforcement of the judgment of the court is within the court itself.**
- **It is the special duty of Government Attorney to take the plea about the property to be restituted to the victim from the perpetator by identifying the partners or family status, details of movable and immovable property.**

Decision

Pawan Kumar Ojha, J; The brief description of the facts and the decision of the case presented before this bench after having been guaranteed approval for review pursuant to No.12(1) (a) and (b) of section of Judicial Administration Act, 2048 against the decision of Appellate Court, Rajbiraj dated on 2058/1/5 B.S. is as follows:

Contents of F.I.R. of Tek Bahadur Khadka: I was informed that my infant daughter Tanki Kumari Kadka while herding the goats in nearby jungle, at 4.00 P.M.of 4th Aswin, 2058, Swasti Baral had forcefully taken her into the jungle and raped her without consent. Therefore, it is prayed to initiate proceedings and punish him.

Clinical Examination Report of Tanki Kumari Khadka: Private organ (Vagina) was slightly torn, swollen and reddish; there were no signs of previous intercourse seen prior to that.

Crime scene deed: There are found signs of ruffle of dry leaves and plants in and around the place of incident, the four pieces of white and red colored broken glass bangles and five hairs were traced around the crime scene.

Statement of Victim Tanki Kumari Khadka: On 4th Aswin 2049, while I was grazing the goats Swasti Baral, a keeper of Nursary came to me and asked me to go to eat *Amaro (a wild fruit)*. I rejected and ranaway

but he followed me and cought my hand, blocked my mouth by force and taken 15 meter down the bush and raped me. He was threatening me saying that he would kill if I cried. I became unconscious as he strike half part of his penis into my vagina. As I recovered my sense, I came to feel a some sticky matter around my private organ.

Spot Inquiry Report: Swasti Baral had raped Tanki Kumari Khadka aged 13, as they heard. Seeing the nature of crime they had strong belief that Swasti Baral had raped her.

Charge Sheet Claim: The medical report of victim Tanki Kumari reveals that the vagina is swollen, reddish and slightly torn. Spot Inquiry Report suggests he had raped Tanki Kumari. The defendant was absconding in stead of appearing before investigation officer to prove of being innocent during search by police. Thus, it is proved that defendant Swasti Baral had forcefully taken victim Tanki Kumari, aged 13 to the jungle, blocked her mouth and raped her. The act of the defendent Swasti Baral is an offence under No. 1 of Chapter on Rape of National Code (Muluki Ain). Thus, the defendant should be punished pursuant to No.3 of same chapter along with the claim to cause to award the victim Tanki Kumari Khadka the half of the offender's property pursuant to No. 10 of the same chapter and it is requested to issue warrant to the absconding defendant by the court, itself

Statement of the defendant Swasti Baral dated 3rd Ashar, 2056: I know the victim and the informant. I had been in Deharadun of India from 1st Bhadra 2049 B.S. and returned home only on 25th Ashar 2056 BS. I was in Delhi working as a driver, on 4th Aswin, 2049 on the day of occurrence of crime. Since I was in Delhi, I had neither met informant nor victim. Since I had not committed any offence the petition lodged by informant is untrue. I had not committed rape. The informant may have lodged such a report because of previous envy and to spoil the political future of my brother. I contend that I am innocent.

The statement made by the people in spot inquires report and the witnesses of defendant tried as per the court's order has been enclosed in the case file.

The decision of Udayapur District Court: Since the denying statement of defendant recorded before the court is supported by the testimony of his witnesses, the baseless statement of the victim the allegation made against the defendant in the charge sheet for an offence under No. 1 of the Chapter on Rape of National Code (Muluki Ain) so as to award half of the property to the victim, cannot be materialized.

Appeal of HMG at the Court of Appeal, Rajbiraj: The judgement delivered by Udayapur District Court is faulty. The statement of informant and the victim is quite similar and not contradictory. The statement of the victim recorded before the police and the testimony before the court is not contradictory. Medical report shows that vagina of victim is seemed swelling and torn slightly. The medical officer who had examined the victim appeared before the court and has recorded his testimony. It is not possible to be torn the vagina due to rubbing and itching.Thus the appellant, therefore, prayed for quashing the judgement given by the District Court and awarding punishment to the defendant as claimed in the charge sheet.

Order of Appellate court Rajbiraj: The decision of the Court of first instance may be subject to change on the grounds of medical report of vagina of the victim, opinion of medical examiner, deed of crime scene and the testimony of victim. Thus, it is notify that the defendant of the case be informed to appear before the court for discussion pursuant to No.202 of Chapter on Court Management of National Code(Muluki Ain).

Judgement of Appellate Court Rajbiraj dated on 2056/1/5/4: The denying statement of the defendant is corroborated by the testimony of his witnesses, hence, the decision of District Court, acquitting the defendant is appeared to be justified. Therefore, the appeal filed by the plaintiff His Majesty's Government is rejected.

Petition of plaintiff His Majesty's Government before the Supreme Court: Since the witnesses who had recorded their statement in the

investigation period appeared before the court and testified their statement, the Appellate Court ignored that evidence which is against the provision of Section 18 of Evidence Act 2031. Further, the judgement of Appellate Court Rajbiraj is against the established precedents propounded by the Supreme Court. Hence, it is hereby requested to review the case pursuant to sub-Section (a) and (b) of Section 12 (1) of Judicial Administration Act, 2048.

Approval/ certificate of Supreme Court to Review the Case: The examination report of victim Tanka Kumari examined by Health Post shows that the vagina is red, swollen and torn slightly.The health post employees who examined the victim explained more things in testimony than he had mentioned in the examination report. Such testimony can not be taken as evidence. Since the age of victim is only 13 years, the statement and the testimony of victim clearly mentions the offence of rape which is corroborated by the examination report. The offence of rape was not seemed contradictory. Hence, the judgement of Appellate court, Rajbiraj to acquit the defendant on the grounds of minor differences between victim's statement and testimony, looks unjustified along with contravening the provision of Section 18 of Evidence Act, 2031 and the precedent established by this court on NKP 2046, decision No.3874, page 727, criminal appeal No.1480 of o54 BS. *Madukar Rajbandari v HMG.* Thus, this court granted an approval/ certificate pursuant to sub- Sections (a) and (b) of Section 12 (1) of Judicial Administration Act, 2048.

In the present case presented before this bench pursuant to rules, learned Government Attorney Surendra Bahadur Thapa on behalf of an appellant argued that since the Scene of Crime reveals that the plants named *Banmaaraa* were ruffled, the pieces of broken bangles were seen at the place of incident, expert clearly mentioned the opinion, statement of victim and the witnesses and their testimony has proved the offence of rape, the judgement of Appellate court approving the decision of District Court Udayapur for acquitting the defendant is seemed erroneous. Thus, the judgement of Appellate Court should have been declared void and the defendant be punished as per the charge sheet. Learned advocate Padam Rokha on behalf

of defendant argued that the informant was not an eye witness. There were no eye witnesses in this case. The First Information Report and the testimony of informant was seemed contradictory each other. The First Information Report did not prove the offence of rape committed by my party. The statement of victim and the testimony was contradictory. The crime scene where the broken bangles were said to be found had not been identified by the defendant. The bangles and the hairs were not identified by the defendant. There was no signature of victim on the confiscation report (muchulka). No injury and marks were seen on the victim's body as well as no sperm examination was conducted by investigation side. The alibi of defendant was substantiated by the testimony of defendant's witnesses. Since the prosecution side could not prove the accusation of defendant beyond reasonable doubt, it would be unreasonable to punish the defendant in the serious offences like rape. Hence, the judgment of Appellate court to acquit the defendant should be sustained. Listening the submission of both sides, the Court needs to decide whether or not the judgment of Appellate court Rajbiraj delivered on 2058/ 1/ 15 sustains?

In this case the defendant Swasti Baral has been charged by the prosecution for the Punishment pursuant to No. 3 of the chapter on Rape of National Code(Muluki Ain) for the offence of No.1 of the same chapter along with the claim to award half portion of his property to victim Tanka Kumari khadka pursuant to No. 10 of the same chapter. In this case, the Appellate Court Rajbiraj has sustained the judgement of Udayapur District Court to acquit the defendant from the accusation on the appeal of plaintiff. This case has been registered in this court as per the order of this court approving the petition of plaintiff on the ground that the judgement has been contravening the law and precedents for review of the judgement of Appellate court Rajbiraj pursuant to sub- Sections (a) and (b) of Section 12 (1) of Judicial Administration Act, 2048.

Here, considering about the question to be decided, the following questions has emerged:

Whether the defendant Swasti Baral had raped Tanki Kumari Khadka, the daughter of Informant Tek Bahadur Khadka or not? The case file in this regard exhibits that the Informant Tek Bahadur Khadka had given the confirmed First Information Report and also had testified his version before the court that her daughter Tanki Kumari Khadka was raped by the defendant while she had been to the grassland to graze goats. Scene of crime reveals that the plants named *Banmaaraa* were ruffled around the place of incident, 5 long and small hairs and the pieces of glass bangles were identified from the place of incident. Victim Tanki Kumari Khadka, during investigation had stated that defendant Swasti Baral raped her while she was grazing goats, who had later testified before the Court without any fundamental changes in her version. The persons signing as attendees in the affidavits of Scene of crime and survey document namely Ghamanda Bahadur Karki, Kantu Bahadur Karki, Ek Bahadur Karki, Padam Karki *et.al.* had given the same information and also testified before the court that on dated 2049-06-04 at around 4.00 pm defendant Swasti Baral raped Tanki Kumari Khadka, the daughter of Informant Tek Bahadur Khadka and they had seen hairs, broken glass bangles of victim and ruffled plants of *Banmaaraa* around the scene of crime.

Defendant, during interrogation has stated that he was not present at the scene of crime on the day of incident as he had been to Delhi Dehradun of India. In other side, victim has stated that the defendant himself had committed the offence and persons inquired during the investigation had also expressed that the defendant was present in the scene of crime and had committed the offence, which was later testified before the court of law. Defendant may defend with the plea of *alibi* and it can be considered as a valid defense in the criminal justice. The accused, if can establish about his or her absence in the scene of crime, there is possibility of acquittal. But, where the defendant takes the plea of alibi, the court should always be alert. In our practice, we have trend of furnishing the witness as evidence in the defense of plea of alibi. The version of witnesses often seems fabricated. It requires support from other evidences. Hence, only the testimony of witness which is supported by established facts could be accepted as a basis for evidence. In the given case, the plea of

defendant about his presence in Dehradun, India, is neither has been proved confidently nor has been supported by any other facts. Since Delhi and Dehradun is not the same place and they are distant to each other it is not possible for defendant to be present in Delhi-Dehradun at the same time. In other side, defendant has taken the plea of alibi with intent that Delhi Dehradun is the same place, which is *ipso facto* established as false; hence, there is no requirement of further analysis. Victim of the incident has very clearly given her statement that the defendant had raped her and the individuals giving their statement during investigation was further supported through testimony in the court. There is not any factual basis that those witnesses were bias against the defendant and had testified against him. Hence, no objective basis is found on the plea of alibi of defendant about his absence in the scene of crime.

The Examination Report of vagina of victim and the opinion of the Medical Examiner has been very significant means to confirm the rape against victim. The main witness of the rape is the body of the victim woman and the condition of her sexual organs. The Examination Report of the vagina of 13 years girl victim prepared during investigation states that her vagina was torn and swollen, penis was not penetrated. Though the report states that there was no signs of previous intercourse and the vagina of the victim was torn for the first time in the same incident, the In-charge of Health Post while testifying in the Court has expressed the intent of non occurrence of rape that the victim had itching diseases and hence while rubbing her vagina with her fingers the vagina was swollen and became reddish, and was torn out. It is possible for vagina to be reddish while rubbing due to the itching, but it is not possible to be torn and it is unbelievable in itself. Since it is seen that the Health Assistant didn't stated anything about itching and rubbing during the examination of the vagina and had only given such version during the testimony before the court, the expression of Report of Health Assistant is not of evidentiary value pursuant to Section 18 of Evidence Act, 2031. His version is not feasible, appropriate or cooperative towards the justice process. The expertise knowledge should be applied only for making the judicial process scientific, real and easy, but not towards hindering or

deceiving the justice. The testimony of the statement intending to defunct the version of witness before the court expressing about the facts that supports the details about pieces of glass bangles, hair and the suppressed grasses in the scene of crime and being hostile to the one's own version of examination report which creates situation to the acquittal of the real offenders could never possess evidentiary value. Such kind of expert's opinion will also create obstacle to the judicial process.

As much as the investigation is clear and factual, it gives effect not only to collect real and adequate evidence against the offender but also enables such evidences to be real and factual. Only the real, factual and adequate evidences can assist the criminal justice process. As a consequence, court can punish the offender and provide justice to victim. The investigation in criminal cases have immediate and long term effect on judicial process, peace and security, construction of fair social circumstances, and the entire effect of these have upon the infinite progress of the State. In the given case, no investigation has been conducted about the presence of defendant in the scene of crime though defendant was the keeper of the nursery. There has been no investigation about the glass bangles and 5 hairs that were identified from the scene of crime. There has been no examination of the sperm of defendant and moreover, the questions raised by the lawyers of defendant about the absence of sign of victim in the seizure document and in what ways this case is related with the political career of the defendant's brother is unanswered. From such issues, anyone i.e. either the person punished or victim can raise questions on the justice delivered or to be delivered by the Court. In spite of the weaknesses of the investigation, the condition of the vagina of the victim, presence of the offender in the scene of crime, the entire evaluation of the evidences collected during investigation as the significant material facts to decide the case like identification of the offender, testimony of the persons of spot inquiry report against him, confirmed First Information Report during the incident, and testimony of the victim before the police and court establishes that the defendant had raped the victim, hence, the

argument of the lawyers of the appellant could not be considered valid at this situation.

Since there is no any contradiction in between the documents of First Information Report and the statement of victim during investigation on the incident and later at the court while testifying, the issues raised by the lawyers of the appellant stating those documents as contradictory were not as claimed. Whereas, the things expressed at certain place cannot be said to be the ditto at other places, neither such things could be the same. Any person who expresses something cannot express the ditto sometimes unless such person tries to do so through learn by heart method. It is therefore, the situation is not same as stated by the lawyers from the appellant, and hence, there are not any contradictions in the fact only due to general differences in the things.

All other evidences are considered secondary in comparison to the statement of the victim. This court, in the case of *His Majesty's Government v. Harilal Rokaya et.al.*, elaborating about the acceptability of the statement of woman, has laid down the principle as follows:

"It is not appropriate to impose the preliminary burden of proof upon the victim woman in the rape case asking the corroboration of the statement of such victim with other evidences without recognizing it as acceptable evidence, and having suspicion and skepticism is not appropriate for the woman who grows up in our social structure. It should be understood as a general judicial presumption and should not be considered otherwise through the suspicion that unless there is strong basis or evidence to ignore the statement of victim woman a general woman does not give a statement against her relatives appearing before the court of law which will insult herself. There may be some differences in between the things expressed in the course of suspicion and unreliability, and the things expressed during testimony in the court, but unless there is fundamental inconsistency, which would make her statement unbelievable, the statement of the victim woman should be undertaken as very important evidence."

Chief Justice of Indian Supreme Court A.S. Anand has expressed that if the statement of victim is reliable, the court may not search other corroborative evidences. The version of Justice Anand is clarified from the paragraph as below:

"It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault; it is often destructive of the whole personality of the victim. A murder destroys the physical body to the victim; a rapist degrades the very soul of the helpless female. The courts, therefore shoulder a great responsibility while trying an accused on the charge of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statements of the prosecutix, which are not of fatal nature to throw out an otherwise reliable prosecution case. If evidence of the prosecutix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars." (Justice for Woman, Concerns and Expression, 2nd ed., 2004 at 9).

Since the rape is a heinous crime, it is not justifiable to say that the defendant shall be acquitted only on the basis of general differences in between the testimony of victim and other persons giving statement during investigation. The Full Bench of this Court, in the case of *Advocate Sapana Pradhan Malla v. Ministry of Law, Justice and Parliamentary Affairs et.al.* Writ No. 56 of the Year 2058 B.S., while laying down the principle on inhuman assault and charge against the individual liberty of woman from the offence of rape, has said that it will be the insult of the right to dignified life and the human right of self determination to compel woman to use her organs without her permission; and has further stated:

"The rape is an inhuman act against the human right of woman attacking upon the individual liberty and right to self determination of victim woman. It will not only negatively affect the mental, family and

spiritual life of victim woman, but threats to the self respect and existence of the woman. This offence is not only against the woman but is the offence against the whole society. Homicide destroys the physical body of human being and the offence of rape harms the physical, mental, spiritual conditions of woman. Hence, this is a hatred offence. Laws of all nations provide punishment to the offence of rape stating it as a heinous criminal offence. In our country too, it has been considered as a heinous criminal offence and the punishment has been provided".

The part of the judgment of this court as mentioned above and the version of the Indian Chief Justice Anand does not only states that the rape is the most heinous social criminal offence against woman rather it also alerts that Courts should address it with much seriousness relating with the woman chastity, existence and human rights. The judgment delivered by the Court of first instance and the Court at appellate level to acquit the defendant on the basis of small loopholes as in other minor criminal offences shows the inability of those subordinate Courts to be conscious and responsible, and consider special seriousness in the cases like rape.

Therefore, in the above conditions where the plea of alibi taken by the defendant has not been proved, and other evidences including the confirmed statement against the defendant, the statement and testimony of victim, testimony of the persons during investigation and the conclusion of the Medical Report of the victim has established that the defendant Swasti Baral raped victim. The judgment of Trial Court and Appellate Court acquitting the defendant is not seen appropriate. Hence, those judgments are hereby reversed and the defendant Swasti Baral is hereby punished with the imprisonment of (6) six years pursuant to No. 3 of Chapter on Rape for the commission of the offence under No. 1 of the same Chapter and the half of the share of property owned in the name of defendant Swasti Baral is also hereby restituted to the victim Tanki Kumari Kadka pursuant to No. 10 of the same Chapter.

The legal provision of criminal and civil nature is in existence to punish the offender with imprisonment and to provide the victim the half of the

property of offender as compensation, after the establishment of the offence of rape. Although the judgment of imprisonment against offender is immediately enforced along with the imprisonment, there is general grievance that the provision of half portion of the property to victim as compensation is not enforced immediately as per the will of the legislators. For this cause, it is said that the lack of appropriate legal procedure to enforce the judgment of half portion of property, the charge sheet filed without request for sequestration of the property with details and the victim not seeking the property with the process in the court are major reasons.

The responsibility to enforce the judgments of the Courts is provided to the District Courts. The provisions as expressed in the Chapter on Punishment of National Code (Muluki Ain) and District Court Regulations, 2052 are major laws for the purpose of enforcement. Although the procedure for the partition of property among co-parceners (*Angsiyaar*) are provided in No. 46 of the Chapter on Punishment and Rule 78b of District Court Regulations, 2052, there is no any clear provision to provide the half of the property owned by offender to victim of rape case. This part on providing half of the property is also shadowed due to the concept that the receiving of property by the victim of rape and the partition of property among partners is not of the same nature. However, only due to the absence of the appropriate legal procedure the judgments rendered lawfully to provide half of the property cannot remain without enforcement. Court itself through the application of justifiable process should enforce and cause to enforce the judgment at any situations. It is an inherent power of the court. It is also the duty and responsibility of the court to assure the realization of justice to the victim.

Actually, in rape cases prosecuted as a state party, the legal provision shows that the status of the victim is only as a witness of prosecution. Therefore, generally the victim does not know about the consequences of the cases, neither there is trend of notifying her. Due to this, there will be no situations that the victim would come to the court with the petition for half of the property. It is not justifiable to blame the victim for her inability to ask the property and making the

legislative spirit dysfunctional. Very essentially, the satisfaction of justice could be attained only when the essence of the judgments could be consumed. In any nature of cases, it becomes the main duty of the court to be active and to provide the result of judgment to the petitioner of justice. The duty of the enforcement of the judgment of the court is within the court itself.

In rape cases, the special duty of providing half property from the offender is with the prosecutor as well. Government Attorneys are the main engineers of the cases in which the State is party. The main responsibility to provide the result by designing the case and revealing the basis and reasons of such and preparing the structure and form of the case remains with him or her. Although it is the special duty of Government Attorney to take the plea about the property to be restituted to the victim from the offender by identifying the partners or family status, details of movable and immovable property, in the given case charge sheet has been taken randomly stating the half of the property of the offender quoting No. 10 of the Chapter on Rape. Even more, the District Court also not seen to have thought about the enforcement of judgment by collecting evidences along with identifying the basis and reasons.

It is therefore, as stated above, it is hereby ordered to give the notification to Court of first instance Udaypur District Court to provide half of the property of offender Swasti Baral to the victim Tanki Kumari Khadka by initiating the enforcement of judgement through this order with appropriate process whatsoever required to identify the family status, details of the movable and immovable property including the order of No. 139, 133 of Chapter on Court Management of National Code(Muluki Ain). Likewise, it is hereby ordered to notify the Office of the Attorney General to make circular the subordinate Government Attorney Offices for necessary arrangements to take the plea along with the request for sequestration of the property of defendant by identifying the partners of the offenders, details of the movable and immovable property and the basis and reasons in the indictment of the No. 10 of the Chapter on Rape.

Likewise, in the given case, the attention of this Court has been attracted also towards the opinion given by the expert. In the given case, while the Area Police Office Katari had sent for the physical examination of victim Tanki Kumari Khadka to the Public Health Branch Katari (Health Post) the Acting In- charge of the Office Israel Rayin while examining the vagina of the victim Tanki Kumari Khadka had mentioned that the vagina had become reddish due to swelling, slightly torn but penis has not been penetrated and there were no sign of previous intercourse prior to that. He, while testifying before the court, had given the statement that the vagina had become reddish, swollen due to the itching and rubbing with the finger as the penis has not entered into the vagina and there was itching allergic wounds the vagina. While the Area Police Office had requested for physical examination and exact details with the Public Health Branch Katari (Health Post) the Acting In charge Israel Rayin of General Health Post had not mentioned anything about itching and allergic around vagina during investigation, and only during the testimony before the court he had expressed that there were itching and allergic wounds, reddish swollen and slightly torn around vagina, which seems to be only for the purpose of protecting defendant. Since from the study of statement of Acting In-charge during investigation and during the testimony before the court it is seen that the then Acting In-charge Israel Rayin of the Area Health Post Office examining the vagina and body of the victim is not serious in the important service like health and is not accountable towards his duty and is found negligent, it is hereby ordered to send the copy of this judgment to the Ministry of Health, Department of Health Service for managing necessary arrangements to take departmental action against him and give the notification of such action to this court, and for managing necessary arrangements to prevent from such happenings in future. It is hereby ordered to do as following in other affairs:

Particulars

Since Defendant Swasti Baral is convicted with the 6 (six) years imprisonment, it is hereby ordered to notify the Court of first instance

Udyapur District Court about the record of the imprisonment of 6 (six) years and execute the imprisonment by maintaining the penal record as per law ------- 1

It is hereby ordered to notify in writing to the Court of first instance Udpaypur District Court to register the half portion of the property of Defendant Swasti Baral by confiscation in the name of victim Tanki alias Tanki Kumari Khadka --- 2

For the purpose of the notification, let the copy of this judgment be sent to the Ministry of Health, Office of the Attorney General and Monitoring Division of this Court ---- 3

Let the case file be submitted pursuant to the rules ------- 4

I concur with the above decision.

Justice Rajendra Kumar Bhandari

Done on the 8th Falgun, 2062 (20th Feb, 2006).

Translated by Sanjeev Raj Regmi