Some Decisions of The Supreme Court, Nepal

2012

Some Decisions of The Supreme Court, Nepal

Volume v4

2012

Editors

Lohit Chandra Shah
Registrar
Supreme Court of Nepal

Bhim Nath Ghimire
Advocate
Supreme Court of Nepal

Supreme Court, Nepal

Phone: 4250742, 4262397, 4262398, 4262801, 4258122
Fax: 4262878, P.O.Box: 20438
Email: info@supremecourt.gov.np, **Web**: www.supremecourt.gov.np

Published by: *Supreme Court, Nepal*
Ramshahapath, Kathmandu

Printed Copies: 1000

Price:

Date of Publication: December, 2012

© Copyright: Supreme Court, Nepal

Printed at: Supreme Court Press

Editorial

Various types of issues are emerging in the field of justice and some of them are surfaced in Nepali society too. Most occurring are the issues related to the basic human needs, fundamental rights of the people with disability and third gender rights. It can be easily assumed that these are the results of increasing level of awareness in the society and people. With this, the needs and aspiration of the people are also going up. In another hand the state mechanism are not competent and enough in terms of its reach to cope-up with these emerging challenges. The common tendency prevailed in the society is that all these problems and issues should get their respite reaching in the courts. Consequently our judiciary has been sustaining pressure of such a kind every day.

Innovative campaigns and initiatives are also being tried with lots of technical reforms. New types of ways and means have been explored and applied within the availability of state's resources. Many new benches have been created and introduced to administer cases of women, children, elderly people as well as the person with various disabilities. According to the seriousness of the cases . A large number of jurisdictions have been conferred to the subordinates of courts and court of first instances with the aim to reduce the load to the Supreme Court. These initiative have proved to be instrumental delivering prompt justice at people's (reach) doorstep. The key focus is to encourage timely and inexpensive justice. Mediation, as one of the most practical tools of dispute resolution has once again revitalized in order to define social justice in practical term.

Despite of all these efforts, there are still some hitches to overcome to insure quality justice delivery. Manpower shortage with the desired efficiency is evident who could counter the given problem adequately and appropriately as the crime always changes its nature and course to escape the arms to prevailing lams and rules. Besides, although, we have been the party of a number of international treaties, covenants, protocols, agreements and conventions . Provisions contained in them take effect only after the national legislative ratifies them. Many

provisions envisaged in human right instruments are from foreign and not feasible to be adopted in local circumstances. They take a long time to be incorporated in local laws. Challenges ahead are of their successful implementation and materialize their notions and spirits.

We are passing through the phases of transitional justice which must not go for long. Longer the transitional period, the more we have to encounter with such new types of challenges. With paradigm change, our state mechanism have been segmented which require proper care and skilled hands for their rejuvenation. At a time when both the executive and legislative bodies are facing a kind of dilemma associated with the types of governance and state restructuring, judiciary have become the only center of hope . This has led to judiciary shouldering almost all the prominent issues and draws a national code of ethics to run and guide the life of people and the nation. It is the duty of all concerned to sincerely co-operate for the smooth functioning of judiciary.

In view of all these issues raised above, we have assembled here in these volumes subject matters of diverse fields so that they could reflect some of the key features of our way of interpreting the statue an modes of delivering the justice. Majority of the decisions contain in this volume are related with enforcement of fundamental rights originated from the international instruments and questions involved in them. The others subject incorporated in this are human trade and trafficking, urban development and environment, consumption as well as transaction of narcotic substance, rape, culpable homicide, breach of promissory estoppels, trademark, national dress code, rights and rituals and the matters concerned with individual liberty as well as property matters concerned with women.

Sincere gratitude to those honorable justices of Supreme Court who have endeavored in disposing free and fair justices and also to learned advocates who have contributed in shaping the ideas to define the things to the scholarly deliberations in a rational way. We are committed to bring next issue more useful and readable. Healthy comments and recommendations are welcomed.

Thank you!!!

Lohit Chandra Shah
Registrar
Supreme Court of Nepal

Bhim Nath Ghimire
Advocate
Supreme Court of Nepal

December, 2013

Contents

S. N.	Parties	Subject / Case	Page
1.	Bhuwan Prasad Niraula & others Vs.Constituent Assembly and Legislature Parliament & others	Mandamus & others	1
2.	Achyut Prasad Kharel Vs. Office of the Prime Minister and Office of the Council of Ministers	Certiorari & others	41
3.	Advocacy Forum Vs. Home Ministry & others	Certiorari & others	56
4.	Woman, Law and Development Forum & others Vs. Office of the Prime Minister and Council of Ministers & others	Certiorari plus Mandamus	108
5.	Sunil Ranjan Singh Vs. Office of the Prime Minister and Council of Ministers	Certiorari mandamus & others	117
6.	Nepal Government Vs.Bel Bhadur Thapa Magar	Trafficking of Illegal Timber	134
7.	Shri Krishna Shrestha & others Vs.Nepal Government	Corruption	153
8.	Government of Nepal Vs. Man Kumari Nepali	Culpable Homicide	226
	Government of Nepal Vs. Jyoti Rai	Human Trade &Trafficking	243
9.	Bindeshwor Prasad Patel Vs. Ministry of Forest and Soil Conservation & others	Certiorari Plus & others	260
10.	Sumy Distillery & others Vs. Diageo Bronds SBV	Registration of Trade Mark	272
11.	Pro-public (Janahit Samrakshan Forum) Vs. Office of the Prime Minister & others	Mandamus	284
12.	Sher Bahadur Thapa Vs. Government of Nepal	Narcotic Drugs	309
13.	Abdul Khalik Vs. office of the Prime Minister and Council of Ministers	Habeas Corpus	326
14.	Molhuysen Hendrik Otto Vs. Government of Nepal	Rape	336
15.	INHURED International & others Vs. Office of the Prime Minister	Certiorari, Mandamus	361
16.	Nepal credit and commerce Bank Ltd Vs. Commission for the Investigation of Abuse of Authority	Certiorari Plus Mandamus	387
17.	Nepal Disability Human Rights Center Vs. Office of the Prime Minister and the Council of Ministers	Mandamus & others	407
18.	Government of Nepal Vs. Rabin alias Nayaran Poudel Khatri	Rape	429
19.	Damodar Ropeways and Construction Company Vs. Hazama Corporation	Request for the recovery of amout	456
20.	Spice Nepal Vs. Ministry of Information & Communication	Certiorari, Mandamus	474
21.	Purna Bahadur Timsina Vs.Government of Nepal	Homicide, Attempted Rape	496
22.	Chari Bahadur Gahatraj & others Vs. Office of the Prime Minister and Council of Ministers & others	Mandamus	512
23.	Rajkumar Rana & others Vs. Prime Minister and the Office of the Council of Ministers & others	Certiorari & others	537

It is expedient to bring about timely reform and corrections in Military Act and Rules to ensure smooth functioning of modern democratic system, rule of law as the well as constitutionalism.

Supreme Court, Special Bench

Hon'ble Chief Justice Khil Raj Regmi

Hon'ble Justice Kalyan Shrestha

Hon'ble Justice Krishna Prasad Upadhyaya

Writ No. 065-WS-0010

Subject: Mandamus & others.

Petitioner: Advocate Bhuwan Prasad Niraula, a resident of Okhaldhunga District, Taluwa VDC Ward No. 2 & others

Vs

Respondent: Constituent Assembly and Legislature Parliament & others

- **Since there is established international norms regarding the establishment of specialized courts or tribunals or other judicial authorities; and the constitution as a principal law in Nepal has also imagined for the establishment of such entities in the constitution itself, the possibilities of establishment of Court Martial for the purpose of military judicial system cannot be ignored.**
- **Given that the Military Act itself has accepted Court Martial as judicial authorities, and while being based on the performance of every tier of Court Martial**

established pursuant to Military Act 2006, all such courts are hearing and adjudicating the cases, thus, they cannot be placed beyond the ambit of the judicial authorities prescribed by Article 100 of the constitution.

- **It shall not be inappropriate to play the role by this court to make microscopic observation and study of the provisions related with military justice enshrined in Military Act, in order to establish them as per the existing modern democratic system, constitutionalism and rule of law.**
- **It shall not be reasonable through the perspectives of military justice to observe the provisions related with Court Martial through singular aspect, completely ignoring the specialized character of military discipline and military justice.**
- **Considering the military justice, along with the effectiveness of Court Martial, it is also necessary to ensure the effectiveness of investigation, prosecution and defense system of the offenses under the jurisdiction of Court Martial. There should not be any incidence of direct intervention of Military Officials in such mechanisms; if officials involved in such mechanisms are also guided through the similar service, terms and regulations like other military personnel, the independent functioning of such mechanisms is not possible and the independent investigation and prosecution from such mechanisms could not be expected.**
- **There shall be assurance of the provision for appeal against the judgments of Court Martial. It is necessary to ensure at least one tier examination of judgments in order to correct the mistakes of judgments of lower judicial authorities, to ensure the reliability of the**

adjudication, and to assure the respective party that the justice has been done in the matters related with rights and liabilities.

- **The provisions related with military justice enshrined in Military Act and Regulations should be established in such a manner that they are consistent with the constitution and principles of justice. Since the system of either approving or repealing the judgments of Court Martial of first instance by Military Official cannot be said to be reasonable through any logic, there shall be assurance of at least one tier appeal system for the examination of the judgments or decisions of Court Martial.**

Decision

Kalyan Shrestha, J: The brief fact and ruling of the given writ petition submitted before this bench after being registered in this court pursuant to Article 32 and Clause (1) and (2) of Article 107 of Interim Constitution of Nepal, 2007, requesting the *ultra vires* of the inconsistent provisions, and the order of *mandamus* for necessary provisions of Military Act, 2006 related with Court Martial in compliance with the constitution; is as following:

The content of the writ petition submitted by the petitioner is this that the Interim Constitution of Nepal, 2007, in its preamble, has expressed its full commitment towards independent judiciary and the concept of rule of law; and in its Clause (1) of Article 100, it has expressed that all the judicial powers in Nepal shall be exercised by the courts and other judicial authorities pursuant to this constitution and other laws and principles of justice, and Clause (2) of the same Article has provided that concept and values of independent judiciary shall be incorporated. Similarly, Clause (2) of Article 101 has expressed that other courts, judicial authorities and tribunals could be established pursuant to the law for the hearing and adjudication

of special nature of cases; and since Clause (2) of Article 102 of the constitution has provided that all the courts and judicial authorities, except Constituent Assembly Court, shall remain in subordination of Supreme Court, it is seen that Court Martial in Nepal also remain under the judiciary. The constitution, in its Clause (2) of Article 13 has ensured that all citizens shall be equal in the eye of law and no one shall be deprived of the equal protection of law; Article 12(2) has ensured that the individual liberty of every person shall be inviolable except as per the law; Clause (2) of Article 24 has ensured that any person shall not be deprived of the right to be counseled and represented by the lawyer from the time of arrest, and Clause (9) of the same Article has expressed its commitment that every individual shall have right to fair trial before competent court or judicial authorities. Similarly, Article 9(1), 14(1), 14(3)(b), 14(3)(d) of International Covenant on Civil and Political Rights, 1966, to which Nepal is a party; and Article 10 of Universal Declaration on Human Rights, 1948 have also established norms regarding fair trial.

Section 67 of Military Act, 2006 has the provision of four types of Court Martial. All the officials of such courts are under the order of precedence of the military organization and adhere to the orders of their senior military officials.

Subsection (1) of Section 81 of Military Act, 2006 has provided that there shall be the representation of Judge Advocate General Department in every Summary General Court Martial and other Court Martial; and sub-Section (2) of the same Section has provision that if any accused of the military offense requests before the Defense Section of the Judge Advocate General Department to designate any Legal Official of his/her choice for his representation before the Court Martial, Judge Advocate General Department shall designate such official as per the request. Such provision is completely inconsistent with the constitution and has infringed the right to be counseled and represented by the lawyer of one's choice, as ensured by the Right to Justice provided in Clause (2) of Article 24 of Interim Constitution of Nepal, 2007.

Section 84(3) of Military Act, 2006 has provided right to express separate Note of Dissent to the Judge Advocate General Department or its representatives during the conviction of any offense. Rule 4 of Court Martial Regulations, 2007 has provided that Office of the Judge Advocate General Department may recommend before the Chief of Army Staff to constitute Court of Inquiry and send the case file before the Chief of Army Staff for the decision whether to initiate or not; and Rule 7(2) has provided that Chief of Army Staff shall give final decision on the matter. Rule of 7(3) of Military Regulations has provided power to the Judge Advocate General Department to decide whether or not to initiate the cases where the offense is committed by other persons except Officers and Junior Commissioned Officers pursuant to Clause (c) of Section 68 of Military Act, 2006, and Rule 11 has provided power to the Legal Officer to prosecute on the case. This situation of the military, where it investigates through the formation of Court of Inquiry, decides whether or not to initiate the case, adjudicates by the court constituted by it, and prosecutes and defends cases itself, in the offenses prescribed by Military Act, 2006, has violated the principles of natural justice. The provision of formation of Court Martial as prescribed Military Act is directly inconsistent to the Article 24(9), Article 100 (1) and (2) and principles established in the cases *Yagyamurti Banjade v. Durgadas Shrestha, NKP 2027, Dec. No. 547* and *Rajiv Parajuli v. Royal Commission on Corruption Control, NKP 2062, No. 11, Dec. No. 7618*.

Section 119(1) of Military Act, 2006 has provided that there shall be one Military Special Court to hear appeals against the orders and judgments of Court Martial. There shall be a Judge of Court of Appeals designated by Government of Nepal in recommendation of Judicial Council, Secretary of Ministry of Defense and Chief of Judge Advocate General Department of Nepal Army, as its members. The qualification of other two members of the court except the Judge of the Court of Appeals is not similar to that of Judge of the Court of Appeals, and hence is as the Official of Government of Nepal and

Military Official. Since Rule 30 of Court Martial Regulations, 2007 provides that the opinions of the majority members shall be the decision of the court, the Chairperson in the Military Special Court is more prone to be in minority; and since other two members except the Chairperson are not independent persons like that of judiciary and are the chief of Judge Advocate General Department of the Army and the Secretary of the Ministry of Defense, the question of independence, impartiality, of such authorities will be obviously raised. Moreover, this Military Special Court and other Court Martial are constituted against the principles of Separation of Power. Hence, such Court Martial is against the provision and spirit of competent, impartial and independent judiciary as accepted by the constitution.

Since there is a provision of appealing before the Chief of Army Staff pursuant to sub-Section (6) of Section 119 of Military Act, 2006 against the judgment of District Court Martial of Clause (b) and of summary Court Martial of Clause (c) of Section 68 of Military Act, 2063; and since sub-Section (7) provides the committee comprising of the Brigadier General as Chairperson designated by the Chief of Army Staff, Colonel as a member and a representative of Judge Advocate General Department who is not involved in the case of Court Martial as a member, such Appellate Committee is also not seen to be impartial and independent. It is also clear that these provisions are against Clause (9) of Article 24 and Article 100(1) and (2) of the Interim Constitution.

Since Sections 67, 68, 73, 81, 82, 84, 98, 100, 108, 109, 110, 115(1) and 119 respectively of Military Act, 2006 are inconsistent with the constitution being against the constitutional guarantee of independent judiciary, rule of law, right to justice and principles of fair trial, it is hereby requested to declare the above mentioned Sections of Military Act, 2006 *ultra vires* to the extent of such inconsistency. Moreover, it is also requested hereby to issue the order of *Mandamus* and other appropriate orders and decrees in the name of defendants to arrange those Sections in the manner so that they concur to the rights guaranteed by the constitution.

Show Cause Notice of this Court dated 2065-06-13: What was happened in this matter? 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, it is hereby asked with the respondents to submit a reply thereof in writing through the Office of the Attorney General within 15 days of receiving this notice of the order, and let one carbon copy of this order be sent to the Office of the Attorney General. Let the case be submitted before the bench pursuant to the rules after the receipt of the rejoinders from the defendants or after the lapse of the time provided to submit rejoinder.

Rejoinder of Joint Secretary Tek Prasad Dhungana, on behalf of Legislature Parliament: The disputed Military Act, 2006, raised by the petitioner, was enacted by the then reinstated House of Representatives, prior to the promulgation of the existing Interim Constitution of Nepal, 2007. The constitutionality of the provisions of such laws which were enacted prior to the promulgation of the constitution could not be tested through the provisions of judicial review of Article 32 and Clause (2) of Article 107 of Interim Constitution of Nepal, 2007. However, Article 164 of the constitution is attractive in this regard. Clause (2) of Article 164 of Interim Constitution of Nepal, 2007 provides that the all laws which are prevalent at the time of the promulgation of the constitution shall remain in force until they are repealed or amended, provided that, the laws inconsistent with the constitution shall be *ipso facto* be considered *ultra vires* to the extent of such inconsistency after three months of the promulgation of the constitution. Whereas, if any situation exists which causes a situation of infringement of the fundamental rights of citizens due to the enforcement of such inconsistent laws, respective aggrieved party may reach to the court at any time with reasons and grounds for the judicial remedy. In the given case, petitioner has not been able to establish that in what manner which provision of the Military Act, 2006 is inconsistent with the constitution and in what manner is his fundamental rights are infringed through the enforcement of such provisions? And has not

been able to establish his *Locus Standi* to file this petition through any substantive and objective basis. It is therefore, the given writ petition, filed without *Locus Standi,* is subject to be quashed at *prima facie*.

It is evident that the reinstated House of Representatives had enacted Military Act, 2006 as per the changed context, in order to create the legal basis for operating Nepal Army through democratic methods and bringing Court Martial and all judicial authorities under the control and subordination of the Supreme Court, by ending the previous legal provisions of Military Act, 1961 and the activities of Court Martial, which were beyond the extra ordinary jurisdiction of the Supreme Court. Since it is seen that Clause (2) of Article 101 of Interim Constitution of Nepal, 2007 has provided that special courts, judicial authorities and tribunals could be established as per the law, for hearing and adjudication of special nature of cases; and the Military Special Court is established under the chairmanship of incumbent Judge of Court of Appeals to hear the appeals against the judgment of General Court Martial and Summary Court Martial pursuant to Military Act, 2006; and the appeal against the Military Special Court could be filed before the Supreme Court pursuant to Section 119 of Military Act, 2006, the formation of Military Special Court which remains under the judicial control and supervision of respected Supreme Court and the disputes raised in relation to the procedural provisions of Military Act of this court, are not against democratic norms values and independent judiciary; thus, the order as sought by the petitioner could not be issued in the given case. Hence, the writ petition should be quashed.

Rejoinder of Secretary Dr. Kul Ratna Bhurtel, on behalf of Office of Prime Minister and Council of Ministers: The issue raised by the petitioner, related with the enactment or amendment of the laws, is a matter of Exclusive Power of the Legislature, and since this matter is not regulated by this Office, there is no reason and basis to make this Office defendant in the given issue. Moreover, the plea of the petitioner claiming that the provisions of Military Act are inconsistent

with the constitution is also unclear and haphazard, as it has not mentioned that why and in what manner are such legal provisions inconsistent with the constitution. Since the writ petition is filed without exact plea, and is against the principle laid down by the Supreme Court, it is subject to be quashed. The writ petition has also raised the issues of international treaties; however, no any person can invoke the subject of treaty as their rights, thus, the writ petition is not legitimate from this perspective too. Hence, the writ petition should be quashed.

Rejoinder of Secretary Mr. Madhav Poudel, on behalf of Ministry of Law, Justice and Constituent Assembly Affairs: Military Act, 2006 was enacted with legal arrangements for making Nepal Army accountable towards Nepali people, and with the provisions of establishment, management, control, use and mobilization of the Army. There is no debate that the Court Martial constituted pursuant to Schedule 8 of Military Act, 2006 shall remain under the subordination of the Supreme Court under the existing constitutional provision. However, Military Service, being a specialized nature of service, cannot be overlooked comparing it with other general services. Due to the nature of power and duties carried out by the military, the legal provisions related with it are observed distinctly than that of the provisions related with civil administration at international level, and thus, there is global practice of regulating and administering military in different manner than that of civil administration. Legal provisions related military service is the backbone of national security, thus, it may create military anarchy due to deficiency in the mobilization, control and discipline, if such legal provisions are made similar to that of other legal provisions related with civil administration. Since it is considered appropriate to resolve the disputes related with military through separate military mechanisms than ordinary courts, Military Act, 2006 has incorporated such distinct provisions. These types of separate provisions cannot be said to be against the constitution.

It is also false to believe that the order of any official, who is in the hierarchy of certain organization and is designated as judicial authority by the law, cannot be enforced. The issue of enforcement of the order depends upon the legal status where any person should function. The existing law has also the belief that Judicial Official exercises his/her discretion independently in the discharge of official duties, although in whatever hierarchy s/he remains. Otherwise, the orders and decisions made by the officials working as Quasi Judicial Bodies like District Forest Officer, Land Revenue Officer, Immigration Officer, Custom Officer, and Tax Officer would have been without legal validity and the concept of the quasi-judicial bodies would not be existed. The respected Supreme Court has also accepted this principle in the case of *Krishna Prasad Shiwakoti v. Office of the Prime Minister and Council of Ministers (Dec. No. 6930, NKP 2057, No.8, p.619)*.

Through the principle of fair trial, not only the adjudicating authority is examined, rather the method of hearing and the opportunity of appeal are also to be considered. The provision of appeal before Military Special Court chaired by the Judge of the Court of Appeals, and the appeal before respected Supreme Court against the cases heard by the Military Special Court is also made for the purpose of bringing the Court Martial under the judicial supervision. In this sense, Court Martial also remain under the supervision of Supreme Court. Hence, the provisions enshrined in Military Act cannot be said to be against the principle of fair trial.

Rejoinder of Secretary Mr. Baman Prasad Neupane, on behalf of Ministry of Defense: In every nation, separate Martial Laws are developed in order to regulate the military organization in an appropriate way. Since military service is distinct than other institutions and organizations, separate Acts and Regulations are developed in order to make the military service dignified and disciplined; and at many occasions, the customs and traditions should also be followed. Since writ petitioners have also expressed that the Court Martial is constituted for the proceeding of any case

against any army personnel and such court is dissolved along with the adjudication of the case there is no dispute on the fact that Court Martial is of the *ad hoc* nature; and though writ petitioners have raised the issue that various Sections of Military Act, 2006 are inconsistent with the Constitution of Nepal, 2007 they have not been able to state the exact conditions of such inconsistency except showing the procedural errors in the Court Martial; this shows that there is no any legal grounds in the writ petition. The provision of Section 82 of the Military Act, 2006 providing an opportunity to the accused to protest the name of Chairperson, Member of the Court Martial once such name is notified, is completely rational. Moreover, the provision of Section 84, accepting the existence of opinion of majority is subject matter of general principles of justice. The Military Special Court provided in Section 119 is imagined for the purpose of hearing appeals, and there is no any reason to raise questions in its formation method. The legal provisions expressed in Military Act, 2007 are seen to be in clear consistence with the Interim Constitution of Nepal, 2007 from the analysis of some of the issues raised by the petitioner. Hence, the writ petition has to be quashed.

Rejoinder of Brigadier General of Judge Advocate General Department of Nepal Army Mr. BA Kumar Sharma, on behalf of Chief of Army Staff, Army Head Quarters: It is the trend to detain the person in military custody, who is accused of the offense under Military Act; and since Court Martial is subject to be constituted at different location including remote areas, as per the necessity, the provision of designating Legal Officer for the defense of the respective accused before the Court Martial is incorporated with an objective to facilitate the accused for legal counseling and representing him/her before the court, during the detention, recognizing the principles of natural justice and general principles of criminal justice. Since Section 119(1) of Military Act has provided for the establishment of Military Special Court for hearing appeals against Court Martial, and the qualification and requirement of its chairperson and member are also incorporated by the Act itself

recognizing the preamble of the Interim Constitution of Nepal, 2007 and the principles of fair, independent, competent and impartial court; the provision of such court cannot be said to be against the principle of separation of power only on the sentimental ground of qualification and expression of opinion. Sub-Section (6) of Section 119 has provided for the procedure and official for appealing against the order or final decision of District Court Martial and Summary Court Martial, and sub-Section (7) of the same Section has the provision of Appellate Committee. Similarly, sub-Section (8) has provided power to the Appellate Committee to determine its procedure by itself. Thus, the function of Appellate Committee is also of the similar nature to that of court, and there will not be any role of the Chief of Army Staff while dispensing justice from such Committee.

Military Act, 2006 is enacted with the provisions of Court Martial from the legislature, incorporating the nature of military service and military judicial system, recognizing the principles of natural justice, general principles of criminal law, and the concept of independent, competent, impartial judiciary and rule of law. Nepal Army is not a legislating authority and it does not either enact or amend laws, however, it only adheres and implements the law enacted by the legislature. Hence, it is clear from the lawful actions that the provisions of Military Act, raised in the writ petition, are not inconsistent to the Interim Constitution of Nepal, 2007, the writ petition is subject to be quashed; thus, it is hereby requested that the writ petition be quashed.

In the given case submitted before this bench for hearing pursuant to the Rules, petitioner Advocates duo Bhuwan Prasad Niraula and Prem Chandra Rai, including Learned Advocates Mr. Satish Krishna Kharel, Mr. Govinda Prasad Sharma and Mr. Hari Phunyal argued on behalf of petitioner; and Learned Deputy Attorney General Mr. Puspa Raj Koirala, Joint Attorneys duo Mr. Yubaraj Subedi and Mr. Kiran Poudel argued on behalf of Government of Nepal. The

essence of the argument of petitioner and defendant are expressed hereinafter:

Argument of Petitioner:

- In the context, where the constitution has envisaged independent, competent, impartial judiciary, the provisions related with Court Martial in Military Act, 2006 is against the basic principles of independent judiciary.
- Since Military Junior Official and Officers should plea for the justice against the decisions of senior Military Officials, the independent justice cannot be expected from the Officials of Court Martial.
- The formation of Court Martial itself is against Clause (9) of Article 24 of the constitution, and there is no structural independence.
- Although the constitution and international instruments where Nepal is a party, has ensured the right to be represented by a lawyer of one's choice and open hearing, there is no possibility of use of such right in Court Martial. The mechanisms of *Chain of Command* are ever hurdles for the fair trial.
- The Military Special Court established with the majority numbers of members from the representatives of executive branch, cannot be considered as independent court.
- Court Martial should not be observed from the different sphere than that of the regular court system. There has been gradually established norm that the majority of Civilian should prevail in such courts too. Since there is role of Judge Advocate General Department in investigation, prosecution and adjudication; and there is decisive role of military official in all processes, independent and impartial justice cannot be imagined in such situations.

- Since writ petition is filed not with an objective to challenge the concept of Court Martial, but with request to incorporate standards of fair trial and impartial justice in such courts, the plea of defendants stating that the petition was filed with intent to demolish military discipline, is baseless.
- It is essential to issue order as requested, for the assurance of independent and impartial justice in Court Martial as per the concept of independent judiciary.

Argument of Defendant:

- Since Military Act is applicable only to the military personnel, civilian writ petitioners do not possess power to challenge the Act. In situation, where persons in military service have not raised any question regarding legal provisions, the writ petition file by irrelevant persons from military service should not be heard.
- Nepalese judiciary should not decide being based on the foreign laws of any particular nation.
- Since writ petition has not been able to take exact plea that which Section of Military Act is inconsistent with which Article of the constitution the petition is subject to be quashed at prima facie.
- Since new Military Act has been enacted incorporating principles established in developed countries, the Act has accepted fair trial.
- The military justice is being dispensed from the specialized mechanism considering the sensitivity, discipline and chain of command of military service; and this provision is also amended and reformed from time to time, thus, the petitioner's plea is baseless.
- Military justice system cannot be compared with ordinary justice system. The person, who is not aware of the

sensitivity of the military system, cannot even adjudicate the case from Court Martial.

- The petition is subject to be quashed as there is no condition of unequal treatment amongst equals.
- The meaning of fair trial and easy access should be brought from the given context; it is not justifiable to observe and make judicial review of security system through absolute interpretation.
- The law has not prohibited from being represented by lawyers during the hearing of case, and the petition has also not been able to indicate of such prohibition. Hence, the petition, not being based on the fact, should be quashed.

In the given case, where the date of today was issued for the delivery of judgment; after studying above argument plea and written Bench Brief, including other submitted documents and respective case file, following questions are to be settled in the given writ petition:

1. Whether or not, the petitioner has *Locus Standi* to file the given writ petition?
2. What are international practices governing the military judicial administration?
3. Whether or not, the Court Martials constituted under Military Act, 2006 are judicial authorities pursuant to Article 100 of the constitution?
4. Whether Court Martials should follow fundamental principles of justice or such courts should be considered distinct as per special character of military service?
5. Whether or not the provisions related with Court Martials in Military Act, 2006 are consistent with the right to justice ensured by Interim Constitution of Nepal 2007 and principles of justice?

6. Whether or not, the order sought by the petitioner should be issued?

Before entering into the issues determined above, first of all, it is appropriate to overview the legal provisions which the petitioners have claimed to be inconsistent with the constitution. In the given petition, various provisions related with Court Martial envisaged by Military Act, 2006 have been challenged. Among them, Section 67, 68, 73, 81, 82, 84, 98, 100, 108, 109, 110, 115(1) and 119 are mainly challenged. Section 67 of Military Act is related with the formation of Court Martial. This Section has provided for the establishment of four types of Court Martial. This includes, General Court Martial, Summary General Court Martial, District Court Martial and Summary Court Martial. The formation of all these Court Martial is made with the provision of Military Official in every court. Section 68 of the Act has the provision regarding the formation of Court Martial. Similarly, Section 73 has the provision regarding Officials for summoning Court Martial. Section 81 has the provision regarding presence of Judge Advocate General Department in the Court Martial, whereas, Section 82 has provided an opportunity to the accused for objection against the chairperson or members of Court Martial, if any. Section 84 has determined decision process of the Court Martial, whereas, Section 98 has accepted that the bail order accomplished by the Court Martial shall be considered to be judicial proceeding. Section 100 provides that the case file should be furnished to the Judge Advocate General Department after the adjudication of the case, and Judge Advocate General Department should furnish the same case file for the approval of the opinion or the judgment after necessary examination; where the officials authorized for the approval of opinion or the judgment are provided in Sections 108, 109 and 110 respectively. Although the conviction or sentence of General Court Martial, Summary General Court Martial and District Court Martial has to be approved, the conviction or the sentence of Summary Court Martial has to be immediately enforced pursuant to sub-Section (1) of Section 115. Section 119

has the provision of Military Special Court for hearing appeals against the order or judgment of General Court Martial and Summary General Court Martial; and for hearing the cases of corruption, theft, torture and disappearances, with original jurisdiction. This Section provides for the formation of Military Special Court of following nature:

Judge of Court of Appeals, designated by the Government of Nepal, in recommendation of Judicial Council	– Chairperson
Secretary of Ministry of Defense	– Member
Chief of Judge Advocate General Department of Nepal Army	- Member

Since writ petitioners have argued that various provisions of Military Act are inconsistent with Articles 12(2), 13(1), 24(2)(9), 101(1)(2) and 156(1) of the constitution, these provisions of the constitution should also be studied in this regard. Article 12 of Interim Constitution of Nepal, 2007 is related with individual freedom. Under the right to freedom, Clause (2) has established individual freedom as inviolable, uninfringeable right, expressing that no individual freedom could be infringed except through the law. Similarly, Article 13 has ensured the right to equality. Clause (1) of this Article has recognized the equality before law and the concept of equal protection of law. Article 24 of the constitution has the provision related with the right to justice. Among which, Clause (9) has provided right to fair hearing from the competent court of judicial authorities. This right does not possess any condition or has any exceptional provisions, and is guaranteed to every individual. Article 101, raised in the petition, has clear provision related with courts, which states that apart from Supreme Court, Appellate Court and District Court, other courts, judicial authorities or tribunals could be established pursuant to the laws for hearing and adjudicating special types and nature of cases; provided that, no court, judicial authorities

or tribunals could be established for any particular case. Similarly, Article 156 is seen to be related with ratification, accession, approval or acceptance of treaties or conventions.

Here, let's deal with the first question determined as above. In the given writ petition, among the rejoinders of defendants, the Legislature Parliament in its rejoinder, has argued that petitioners have filed the petition without being able to establish their *Locus Standi*, lacking any substantive and objective basis, that which section of Military Act, 2006 is inconsistent with the constitution in what manner? And which fundamental right of the petitioner has been infringed in what manner through the enforcement of such inconsistent provision? Similarly, learned Government Attorneys have also raised the question of *Locus Standi* while arguing on behalf of defendants during hearing.

In the given writ petition, petitioners have based on Article 32 and Article 107(1) of the constitution, arguing that there is inconsistency between some of the provisions of Military Act and some of the provisions of the constitution; and since some of the provisions of Military Act have restricted rights ensured by the constitution, such inconsistent provisions are requested to declare *ultra vires*. In this relation, Article 32 and Clause (1) of Article 107 should be observed. Article 32 has ensured right to constitutional remedy for the enforcement of rights guaranteed by the constitution, pursuant to the process prescribed by Article 107 of the constitution. Similarly, Article 107 has prescribed the jurisdiction of the Supreme Court. Among them, Clause (1) and (2) are related with the extraordinary jurisdiction. Among extraordinary jurisdiction of the Supreme Court, Clause (1) has expressed the power of the Supreme Court to test the constitutionality of any law of nation. There is liberal *Locus Standi* in this Clause, which has provided that any Nepali citizen may file a petition before the Supreme Court demanding any law or its provision to declare *ultra vires*, in case where there is any restriction in the fundamental rights guaranteed by the constitution or in case when any law is inconsistent with the constitution. Theoretically,

traditional standards related with *Locus Standi* are not attractive in extraordinary jurisdiction. Moreover, the provision of the constitution itself has recognized liberal *Locus Standi* in situation where the extraordinary jurisdiction of the Supreme Court is attractive. It is seen that the fundamental rights guaranteed by Part three of the constitution are expressed for individuals, citizens, community and groups. Among them, for the pursuit of enforcement of individual rights of the citizen, only the respective aggrieved person deprived from such rights should file the petition. However, for the enforcement of the rights stated for citizens, community and groups, any person concerned to such issues, can file the petition. Whereas, in the given case, defendants have raised the issue that the petitioners, being civilians, cannot file the petition where the disputes raised of Military Act are only related with persons in military service. However, since Clause (1) of Article 107 of the constitution has provided that any Nepali citizen can raise the question of constitutionality of any Act, such provision cannot be narrowly interpreted.

There are also previous instances of writ petitions, which have challenged few provisions of Military Act, stating them inconsistent with the constitution. Section 75 of Military Act, 2006 was challenged even in case of *Advocate Madhav Kumar Basnet et.al. Vs. Ministry of Defense et.al.* with writ number 064-WS-0028. Although that petition was also filed by civilians, no question of *Locus Standi* was raised by the defendants. In the context of the previous order issued by Special Bench of this court declaring Section 75 of Military Act *ultra vires* through the petition filed in this court, it is not justifiable and reasonable to raise the question of *Locus Standi* in the issue of constitutionality of the law.

Since it is concluded from the above analysis that these petitioners possess *Locus Standi* to file the petition, now, the remaining questions are to be settled. In this regard, the international practices on military justice have to be observed. This is the age of globalization, and the world has been narrowed due to the

interdependency. Like other sectors, the legal sector has also been gradually affected by each other's system. In many legal matters, the national border has been considered negligible, and the effective implementation of such issues is possible only through the assistance and cooperation in between nations. However, in many situations, there is requirement to enact laws considering various aspects like ground reality of respective nation, its judicial legal practices and experience, awareness level of people, social cultural specialties. There is no situation to completely ignore these issues. Although the law of one nation cannot be said to have mandatory effect, the persuasive effect of such provisions during the legislation process and practice can not be ignored. Law is never constant and unchangeable, whereas, the adaptability to the time and situations is the character of law. Hence, it is the universal character of the law making process to study the legal provisions related with the respective issues of other nation as a reference, and internalizing the persuasive provisions during the enactment of new laws or during the amendment of the existing laws.

In the given case, since petitioners has sought the orders to nullify the provisions related with Court Martial of Military Act and directives for enacting the laws in conformity to the constitution and changed context, challenging that the existing provisions are not contextual to the existing time and are beyond the standards recognized in the constitution; it will be pertinent to study the provisions related with Court Martial adopted by the democratic countries similar to Nepal. In this relation, the system of Canada, Australia, United States of America, United Kingdom, South Africa and India have been expressed here.

The practice and legal reform of Canada is considered important regarding military justice system. Three types of Court Martial are established there. According to this, Summary Trial has been provided for the general disciplinary action, and General Court Martial or Standing Court Martial has been provided according to the nature of cases, in chairmanship of permanently appointed Military

Judge along with the provisions of other Military Members. In such courts, Director of Military Prosecution has been established for the purpose of prosecution of cases; who is appointed by the respective Minister for the period not exceeding more than four years until s/he possess good conduct. Separate provision has been made under the supervision of Chief Military Judge for the military judicial administration. The Director of Defense Counsel has been established for the purpose of defense of the cases. Similarly, Court Martial Appeal Court similar to the general court has been established for hearing appeals against the judgments of Court Martial.

The case of *R v. Genereux* is significant in Canadian judicial practice from the perspective of military justice. In this case, the judicial question of, whether or not the principles of independent and impartial judiciary and fair trial could be incorporated in the Court Martial constituted pursuant to National Defense Act, was settled. In this case, the court, after analyzing various aspects like security of the tenure of Judge Advocate, intervention of executive in the performance of his function, possibility of evaluation in promotion and remuneration and the lack of institutional autonomy; had reached to the conclusion that the provisions of National Defense Act were inconsistent to the constitution. After this judgment, it is seen that the process of reforming the Military Act began in Canada and military justice was detached from the military hierarchical system and the provisions regarding complete opportunity of defense to the accused were added gradually.

Similarly, in Australia, Defense Force Discipline Act, 1982 had regulated military service operation. In 2006, although this Act was amended with the provision of Court Martial, the amendment was challenged with the argument that the Court Martial was placed beyond the constitutional provision; which was declared *ultra vires* by their Supreme Court. For the reform of the military justice of the Australia, there had been study in 1995 from the decision of the Military Chief, and through the Parliamentary Committee in 2005.

Among them, the Study Report of Parliamentary Committee had stressed on the establishment of permanent nature of court, for ensuring independency and impartiality of military justice system.

The Supreme Court of Australia, in the case of *Lane v. Morrison*, has concluded that the Court Martial cannot activate distinctly ignoring the principles of judicial independence, impartiality and competency. In that case, referring to Findlay Case and Grieves v. United Kingdom Case of England, and R v. Genereux Case of Canada, it has been expressed that even Court Martial should comply with Article 14(1) of ICCPR, being a member nation of ICCPR. After that decision, there have been substantive changes for the reform of military justice system of Australia.

The military justice system of United States of America is still functioning by Uniform Code of Military Justice of 1951. In that Act, the military justice system has been made the subject matter of military hierarchical system. There are three types of Court Martials, namely Summary, Special and General; where the military officials themselves have decisive roles. The courts are not of permanent nature but are formed on *ad hoc* basis; and with the order of Commanding Officer, such court is constituted, and Judicial Official is designated. Due to all these reasons, the question has been raised on the independency and impartiality of the military justice system; thus, The National Institute of Military Justice has been established for the study of all these affairs.

In United Kingdom, Armed Forces Act, 2006 has regulated the provisions related with military justice system. The separate entity established as Court Administrator Officer determines the Court Martial for hearing depending upon the nature of cases. The hearing of cases prosecuted on trivial matters is conducted by Commanding Officer through summary trial. There is provision of Summary Appeal Court for hearing appeal against the judgments of conviction of Commanding Officer. This Court is constituted on the chairmanship of Judge Advocate with other two officials as its members. The

British Military Justice System has also a special feature, i.e. having a permanent nature of Court Martial. This provision came into effect from 1 November 2009 under Armed Forces Act, 2006, and has replaced the previous temporary provision. In this court, 3 to 7 military officials remain as Jury under the chairmanship of Judge Advocate. Court Martial remain independent from the military hierarchical system and Court Martial Appeal Court has been established with the provision of Judges of general Appellate Courts to hear appeal against the Court Martial; thus, it has created adequate basis for ensuring the judicial independence. There is provision to appoint Judge Advocate by Lord Chancellor and Judge Advocate General by the Queen; and civilian Solicitors, Barristers and Advocates are eligible to be appointed in these posts. In addition to that, separate Director of Service Prosecution has been provided for the prosecution.

In that reform process of the United Kingdom, the judgment rendered by the European Court on Human Rights in the case of *Findlay v. The United Kingdom* has played a crucial role. The earlier provisions of Army Act, 1955 had expressed that Military Commander used to be the authority to constitute the Court Martial, the appointment of the chairperson and member of the Court Martial used to be made by the Military Commander, those officials of Court Martial used to be the subordinate officials of Military Commander, such Court Martial could be dissolved at any time either prior to the hearing or during the hearing; and thus these provisions were challenged on the grounds that there is impossibility of independent and impartial justice from the Court Martial due to such provisions. That judgment created a basis to move the British military justice system towards gradual reform.

The military justice system of South Africa, which has just been merged into democratic system, is also standing on the judicial base. The judgment rendered by the Constitutional Court in the case of *President of the Ordinary Court Martial v. Freedom of Expression Institute* declaring that the provisions of The Defense Act had

violated the rights guaranteed by the constitution, has necessitated the enactment of new Act. The Military Discipline Supplementary Measure Act, 1999 issued after that, ensured the establishment of Court Martial with fair trial and access to the South African High Court. In South Africa, there is provision to remain Judges of general courts and Military Officials experienced in judicial services, in all tiers of Court Martial.

The role of judiciary seems to be important even in the development of military justice system of Nepal's nearest neighboring country India. The Law Commission of India had submitted its Report in 1999, after the Supreme Court of India, in the case of *Lt. Col. Prithi Pal Singh v. Union of India*, had pointed the necessity of review of the then Military Act, Marine Act and Air Force Act on the grounds that those provisions were unable to incorporate the judicial independence. In 2997, integrated Armed Forces Tribunal Act was enacted being based on that Report too. This Tribunal is empowered to hear appeal against the decisions of Court Martial of all three types of military namely Military, Marine, and Air Force; and also is empowered to hear cases of first instance according to the nature of cases. Since the qualification, tenure, security of service, remuneration and allowances, and prescribed appointment process of Chairperson and Member has been provided in the law; it is believed that the Tribunal can dispense independent and impartial justice. Moreover, there is provision of appointing Chairperson of the Tribunal from retired Justice of the Supreme Court or Chief Judge of the High Court, and in case incumbent Military Official of military service is appointed as a Member of the Tribunal s/he is *ipso facto* removed from the post of military service. This provision shows that the Tribunal is out of control of military hierarchical system.

After the comparative analysis of military justice system of various countries, it is relevant to observe the international norms regarding this concept. The international instruments of human rights developed by United Nations and other provisions enshrined in Regional Conventions are significant in this regard.

Universal Declaration of Human Rights, 1948 has ensured that there shall be equal opportunity of fair hearing from the independent and competent court to the person accused of criminal charge, by managing the rights and liabilities of such person. Similarly, Article 14 of International Covenant on Civil and Political Rights (ICCPR), 1966 has also ensured that in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. While interpreting this Article, United Nations Human Rights Committee, in its General Comment No. 32, has clearly expressed that Article 14 of Covenant shall be applicable within the jurisdiction of all types of courts and tribunals, including general or specialized and civil and military.

The Basic Principles on the Independence of the Judiciary, 1985 has very clearly expressed that state shall ensure the independence of the judiciary, such independency shall be protected through the constitution and laws of nation, the judiciary shall adjudicate the disputes came to be submitted before it being based on the fact of the case without any pressure, restriction, influence, intimidation and intervention, the decision of the judiciary shall not be reviewed by any other means except through the means of judicial review or by the principle of determining the sentencing by lawful authorized official, every personal shall have right to be heard from the general court in accordance with the procedure determined by the law, the judiciary shall ensue that judicial procedures are duly followed and the rights of the parties are respected during the hearing of case, the person to be appointed in the post of Judge is adequately trained and is competent.

While observing the Regional provisions, Article 6 of European Convention on Human Rights, 1950 has clearly expressed that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal

established by law. Similarly, American Convention on Human Rights, 1969 has also ensured that every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law. Similar provisions have been incorporated by the African Charter on People's Rights, 1969.

After the overview of comparative study of military justice system, now, while observing that whether or not the Court Martial established by Military Act are judicial authorities of Clause (1) of Article 100 of the Constitution, it is seen that Article 100 of Interim Constitution of Nepal, 2007 has provided that judicial powers shall be exercised by the courts. According to this, the judicial powers shall be exercised by courts and judicial authorities according to the constitution and other laws and established principles of justice. While exercising such judicial powers, the concept and norms of independent judiciary should be pursued. According to this provision of the constitution, the courts and judicial authorities remain in the structure of the judiciary, and in the context of Nepal, there is no dispute that special nature of courts, judicial authorities and tribunals established by the law to hear special types and nature of cases, are also the inherent organs of the Judiciary, apart from three tiers of courts namely Supreme Court, Appellate Court and District Court. Article 101 of the constitution has also expressed about such courts to be remained in Nepal. On this ground, the courts and tribunals like Special Court, Administrative Court, Labor Court, Revenue Tribunal, Debt Recovery Tribunal, and Foreign Employment Tribunal also could be said as judicial authorities apart from the existing Supreme Court, Appellate Court and District Court.

In this context, there are provisions related with various level and structure of Court Martial in Military Act, 2006. According to this, there are four types of courts namely General Court Martial, Summary General Court Martial, District Court Martial pursuant to Section 67, and Military Special Court pursuant to Section 119. Among these five types of Court Martial, the Military Special Court of

Section 119 is seen to be of permanent nature constituted under the chairmanship of Judicial Official out of the control of hierarchical structure of military; however, other Court Martial namely General Court Martial, Summary General Court Martial, District Court Martial and Summary Court Martial are seen to be regulated by military officials under the control of hierarchical structure of military and such courts are of temporary nature to be established on *ad hoc* basis as per the necessity. The performance of any entity determines whether or not such entity is judicial authority. In general terms, judicial authority denotes to the general court. However, in today's age of specialization, effective use of whole judicial authority of nation or effective performance of judicial duties, may not be possible only from the regular courts. Hence, in the context where there are international norms for the establishment of specialized nature of courts or tribunals or judicial authorities, and the constitution as a main law itself has envisaged such authorities, the possibility of establishment of Court Martial for the operation of military justice system cannot be ignored. Generally, public authorities of government which works with judicial administration or the enforcement of laws are considered judicial authorities. Since Section 98 of Military Act, 2006 has expressed that the proceedings conducted by Court Martial pursuant to this Act shall be regarded as judicial proceeding, it is seen that the Military Act itself has recognized Court Martial as judicial authority. In this context, while being based on the performance of every tier of Court Martial established pursuant to Military Act 2006, all such courts are hearing and adjudicating the cases, thus, they cannot be placed beyond the ambit of the judicial authorities prescribed by Article 100 of the constitution.

On the basis of above analysis, given that the Court Martial have remained as judicial authorities under Clause (1) of Article 100 of the Constitution, it is no necessary to enter into the question, whether such courts should follow the basic principles of justice or such courts should be considered separately according to the specialized

nature of military service? Clause (1) of Article 100 of the Constitution has clearly stated that judicial powers in Nepal shall be exercised by the courts and judicial authorities and while exercising such powers, those authorities should follow the Constitution, Laws and recognized principles of justice. Moreover, Clause (2) has mandatory provision, which requires judiciary to follow the concept and values of independent judiciary.

The preamble of Military Act has expressed: "while it is expedient to have timely amendment and to integrate the legal provisions related with the establishment, management, control, use and mobilization of Nepal Army, in order to make Nepal Army accountable towards Nepali people". The main objective of the existing Military Act, which was enacted by replacing Military Act, 1959, is to modernize, democratize and professionalize Nepal Army. Thus, Military Act, 2006 has made substantive changes even in the military justice system. The existing Act has internalized the provision of Military Special Court, as a novice concept, jurisdictionally and structurally. The term judicial authority itself indicates the judicial character inherited to it. The identity of court or judicial authority is not determined by the name or structure; rather, the jurisdiction, working system, and special nature of powers inherited in such authorities establish them distinct from other authorities. Such specialty means their powers and competency to follow recognized principles of justice, the concept of independent judiciary and values related to them.

Military Service is recognized as disciplined, dignified and professional service. The Military Act, in general, has accepted the objectives to uphold the discipline, dignity and dedication of the military. Throughout the world, military is considered distinct among other mechanisms of the state and thus its service and terms are also determined distinctly. This specialty is military service cannot be ignored. However, in the context of military justice system, since Court Martial dispense justice on the activities performed by human resources of its own service, it shall be one of the dimensions of the

military management to create belief of entire military human resources upon such justice. While preserving the discipline and dignity of military service, it is not necessarily required to weaken the aspect of military justice. Even there is not the impossibility of balance in between strict discipline of military service and the right to justice of human resources therein. In the given petition, defendants, while submitting rejoinders and during oral arguments too, stressing on the specialized character of military service, has pleaded that the military justice system cannot be imagined by disturbing military discipline. The main plea of defendants is that the justice dispensed by the Court Martial should not be compared with the justice dispensed by other judicial authorities. However, it will not be logical to say that the right to justice of its own human resources should be infringed for the purpose of continuity and conformity of military discipline and Chain of Command system.

The defendants have raised their arguments that the legal provisions related with the military as a backbone of national security, if made, similar to that of other legal provisions of civil administration, there will be possibility of military anarchy due to decline in mobilization, control and discipline of military. There is even separate provision in Part 20 of the Constitution. In this context, where Clause (4) of Article 144, stressing on the democratic structure of Nepal Army, has provided that Nepal Army shall be trained with the values of democracy and human rights; military organization, even being one of the entity of the same state mechanisms, if wishes to retain itself distinct from the Constitution and established values and principles, that shall be against the constitutionalism and rule of law. The main basis of constitutionalism is the constitutional supremacy, and rule of law stresses on judicial independence. In the context where the Constitution has determined basis for the use of judicial powers of the country and has imagined the plan of action of control, mobilization and management of Nepal Army, it shall not be justifiable to make traditional narrow opinion that the Court Martial which are included within the purview of judicial authorities

prescribed by the Constitution, should not follow the fundamental principles of justice. The provision of previous Constitution of the Kingdom of Nepal, 1990 which had excluded military activities of military from the judicial review, has not been continued by the existing Interim Constitution of Nepal, 2007. The existing Constitution has not even placed Court Martial from the entire structure of the judiciary. Hence, it shall not be inappropriate to play the role by this court to make microscopic observation and study of the provisions related with military justice enshrined in Military Act, in order to establish them as per the existing modern democratic system, constitutionalism and rule of law.

In the given petition, the main plea of the petitioner is that the provisions related with Court Martial enshrined in Military Act, 2006 are inconsistent to the right to justice and recognized principles of justice guaranteed by the Interim Constitution of Nepal, 2007. Hence, it is now necessary to identify that whether or not the provisions related with the Court Martial enshrined in Military Act, 2006 are consistent to the right to justice and recognized principles of justice guaranteed by the Interim Constitution of Nepal, 2006.

From the aforementioned analysis, this Bench has reached to the conclusion that even Court Martial should pursue the Constitution and recognized values and principles of justice. Hence, on the basis of right to justice and recognized principles of justice guaranteed by the Interim Constitution of Nepal, 2007, it is necessary to deeply analyze the provisions related with Court Martial enshrined in Military Act, 2006. Article 24 of the Interim Constitution of Nepal, 2007 has provided right to justice and has guaranteed such right to every individual. It includes right to be notified of the arrest, right to be counseled and represented by the lawyer, right against retrospective effect of law, right to be presumed innocent until the guilt is established, right against self incrimination, right to fair trial in the competent court or judicial authority, right to legal aid, etc. The Constitution has not applied any conditions for the enjoyment of

these rights based on the recognized principles of justice. It means these rights are subject to the enjoyment without any disturbances.

Since given petition has the plea that the provisions related with Court Martial are inconsistent to the right to fair trial, here, it will be pertinent to analyze various dimensions of right to fair trial. Fair trial is important aspect of criminal justice. It has various dimensions. It has accepted the value that every party of cases has right to submit their plea before the court. In criminal cases, the person arrested or accused must be immediately informed of the reasons of such arrest or accusation and about the indictment and evidences, in the language s/he understands. Such person must be provided with enough time and facilities for enough preparations to defend the case. Every person arrested in any criminal charge, must be provided with opportunity to defend himself or by lawyer of his choice. If such person is unable to appoint lawyer by himself, he should be provided with the service of legal aid lawyer. Such person must be provided with the opportunity to participate in examination of witness against him and to examine his own witness. Reflecting these and other similar specialized provisions included within right to fair trial in the judicial process, is the important basis of judicial independence.

Beside this, the assurance of adjudication from independent judicial authorities free from the influence of any entity or official of executive or legislature, provision of open bench ensuring entrance for parties of the cases, witnesses, other general public and media persons (except in situations when hearing is to be conducted in camera court considering the interests of the parties), and documents related with the cases, and availability of evidences are also the inherent aspects of fair trial.

The petitioner has raised the argument that Court Martial are not of the judicial nature and fair trial has not been ensured in such courts. Furthermore, it has been contended that although Military Special Court is chaired by the Judicial Official, the majority of its members are under the executive control and due to the provision of prevailing

the majority's decision; the possibility of independent and competent justice cannot be imagined from such courts. Beside this, the petition has also raised the issue that the Judge Advocate General Department of military and its officials have control over the investigation, prosecution and adjudication; thus, there is no possibility of impartial investigation, prosecution and adjudication. On the basis of above theoretical premise, while observing the legal provisions related with the Court Martial, it is seen that in all four types of Court Martial, military officials themselves remain as adjudicator except in Military Special Court; all such courts are constituted on *ad hoc* basis and they are not of permanent nature and there are no permanent officials; there is no provision of defending from the Lawyer of one's choice in the proceedings of such courts; there is provision of adjournment or dissolution of Court Martial at any time; Except that of the Summary Court Martial, the case file should be sent with its decision through the Judge Advocate General Department for the approval of judgment or opinion, after the completion of bail hearing, proceeding or judgment; the provision of hearing appeals by Chief of Army Staff, against the judgments of District and Summary Court Martial; and there are also provisions in Military Act that the Chairperson and Members of Court Martial, and Legal Officers of Judge Advocate General Department should present in the Court Martial on Tunic, Farez Cap, Officers Boot, Black Belt, and medals and decorations, if any, their Sword.

From the observation of the above legal provision, it is seen that those legal provision has not incorporated right to fair hearing and the concept of independent judiciary and the values related to them. However, it will also not be reasonable through the eye of military justice system to see the provisions related with Court Martial from one side completely ignoring the military discipline and special character of military service. This Court, while exercising the jurisdiction of judicial review under extraordinary jurisdiction, respective legal provisions are tested through their entire surroundings and on the basis of relativity of total legal provisions.

The preamble of Military Act has clearly realized and expressed: "while it is expedient to have timely amendment and to integrate the legal provisions related with the establishment, management, control, use and mobilization of Nepal Army, in order to make Nepal Army accountable towards Nepali people". Military Act has also made important provision with the establishment of Army Special Court Martial, under the chairmanship of Judge of Court of Appeals recommended by Judicial Council, in order to hear appeals against the judgments of General Court Martial and Summary General Court Martial, and with the provision of appeal in the Supreme Court against the judgments delivered by Army Special Court Martial. Moreover, there are also special features related with Military Act, which provides the accused with an opportunity to defend the case from separate Lawyers during hearing in Army Special Court Martial; and also ensures of protection of the right to criminal justice of accused and provides reasonable opportunity to submit evidences for defense during investigation and hearing of the cases to be heard in Court Martial. Along with the provision of appeal before Supreme Court against the decision of Army Special Court Martial, the military justice system has been associated with the judiciary. This provision could also be considered as a significant provision of Military Act as it prescribes for the appellate control and supervision of the Supreme Court in the military justice.

In the context, where there has been substantive changes in the military justice system through the incorporation of novice trends, it has to be seriously thought about the possible vacuum that may be caused from the nullification and invalidation of entire provisions related with Court Martial, only on the basis that some provisions related with them have not recognized the established principles of justice. This Court, while exercising the jurisdiction of judicial review, always considers the specialty and the sensitivity of respective legal provisions.

During the oral arguments before this bench, Learned Lawyers, representing the petitioners, had stressed that the petitioner's claim

is not to challenge the concept of Court Martial rather to request for the incorporation of principles of fair hearing and impartial justice in such courts; and while submitting Bench Memo before this Court, had requested for the issuance of order in the name of government to constitute an independent and impartial Commission with Term of Reference, for recommending the establishment of independent, impartial and competent Court Martial assuring the principles of fair trial. Moreover, the oral arguments of Learned Government Attorneys representing the defendants had also expressed that Military Act will be amended and refined according to the context as per the necessity. Since the given writ petition filed before this court as a public interest litigation has not any personal interests or loss or gain, and it has only expected for the contextual reform in the military justice, it is natural to notice the absence of adversarial character in such issues, unlike traditional cases. Hence, the oral arguments of the petitioners and defendants have also expressed little corroboration. In the given writ petition, while reaching to the final point of judgment, such positive aspects have to be recognized too.

The Interim Constitution of Nepal has provided Nepali people with various fundamental rights, including right to equality, freedom and justice. Since the Constitution has provided the provisions related with justice expressing that judiciary shall dispense justice on the basis of Constitution, Acts, Laws and other general principles of justice; and in the context where Nepal has been party to various conventions related with human rights, and has expressed commitments to the principles expressed in UN Charter and has also accepted the obligations created by various treaties, it is clear that the country's governance should be guided through the broader concept of rule of law. According to this, all organs within the state should pursue the principles of constitutional supremacy and rule of law, and it is compulsory that all judicial and quasi-judicial bodies should resolve the disputes came before them pursuant to the Constitution and Laws.

Since the Constitution has clearly provided Right to Justice to the people, in the given case, it is necessary to address and resolve disputes aroused during the operation of service pursuant to Military Act, in legal and judicial manner, through the perspectives of rule of law and protection of human rights. In the given case, while observing the provisions related with military justice in Military Act, it is found that the same entity within the structure of military organization has been exercising entire powers of investigation, prosecution and adjudication. Moreover, it is seen that there is provision for approving the judgments rendered by the Court Martial from the administrative level; defendants are deprived of the service of independent Lawyers for the legal defense in the proceeding and hearing of cases from other Court Martial except that of Special Court Martial; most of the Courts constituted for the resolution of disputes are also of temporary or *ad hoc* nature; even in serious nature of cases, due to the lack of permanent nature of court, there is absence of inclusion of competent and independent person of law and justice who coordinates with the specialization required for justice; due to the reason that the person involving in the Court Martial is only the person of military hierarchy and Chain of Command, the judicial official himself is not able to overcome the hierarchy of discipline during the dispensation of justice and thus, there is no situation to reject the fact that they will be unable to ensure the judicial fairness by assuring independent and impartial justice.

There is no dispute that the cases related with other persons except than that of military personnel do not come within the jurisdiction of Court Martial. In this regard, this Court, in the case of *Iman Sing Gurung* (*N.K.P. 2049, No.7, P. 710*) has established the principle that no civilians should be deprived of the opportunity to ask and receive justice from ordinary courts. Moreover, any military personnel, except in situation where he has committed the offence related with the military organizations or offences related with discipline and conduct, if commits any offence defined by the

existing law, is liable to the existing legal provisions; such issues cannot be the subject matter of Court Martial only on the basis that any personnel involved in such offence is in military service. It is therefore, while reviewing and reforming Military Act and Regulations, such issues has to be seriously considered.

The legal provision of constituting Court Martial only during the pleasure of military officials, always suppress the matter of justice providing it under the discretion of military organization, and it ultimately promotes arbitrariness. The provision of Military Act empowering authorized official to dissolve Court Martial on the basis of military necessity or discipline has shown that the competency and independency of the Court Martial itself has become the subject matter of discretion of military officials. From this type of justice system based on *ad hoc* structure and thought along with discretionary powers, the most fundamental issue - justice, is also likely to be revolving within uncertainty and ambiguity. Nevertheless, we should keep in mind that there should not be any incidence of arbitrariness in the rule of law. In the context, where Nepal has expressed its commitments towards rule of law through the preamble of Constitution itself, such temporary and uncertain nature of judicial authorities cannot be imagined.

Not only issues of having hierarchical control upon the military organization and making military personnel disciplined and dignified, are within the subject matter of military justice, rather, opportunity to submit grievances in disciplined and dignified manner and having judicial remedy in such issues, are also the subject matter of military justice. Hence, while reviewing the structure and jurisdiction of military courts, there should be attention towards such judicial mechanisms too. This issue is important from the perspective to create an environment for enhancing faith and confidence of military personnel in military justice system too.

Judicial process is an entire process of investigation, prosecution, defense and adjudication. The justice dispensation become effective only through all these process and competency, effectiveness and

fairness involved in such mechanisms. The investigation and prosecution should also be independent, fair and effective in the same manner as the independency and fairness of judicial authorities is expected. In the absence of thematic specialization in such entities, it is not possible to fulfill expected responsibility. Considering the military justice, along with the effectiveness of Court Martial, it is also equally necessary to ensure the effectiveness of investigation, prosecution and defense system of the offenses under the jurisdiction of Court Martial. There shall not be any smell of direct intervention of Military Officials in such mechanisms; if officials involved in such mechanisms are also guided through the similar service, terms and regulations like other military personnel, the independent functioning of such mechanisms is not possible and the independent investigation and prosecution from such mechanisms could not be expected.

Similarly, the practice of involving the same official or same mechanism of the military organization in investigation, prosecution, defense and adjudication ultimately weakens the entire military justice system. Such kind of judicial system cannot be expected in any civilized, democratic and the nation dedicated towards rule of law. There is need of reform in the existing military justice system even in the context, where this court had dissolved Royal Commission on Corruption Control (*NKP 2062, No. 11, P.1307*) with an opinion that independency and fairness cannot be ensured when entire functions of investigation, prosecution and adjudication are prescribed to the same authority.

There should be assurance of the provision for appeal against the judgments of Court Martial. It is necessary to ensure at least one tier examination of judgments in order to correct the mistakes of judgments of lower judicial authorities, to ensure the reliability of the adjudication, and to assure the respective party that the justice has been done in the matters related with rights and liabilities. It is therefore, the necessity and reasonability of appellate jurisdiction is equally important in the context of military justice too.

While observing the provisions of Military Act, it is seen that Special Court Martial is empowered to hear appeals against the judgments or final orders of General Court Martial and Summary General Court Martial. Moreover, Act has also provided that the judgment or punishment of Summary Court Martial is to be final, and the judgment or the punishment of District Court Martial is also to be final after an approval from higher military official. These provisions show that the judgments of such Court Martial are final without appellate judicial process. Similarly, the provision of approving the judgment or punishment of General Court Martial and Summary General Court Martial by military official makes it likely that judgments or decisions of General Court Martial, Summary General Court Martial, Summary Court Martial and District Court Martial, except that of Special Court Martial are under the administrative control of military organization. The decision of any judicial authority could be examined only through the judicial processes, and no any authority or official retain any power to either approve or repeal such decisions. This is the sovereign character of judicial decision. Hence, the provisions related with military justice enshrined in Military Act and Regulations should be established in such a manner that they are consistent with the constitution and principles of justice. Since the system of either approving or repealing the judgments of Court Martial of first instance by Military Official cannot be said to be reasonable through any logic, there shall be assurance of at least one tier appeal system for the examination of the judgments or decisions of Court Martial.

The appellate judicial authorities as such examines the judgments of court of first instance, thus, judicial officials to remain in such authorities should possess basic knowledge regarding general standards of justice. Due to the impossibility of justice dispensation in the lack of thematic specialization of law and justice, in recent days, there is widespread trend of constituting courts with the majority number of civilian judicial officials who can adjudicate impartially and independently, rather than constituting with presence

of majority number of military or administrative officials in such authorities. In the process of reforming military justice system, the civilized democratic nations of the world have stressed in this aspect too. It is therefore, in the structural and legal reform process of Nepalese military justice system, this issue should also be prioritized.

On the basis of above observation, the Special Court Martial, which is established as a court of first instance in certain serious nature of cases and as an appellate body against the judgments of Court Martial; requires timely reform in its structure in order to ensure judicial impartiality, independence and fairness. Similarly, it is also necessary to rethink about the formation of Court, jurisdiction, its place, working procedure, working environment, service, terms and facilities of judges and officials of courts, with an objective to have adequate provision as per the spirit of required independency for justice, impartiality, fairness and responsibility. It is therefore, in the context of modernization and democratization ongoing in various sectors of the country, and the human rights obligations accepted by the country, along with ongoing continuous reforms of various other civilized nations of the world; this Bench has reached to the conclusion that, it is necessary to create a situation where military personnel could realize the fairness of justice, by initiating judicial reform through timely review of military justice system under Military Act.

Although the petitioner, in the given petition, has claimed for the nullification of certain sections of Military Act with arguments that those sections are inconsistent to the constitution, in the context, where it is expedient to observe given dispute through broad periphery of military justice under the entire provision of Military Act, it will be difficult to manage the effect to the entire Act from the nullification of certain provisions of the Act; hence, here, it is not feasible to declare certain sections of Military Act *ultra vires* as per the demand of the petition. However, in the context of the questions raised by the petitioner, various provisions of Military Act are

required to be amended as stated above, through the perspectives of human rights, fair justice and rule of law.

Thus, by creating a balancing situation in between the sensitive nature of military service, compliance of hard discipline, and the fact that military personnel should not surrender their human rights and right to justice only due to the reason that they serve in the military, there is necessity of legal and institutional reform of Military Act, 2006 after reviewing its various provisions, and necessity of effective enforcement of such amendments, in order to develop modern, civilized and democratic system that ensures justice to the military personnel as like other people of the country. It is therefore, this Directive Order has been issued in the name of Government of Nepal, Office of the Prime Minister and Council of Ministers, Ministry of Defense and Ministry of Law and Justice, for the arrangement of necessary reforms as required, by reviewing the existing provisions related with military justice in Military Act, along with adequate consultation with experts working in the area of law and justice, military personnel of all ranks, security sector of the government, civil society and human right activists, after constituting a Task Force with representation of Law, Justice and Security sectors, within six months from the date of receipt of this order. Let the notice of this order be given to the respondents.

Furthermore, let the Judgment Enforcement Directorate of this Court be notified in written for regularly monitoring on this matter, and the Case File be transferred pursuant to the rules after cancelling the registration of the petition.

We concur with the above decision.

Chief Justice Khil Raj Regmi
Justice Krishna Prasad Upadhyaya

Done at this day of 16th Ashadh 2068 BS (June 30, 2011)
Translated by Saroj Raj Regmi

The right to enter into a marriage and settle a family is an universally recognized human right. When she has attained marriageable age and prohibited to marry for a long period it can not be called lawful and reasonable because it hinders her right to reproduction and of reproductive health.

Supreme Court, Special Bench

Hon'ble Justice Ram Kumar Prasad Shah

Hon'ble Justice Gauri Dhakal

Hon'ble Justice Prem Sharma

Writ no. 064-ws-0034

Subject : Certiorari & others.

Petitioner: Advocate Achyut Prasad Kharel, a resident of Kavrepalanchowk district, Kharelthok VDC, Ward No.4, Kharelthok

Vs

Respondents: Office of the Prime Minister and the Council of Ministers.

- **It can not be viewed as proper and reasonable by both the judicial and practical point of view that a subject matter which has no relation with the function to be carried out in any service to become the conditions of that service.**
- **The terms and conditions of every public service may vary to each other. Every service has the privilege of placing its own distinct type of conditions each**

depending upon the nature of the work. However, the conditions determined for each service must substantially be relevant to the functions to be carried out holding under such service group. If these conditions of service are not found relevant to the nature of the work to be performed holding in any post of the given (concerned) service but directly injures the self-dignity or feelings of the people of any class or community and is discriminatory in term of race or gender in such a situation it must be contemplated that such activities hinder the right to live a dignified life as enshrined in Article 12(1) of the Constitution.

- **In military service, all the jobs may not be of similar nature. Hence, those assisting in managerial works and those commissioned in military warfare and are leading the troops in war fronts must not be thought the same and put in the equal parameter. In spite of this, if the duties to be performed by man and woman are the same but conditions of qualifications and disqualifications are varied, the reason thereof must be clearly and understandably explained.**
- **To take birth in any particular sex must not be perceived as a bad omen nor should it be held as key criteria of disqualifications since it is the gift of nature.**
- **If there is imposed unnecessary and unreasonable limitation in the name of ensuring development or empowerment of the backward classes including women such an act can not be taken as constitutional.**
- **The constitution has recognized the right of reproduction and the reproductive health as the fundamental right but to impose restriction by law on marriage for five years to a matured woman cannot be called as constitutional.**

Decision

Ram Kumar Prasad Shah, J: The brief fact of the present writ petition came to register in this court in pursuant to Articles 32 and 107 (1) of the Interim Constitution of Nepal, 2063 and the order made thereof is as follows:

Article 16 of the Universal Declaration of Human Rights guarantees the right to marry and settle the family to man and woman of marriageable age. The same right is ensured also by the Article 23 of the International Protocol on Civil and Political Rights, 1966 to which Nepal is a signatory.

Rule 4.1.2 of Military Parachute Folder Woman Rules, 2046 had a provision that a military parachute folder woman must be retired from the service if she married within 5 years of her appointment. Even if the marriage was performed in accordance with the Chapter on Marriage of the Country Code (Muluki Ain) which provides for different criteria relating to marriage, or has performed the marriage under Marriage Registration Act, 2028 complying with the prescribed conditions, however, the provision made in the said Rule 4.1.2 has put restriction on the exercise of the right to settle a family as provided by Article 23(2) of the said protocol and on the other, it has not only encroached the right of equality under Article 12(1), (2), (3) of the Interim Constitution of Nepal, 2063 but also prevents from enjoying the rights pledged for the protection and empowerment of woman and the people of the weaker section of the society mentioned in the restrictive clause of the said Article as a special arrangement including enjoying the right of woman mentioned in Article 20 (1) which provides for not making any discrimination only on the ground of being a woman.

Hence, the provision contained in Rule 4.1.2 of the Military Parachute Folder Woman Rules, 2046 which contradicts with the Articles 12(1), (2) and (3) and Article 20(1) as well as Article 23(2) of

the International Protocol on Civil and Political Right, 1966 is requested to declare unlawful and void in accordance with Article 107(1) of the Interim Constitution of Nepal, 2003.

> The single Bench of this court has made an order to show-cause about what had happened in this and why an order as demanded by the petitioner should not be issued? Notify the respondents to submit their reply in writing and present the case as per rule after the respondents submit their reply.

The Ministry of Defense in its written reply had a mention that-

Military Parachute Folder Woman Rules, 2046 was promulgated with the authority of Military Act, 2016. Currently, the Military Act, 2063 prevails following the death of the earlier Act. Section 144 of the Act has stipulated that the actions taken or performed under the Military Act, 2016 shall be deemed to have been done or performed under the Military Act, 2063. Since, it is natural to enact various Rules and effect amendments under the Act as per need, the writ petition should be quashed.

The written reply submitted on behalf of the GON, Office of the Prime Minister and the Council of Ministers which complains for the cancellation of writ petition had a mention that it is a law of nature to appear the signs of special changes on the physical conditions of woman after marriage because of the biological reason. Because of the marriage the natural changes could be seen in the body of the trainee during Parachute Folding Training period and may cause hazard in her body, therefore, the said provision was incorporated for the privilege of the positive discrimination taking into account their health and also for the protection of human rights. The provision made in the form of positive discrimination can not be referred as discriminatory.

The written reply submitted on behalf of the Ministry of Law, Justice and Parliamentary Affairs had a mention that since the Military Parachute Folder Rules is a rule related with a particular subject or service, now therefore, the specific or the particular type of qualification and the conditions are determined for the military service under that Rules. Those women who do not posses the qualification needed therefor, or have not met the prescribed criteria or are unable to fulfill the required quality or conditions are free from joining in this service. Where the entry in the service is the acceptance of the provision contained in the Rules, now therefore, it can not be assumed that someone has deprived of his/her human rights. Where it is clearly provided that one can enter into marriage life after passing 5 years of the recruitment, the writ petition should be quashed.

The written reply submitted by the Ministry of Women, Children and Social Welfare claiming the cancellation of writ petition has mentioned that the Ministry is always working for the abolition of all the discriminatory laws based on gender and marriage status and incorporating the provision based on equality. Now therefore, there is no need for declaring the Rule 4.1.2 of Military Parachute Folder woman Rules, 2046 null and void.

The military service is different to that of the other services and deserves special quality. Some of the fundamental rights of the persons working in this service may be suspended during service period and made this institution more disciplined, respectable and given stress on professional skills.

Even a minor mistake or carelessness during parachute folding may cause a great casualty or death of a person exercising para-jump. So the person joined in this service required to build their skill. After being appointed in military parachute woman, she needs undergo various training together with parachute folding. For the completion of this training, it consumes a five years period. While taking leave during the period of training for marriage and impregnated she may

have to miss such training. When the training was missed she cannot become a skilled woman para folder and hampers her promotion and other service facilities, which consequently leaves serious impact also in generating the livelihood means. It violates also the restrictive Clause of Article 12 of the constitution that provides for women empowerment.

The provision contained in Rule 4.1.2 of the Rules has provided for an equal opportunity available for a man while exercising para folding and para jump. If she is asked to undergo such a laborious task during her pregnancy the embryo inside her would be destroyed and may cause risk to both the mother and baby. During training period she has to live inside the barrack. She can not stay separately immediately after she delivers a baby. So this provision was brought for the welfare of woman hence does not contradict with the constitution. Therefore, the writ petition is subject to cancellation. This was the content of the written reply presented on behalf of the Ministry of Defense.

In this writ petition, which is duly presented for hearing today, the petitioner's advocate Achyut Prasad Kharel maintained that the Rule 4.1.2 of the Military Parachute Folder Woman's Rules, 2046 had a statutory provision that a Parachute Folder Woman, who marriage prior to the completion of five years from the date of her appointment should leave the job. The said provision which puts restriction on marriage merely because of being a woman is subject to void since it unreasonably deprives the fundamental right provided in Articles 12, 13, 18 and 20 of the constitution. The right to marry and settle a home by a matured citizen is ensured also by Article 23(2) of the International Protocol on Civic and Political Rights. When the Nepal law contradicts with that protocol on Civic and political Rights the Nepal law becomes invalid under Section 9(2) of the Treaty Act and the provision enshrined in Protocol prevails to which Nepal is a signatory. The provision contained in the Rules pertaining to Armed-Police which puts restriction on marriage during training period is declared contrary to the constitution and the international protocol

and has issued a directive order by this court to bring about necessary reforms in it. The present Rule in question has not put restriction only for training period but for a period of five years of joining the service. A woman who involves in the normal operation of parachute folding has no reason to impose ban on her fundamental right to marry should be invalidated.

The learned joint attorney general represented on behalf government of Nepal Mr. Yuva Raj Subedi presenting his advocacy reiterated that the military service is a service different to that of the other civil services. It demands a hard physical labor and discipline. If marriage is allowed within the training period, no training can be completed as demanded by the standard of the service. The hard labor causes negative impact on the embryo of the womb and also to the mother. It hampers on the effectiveness of the whole military service so it is reasonable to put restriction for some period. As she is free to marry after five years, there is no relevancy of a question of breaching the fundamental right. The writ petition should be quashed.

After hearing the argument of the learned counsels represented from both the parties while this court observes the writ-petition, written reply and the overall aspects of the relevant provisions of the laws and the constitution, the following questions have been necessary to be settled in regard to the claim made in the writ petition:

(1) Whether or not the provision of Rule 4.1.2 of the Parachute Folder Woman's Rules, 2046d which states that a woman who enters into marriage prior to the completion of five years of her appointment should be retired from the service is consistent to the Interim Constitution of Nepal?

(2) Whether an order as requested in the petition should be issued or not?

While considering upon the first question to be settled, the petitioner's main claim is that a legal provision which has compelled a women to take retire from service if she got married prior to the completion of five years from the date of her appointment mentioned in Rule 4.1.2 of Armed- Police Parachute Folder Woman's Rules , 2046 has unlawfully imposed restriction on the fundamental rights provided by Articles 13 and 20 of the Interim Constitution of Nepal, 2063. As the written reply of the respondents were observed, they are found to have made a clear that the military service is a special type of service and while employing the physical labor for the performances of duty holding in the post under that service, the embryo inside the womb and the pregnant woman sustain injury that's why such a provision was brought about. In order to become clearer about what has claimed in the petition and written reply, it will be appropriate to go through the relevant provisions of the concerned laws.

Rule 4.1 of Military Parachute Folder Woman's Rules, 2046 reads- " The Parachute Folder Woman shall be removed from service in the following circumstances and likewise, in Rule 4.1.2 " If she got married prior to the completion of five years from the date of appointment". This statutory provision of the Rules explicitly mentions that incase a Parachute Folder Woman married prior to the completion of five years from the date of her appointment, she is compulsory to take retirement from the service. This provision of Rules is found included under the criteria of disqualification.

For the operation of any public services, there have been the provisions of separate laws each in view the nature of the work to be performed remaining in the concerned service, group or sub-group including the accountability and the risk associated therein. Basically, the objectives of determining the conditions of service also lie in it. It can not be viewed as proper and reasonable by both the judicial and practical point of view that a subject matter, which has no relation with the functions to be carried out in any service, to become the conditions of that service. The terms and conditions of

every public service may vary to each other. Every service has the privilege of placing its own district type of conditions each depending upon the nature of the work. However, the conditions determined for each service must remarkably be relevant to the functions to be carried out holding under such service group. If these conditions of services are not found relevant to the nature of the work to be carried out holding in any post of the concerned service but directly injures the self-dignity or feelings of people of any class or community and is discriminatory in term of race or gender, in such a situation, it must be contemplated that such activities hinder the right to live a dignified life as enshrined in Article 12(1) of the constitution.

In the written reply of Nepali Army Headquarter, it is claimed that the military service is a special type of service so it demands special qualification and service conditions. Essentially, the military service is a service of strategic importance which has to maintain the national sovereignty inviolable by the external force, there is no reason to dispute with the fact expressed in the written reply that the military is the distinct and of outstanding nature of service than the other public services. However, all the business may not be of similar nature there too. Hence, those assisting in managerial works and those commissioned in military warfare and are leading the troops in warfronts must not be thought the same and put in the equal parameter. In spite of this, if the duties to be performed by man and woman are the same but the conditions of qualifications and disqualifications are varied the reason thereof must be clearly and understandably explained.

While making observations of the preamble of the Rules in question it is found stated that the said Rule was formulated in exercise of the power conferred by Section 165 of the Military Act, 2016 and the Section 165 indicated by that Rule provides-" the government may promulgate Rules on various subjects of military service to implant the objective of the Act. It has been clear by the very title of the Rule that the Military Parachute Woman's Rules, 2046 was brought to determine the service conditions for women associated with the task

of parachute folding among the various jobs of the military service. The very diction used in the Rule called Parachute Folding is sufficient to understand the fact that it is the folding of parachute and maintain it in good conditions for the use.

For more clarity about what type of post is the Parachute Folder Woman's post and the nature of the service she is required to deliver, it is necessary to observe the other provisions mentioned in the same Rules. In the Rule 2.1.2 of the definition part of the Rules, the Parachute Folder Woman means a woman working as Parachute Folding Commander, Register clerk, Associated Chief Folder Woman and the Chief Folder Woman. Defining the term Parachute Folding commander used in the said Rule, the Rule 2.1.1 states that the term commander includes a person who packs, repairs and maintains the parachute and the other accessories relating to the parachute. By this, it has come to clear that the key concern of the post of Parachute Folder Woman is attached with the task of folding the parachute, carry maintenance work thereof and take care of the accessories thereto which has no concern with warfare to take place in the warfronts. To carry out these activities, according to what the respondent the Army Headquarter has claimed in its written reply needs a five year long training program and if impregnated after marriage the embryo may be destroyed appears irrational and unreliable which is not clearly pointed out in the written reply of the respondents showing the sufficient ground to believe that if Parachute Folder Woman got married or got impregnated, she cannot perform even the managerial task or sustains negative impact in her health.

The issue which the petitioner would like to raise in this petition is a discriminatory treatment made in course of enjoying the right to employment by imposing unreasonable restriction merely because of being a woman. Because of a provision made in Rule 4.1.2 of Military Parachute Folder Woman's Rule, 2046 according to which a Parachute Folder Woman may be removed from the service in case she got married prior to the completion of five years from the date of

her appointment has substantiated a claim of discriminating treatment against woman and the said restriction was imposed only because she is a woman has violated her right of equality provided by Article 13 and the rights relating to woman under Article 20 of the Interim Constitution of Nepal, 2063.

This restriction imposed on marriage for a long period just to remain in that service because of being a woman has created a compelling situation to Nepalese women to choose only one alternative between the two: either not enter into that service or remain unmarried until five years of joining in the service. Since the written reply of the respondents had a claim that the women are free not to enter in that service, it indicates a discriminatory treatment made towards Parachute Folder Women on the ground of sex. To take birth in any particular sex must not be perceived as a bad omen nor should it be taken as the key criteria of disqualifications since it is the gift of nature.

Article 13 of the Interim Constitution of Nepal, 2063 had a constitutional arrangement on rights of equality. The sub-Article (1) of which states- " All the citizens are equal before law and no one shall be prevented from the equal protection of law". This fundamental value has been incorporated in the constitution. The right of equality must not be perceived indifferently. The basic objective of the principle of equality opposes unequal treatment among the people of any class or community of equal conditions and status or it means equality among the equals. Therefore, the state may enact laws by classifying the people of the equal conditions and status. But such classification must be rational, reasonable and simple to understand and there must have been a meaningful law and such specification. The full bench of this court has drawn a principle in a case of habeas corpus run between Iman Singh Gurung and Court of Army General (Nepal law bulletin 2049, Decision No. 4597, page 710) in this regard has been recognizing to date as an established principle.

The respondents in their written reply have made a claim that such a provision was brought for the protection of life and liberty of women themselves. There has been made constitutional provision in the restrictive Clause of Article 13(3) so as to make a special arrangement of women and other backward class. However, the said service conditions of the Rules which compels women to remain unmarried for five years just for joining in a profession or employment has prevented them from an opportunity and created discrimination on the ground of sex rather than ensuring their empowerment and development. Nothing as the need of excessive labor donation or the job is risk prone etc to undertake the jobs of parachute folding has not been clearly stated by the respondents. The biological change likely to occur in woman during post-marriage period would make them unable to undertake the job of parachute folding or would create risk in her body if she undertook it as claimed in the written reply by the respondents have not been proved substantially. Hence, this bench can not agree with such baseless claim.

The proviso Clause of Article 13(3) of the constitution which is motivated to internalize the theme of the development, protection and empowerment of backward classes of people including women has comprehended the positive attitude of promotion and upliftment of the people of that class. For this they are needed to facilitat with the health, education and employment related opportunities giving priority or providing special protection. This type of reservation system has been initiated in various public services of the country including the civil service. But if there are imposed unnecessary and unreasonable limitations in the name of insuring the development or the empowerment of the backward classes of people including women such an act can not be taken as constitutional.

The Article 18 of the existing constitution of Nepal, 2063 has incorporated the right to employment and social security as fundamental right about which earlier constitutions were silent. Sub-Article (1) of Article 18 of the constitution states "every citizen shall

have the right of employment as provided in law" and sub-Article (2): the women, laborer, elderly people, physically impaired as well as disabled and helpless citizens shall have the right of social security as provided in law". What a sincere importance and priority the staff would like to offer to the right to employment can easily be understood by its readiness though it is said to be available only as provided in law. To realize this objective, the existing laws and laws to be enacted in future in regard to the right to employment must be sincere to ensure this right of the people. If any provision so as to acquire an employment on the ground of sex is brought about, such a provision would make the right to employment of citizen uncertain.

Likewise, Article 20 of the constitution had a provision of fundamental right pertaining to the right of women. Sub- Article (1) of Article 20 reads- " No discrimination shall be made merely on being a women. The said provision of sub-Article (1) has negated any forms of discrimination against woman. That means constitutionally no discrimination could be made on woman only because she is a woman. In the given case, the disqualification is found created by prohibiting marriage prior to the completion of five years of appointment and to act remaining in the post of Parachute Folder because of her being a woman. In the same manner, the sub-Article (2) reads- "Every woman shall have the right of reproductive health and reproduction". The constitution has recognized the right of reproduction and reproductive health as fundamental right but to impose restriction by law on marriage for five years to a matured woman can not be taken as consistent with the constitution. Except where the nature of the job itself requires having a specific conditions, in all others cases the legal provision to restrict women for marriage just because she has to enter into any service and held in post shall infringe right relating to reproductive health.

The petitioner also had a claim that the said provision of the Rules has violated the various international treaties, conventions and protocols to which Nepal is a signatory. The basic elements of human right are to live a self dignified life as per the humanitarian

values and norms because of being a human. Human rights discard the discrimination between mankind on the ground of sex. Article 16 of the Universal Declaration of Human Rights, 1948 has not only guaranteed the right of marriage and start a family but also ensured everyone the equal excess in public service of his country in Article 21(2) of the same and the Articles 23(1) has provided every individual the right of work, freedom of his choice of employment, suitable job and favorable working environment as well as protection against employment.

Similarly, the Article 1 of the Convention on the Abolition of All Sorts of Discrimination against Women, 1979 has defined discrimination against women to mean as – " Notwithstanding any forms of marital status between men and women, any discriminations, exclusion or restriction based on sex with the aim of violating human rights and the values of fundamental freedom, intervention in their enjoyment on the ground of equality between men and women in any field as political, economic, social cultural and civil". Article 11(c) of the same convention has guaranteed the freedom of choice of occupation and employment, right of promotion, service security or all the terms and conditions of service and privileges thereof.

As stated above, all sorts of discrimination against women on the ground of sex in terms of employment and holding in service has denied by the provisions of the said declarations and has been a party thereof. So it is her liability to adopt and show respect towards them and keep them inviolable. The said provision contained in the Rule in question is not found consistent with the sprit and provision of those international documents.

Apart from this, this court has invalidated also some of the statutory provisions contrary to international law relating to human rights and unconstitutional rights and all the discriminatory actions against woman on the ground of sex and has issued directives orders to all agencies including the government of Nepal and propounded a matured principle (Nepal Law Bulletin, 2052, Decision No. 613,

page 105, Nepal Law Bulletin 2053, Decision No. 6223, page 537, Nepal Law Bulletin 2057, Decision No. 6898, page 376, Nepal Law Bulletin 2066, Decision No. 8187 page 1089 etc.). There is no reason to dispute with those precedents enunciated by this court.

Now considering upon the last question to be settled on whether or not an order as sought by the petitioner should be issued, the statutory provision contained in Rule 4.1.2 of the Military Parachute Folder Woman's Rules, 2046 which discriminates women on the ground of sex restricting her to get married until five years of appointment is found clearly contradicting with the constitutional provision relating to right of equality and women's right provided by Articles 13 and 20 of the Interim Constitution of Nepal, 2063 on the basis of the discussion held on the various paragraph above. Now therefore, the said statutory provision contradicts with Article 13 and 20 of the constitution. Hence the said statutory provision has been invalidated in accordance with Article 107(1) of the Interim Constitution of Nepal, 2063. The copy of this order be sent through the office of the Attorney General for the knowledge of the respondents and the file of the case be handed over as per rule after removing it from the record of the regular proceedings.

We concur with the above decision.

Justice Gauri Dhakal
Justice Prem Sharma

Done at this day of 5th Kartik, 2066 BS (October 22, 2009)
Translated by Bhim Nath Ghimire

The Judicial independence is vital for the smooth functioning of living democratic system. Now therefore, no administrative officers discharging purely an administrative duty should be delegated the power of awarding punishment of imprisonment beyond limit.

Supreme Court, Special Bench

Hon'ble Justice Kalyan Shrestha

Hon'ble Justice Girish Chandra Lal

Hon'ble Justice Sushila Karki

Writ No. 066 –WS-0043

Subject: Laws inconsistent with the Constitution be declared ultra vires.

Petitioner: Advocate Amar Bahadur Raut, working in Advocacy Forum situated in, Ward No. 3 of Kathmandu Metropolitan City, Kathmandu district on behalf of the said organization and on his own.

Vs.

Respondents: Government of Nepal, Ministry of Home.

- **The backbone of judicial process is independence, competency and impartiality. Faith of the citizens towards judiciary shall be enhanced through easy access to justice, together with by the fair and prompt hearing. There should not prevail any type of interference and pressure from outside in course of performing one's duty independently by any agency and authority. For that, both the institutional and functional**

independence is needed. There shall be required complete knowledge of concerned subject matter as well as substantive law, require degree of experience and training to carry our judicial proceedings and to perform judicial functions competently.

- **Justice shall remain elusive when pressures and interferences on courts and justices are accepted. Citizens' right to get justice is jeopardized finally when there is a situation of delivering justice by access and influence, not by the principles of law and justice. Deviation from the judicial works may be there when officials and institutions, which have the jurisdiction to take decision on life, freedom and rights of the citizens, are put under interference, pressure and influence. Thus judicial independence is inevitable to ensure and respect citizens' rights to access to justice, not for the protection of rights of judicial agencies and officers.**
- **The concept of independent judiciary is directly associated with the rule of law and democracy (Loktantra). Judicial independence is an inevitable element to keep existence of living and practical democratic system intact. Judicial institution should remain free from state agencies including executive and officials to maintain rule of law.**
- **Chief District Officer is an administrative authority who performs duties under direct control and direction of the executive. The District Administration Office and Chief District Officer, who functions under the key component and system of executive mechanism, could not be expected as a separate institution from the government and could not be searched for an independent existence or could not be imagined that it has different role. The Chief District Officer, who represents the**

stature of the government as an administrative chief, could not be imagined that he/she could work going beyond the policies and directives of the government.

- **Under the given situation that the administrative officer of the government is given the judicial power of sentencing a person limit lessly, such exercise cannot be considered as per the values and norms of independent judiciary as it shows the possibility of encroachment of the rights of the minorities from the state level itself.**
- **It cannot be natural and rational expectation that a person having different nature of knowledge, experience, responsibility and context can bring another result.**
- **Under the situation that the Chief District Officer and other administrative officers, who do not need to attend compulsory legal education, and legal and judicial procedures, are given jurisdiction of announcing jail sentence after conducting a hearing of serious criminal cases, and will not be a situation that they can perform the judicial works efficiently.**
- **The rational basis cannot be considered that the Chief District Officer and other administrative officials, who are under the control and direction of the executive and having minimum level of judicial nature, can use judicial jurisdiction in a free and efficient manner.**
- **The judicial authority delegated to the Chief District Officer cannot be exercised impartially as he/she has departmental bias in any pretext regarding the security administration.**
- **There would not be guarantee of citizens' fundamental human rights to get fair and impartial justice at a time**

when executive or government's administrative officer is given rights through law, to look after serious criminal cases of crime prosecuted by the government without basic measurement of judicial independence, fairness and control.

- **It is not appropriate to hand over criminal jurisdiction to any administrative officer that the state functions through different departments by keeping in mind of departmental proximity and easiness with the aim of using justice as a tool without managing basic things like capacity to take judicial decision, proper procedure, physical infrastructure, human resources, mechanism to implement decision, judicial discipline, responsibility and evaluation. Realization of delivering justice cannot be there without using and following basic norms and feelings of judicial process.**
- **Handing over unlimited and broader judicial rights to an administrative officer who has a duty to function solely as administrative role, which will replace the regular courts or tribunals that are unrelated to working nature, specialization and departmental responsibility, shall be inappropriate in terms of accepted principles of justice and constitutional provision, international standards and practicality.**
- **Major consideration must be there to limit the administrative officer to the judicial accountability related to short term jail or departmental action that consists of fine.**
- **The judicial jurisdiction exercised by administrative officer should ensure the basis of independency, competency and impartiality, and it should guarantee the due process of law and judicial review too.**

- **Before authorizing judicial jurisdiction to any administrative officials, it should be considered that the subject should whether be separated from the judicial jurisdiction or such rights should not be misused or the legislator should pay serious attention that there would be basic or minimum standards to ensure performance of such works in an independent, competent and impartial manner.**
- **It is not appropriate and rational to declare laws *ultra vires* because that may invite more complexity and anomalies in the present transition as fulfillment of judicial vacancies could not be made through the judicial decision or order and certain time may consume to make necessary improvement and amendment to the related laws by the legislature, and appropriate arrangement from the executive.**

Decision

Kalyan Shrestha; J: The summary of the fact and order of the writ petition filed in this court in pursuant to the Article 32 and Article 107 (1) of the Interim Constitution, 2063 BS are as follows:

Petitioner Advocacy Forum Nepal, registered with District Administration Office, Kathmandu under Organisation Registration Act., 2031 BS, has been functioning as a non-governmental organization. The organization established with the aim of being active in the field of human rights and rule of law, is playing the role of non-governmental organization in the area of improving criminal justice administration. On the basis of practical experiences while presenting in the District Administration Office in course of providing legal services to the poor people, the jurisdiction to conduct hearing on the criminal cases to such agency provided by the law has undermined independent and impartial hearing, and right to hear cases from competent institution and recognition of independent

judiciary. Thus, I myself have presented here with this writ petition as there is no effective alternative legal remedy to declare the laws that confer district administration office to conduct hearing on criminal cases *ultra vires* because the system contravenes with the recognized principles of justice, tradition and the constitution as well.

The jurisdiction delegated to District Administration Officer by different laws to conduct hearing on criminal cases directly contravenes with the Preamble of the Interim Constitution 2063 BS, its Articles 13, 24 (9), 100, 101, thus, I claim the followings through the petition to declare the laws that contravene with the Constitution null and void as per the Article 107 (1) of the Constitution:

Clause 5 of the Local Administration Act, 2028 BS has stated that here shall be a District Administration Office, Nepal Government shall appoint a Chief District Officer as chief administrative officer and he/she shall function as per the policy, rules and direction of the Government of Nepal. In pursuant to Clause 5 (5) of the same Act, his/her major duties are to maintain law and order in the district, to assist development works conducted by District Development Committee, Municipality, Village Development Committee, to care, protect and repair all the property of Nepal Government, and to work as per the order and direction of the Nepal Government in different time and so on. The Clause 9 of the same Act has delegated various other rights to the Chief District Officer.

Besides these, Children Act, 2048 BS, Compensation against Torture Act, 2028 BS, Prison Act, 2019 BS, Ancient Monuments Protection Act, 2013 BS, Nepal Citizenship Act, 2020 BS, Forest Act, 2049 BS, Motor Vehicle and Transport Management Act, 2049 BS, Marriage Registration Act, 2028 BS, Organisation Regulation Act, 2034 BS, Commission for the Investigation of Abuse of Authority Act, 2049 BS, Public Security Act 2046 BS, and Education Act, 2012 BS and including other Acts and laws have placed Chief District Officer as Chief Administrative Officer as well as ex-officio chairman and member of different committees in the district. By studying these

provisions also proved that the primary duty of the Chief District Officer is to supervise and operate daily administration and maintain law and order in the district. In addition to above mentioned functions, the Chief District Officer has been delegated judicial works too under different laws they are as follows:

a. Clause 5 and 6 of Some Public (Crime and Punishment) Act, 2027
b. Clause 9 of Essential Comodities Protection Act, 2012.
c. Clause 15 of the Black-marketing and Some Other Social Offences and Punishment Act, 2015.
d. Clause 19 of the Social Behaviour (Reform) Act, 2033.
e. Clause 19 of Arms and Ammunition Act, 2019.
f. Clause 15 of Birth, Death and other Personal Events (Registration) Act, 2033.
g. Clause 11 of Aquatic Animal Protection Act, 2017.
h. Clause 15 of Nepal Standards (Certification Marks) Act, 2037.
i. Clause 22 of Veterinary and Livestock Service Act, 2055.

As per the Article 100 (1) of the Interim Constitution, the power relating to justice in Nepal shall be exercised by the courts and other judicial institution in accordance with the provisions of this Constitution, the laws and the recognized principles of justice and the Article 101 of the Constitution has provisioned three-tiers of courts. Law has provisioned that there are other courts, judicial agencies or tribunals as well to conduct hearing and to decide special cases. With this provision, there are separate roles of the state organs and among these functions, there are the provisions that other organs can use the justice related rights besides judiciary.

This constitutional provision should be interpreted in accordance with the concept of independent judiciary stated in the Preamble of the Constitution and its Article 33 (c).

Article 24 (9) of the Interim Constitution has stated that every person shall have the right to hear from a competent court and judicial institution and Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR), 1966, to which Nepal is a party, has also guaranteed the civilian rights to get fair trail from an impartial tribunal. As per the Clause 9 of the Treaty Act 2047 BS, the provision of the Covenant shall prevail at a time when the provisions of Nepal Law contravenes with the provisions of the International Conventions.

Right to get hearing from an independent and competent court, judicial body and tribunal, which are the provisions clarified by national and international law are also defined under the fundamental rights and human rights of an individual. It is accepted as a part of human rights that charges labeled against somebody should be heard from a competent and independent judicial institution.

Clause 5 of the Local Administration Act, 2028 BS has fairly proved that Chief District Officer is the chief administrative officer of the district. There is no doubt that district administration officer is an organ of the executive. There is a clear constitutional provision that the works relating to justice shall be exercised through court and judicial body. Although there is a legal provision of constituting other courts, judicial institutions or tribunals to hear and decide on special kinds of cases, district administration office is not a special tribunal to look after special cases. It is a common practice of transferring the Chief District Officer with the change in the government for the purpose of supporting the government in its daily works as the Chief District Officer is the representative of the government in the district. Chief District Officer is not an independent and competent institution to look after cases, rather he/she is an administrative official

appointed with administrative responsibility to perform administrative works as directed by the government. Chief District Officer, by nature of his/her works, should be engaged with the common civilians of the district, in course of perferming different daily works. In this situation, he/she cannot provide fair justice and it is not justice to give the rights to him or her to conduct hearing on the criminal cases.

Separation of authority of state organs is the major principle of separation of power. Every democratic country has adopted these principles to protect the rights of the civilians. That’s why the judicial works are delegated to the court. Justices are aware of judicial principles to be followed, judicial tradition, recognized principles of justice while getting involved in justice delivery and the judges are appointed on the basis of these experiences. Our constitution has also envisaged independent judiciary. Eligibility of judges and independent of the court have been provisioned in the constitution. Chief District Officer is the officer who is directly appointed by the executive. It is not rational to give judicial responsibility to the executive.

It is clear on the technical ground that Chief District Officer is not eligible officer to hear cases as he/she does not need to be a student of law and no compulsory condition to have knowledge of recognized principles of justice, skills and experiences. It is not compatible to justice, law and rationality to provide jurisdiction to decide cases by conducting investigation by the organ of the executive and having right to slap jail term to the extent of seven years by the same institution of the same body. The jurisdiction given to the Chief District Officer to look after cases is null and void on the principle of separation of power, too.

The related law has not clarified the grounds and reasons behind handing over such rights to Chief District Officer although there is independent and competent judiciary to conduct initial trial and decide the cases. If the Chief District Officer is not such person of

having specialized knowledge in the area, there is no proper grounds and reason to delegate such jurisdiction to him/her. Similar kind of accused persons have been facing discrimination at a time when the accused of similar natured case of getting hearing from the independent and competent court while similar natured accused of getting hearing from the organ of the executive. This kind of discriminatory action is against the right to equality guaranteed by the Article 13 of the Constitution.

The Article 101(2) of the Constitution, which has provisioned that other courts, judicial institutions or tribunals shall be constituted, cannot be taken as a basis to prove the relevancy of works conducted by an executive organ like prosecution and hearing with arbitrariness.

Chief District Officer has been authorized a jurisdiction to sentence up to seven years jail term, but there is no provision of bench, no proper representation on behalf of defendant, in the case and persons have a compulsion to spend long time in jail unnecessarily because of the lack of timely decision of the case as the chief district officer has a compulsory legal provision to spend more time in administrative duties and maintaining peace and security in the district than giving time to hear the cases. In this way, handing over judicial rights to Chief District Officer is not appropriate, judicial and practical from both reasons technically and principally. The power delegated to chief district officer has curtailed constitutional as well as fundamental rights of the defendants of the case.

Chief District Officer has to bear the responsibility of cases more than district courts in some districts. As per the Annual Report 2064/065 of the Attorney General, the court, which has six judges to look after criminal cases, a total of 1960 persons were prosecuted out of 892 cases filed by the government whereas in the Kathmandu District Administration Office, which has only one Chief District Officer, criminal cases were filed against a total of 2295 individuals

out of 1098 criminal cases filed by the government in the same year. The situation is similar in other district administration offices also.

In this way, legal provisions including Clause 5 of Some Public (Crime and Punishment) Act, 2027 BS, Clause 24 of Arms and Ammunition Act 2019 BS, Clause 15 of Black Marketing and Some other Social Offences and Punishment Act 2032 BS, Clause 15 of Nepal Standards (Certification Marks) Act 2037 BS, Clause 19 of Social Behaviour (Reform) Act 2033 BS contravene with the Preamble of the Constitution, Article 13, 24 (9), 100, 101 and Article 14 (14) of the International Covenant on Civil and Political Rights 1966, to which Nepal is a signatory, Article 10 of the Universal Declaration of Human Rights, so it is requested that these provisions should be declared null and void abinitions as per the Article 107 (1) of the Constitution. A mandamus writ is requested to be issued in the name of defendants that the previously filed cases in the District Administration Office be transferred in the district court and conduct a hearing, and not to formulate laws designating district administration office which will have jurisdiction of announcing jail punishment.

A single bench of justice had issued an order that it should be presented as per the rule before the bench with written reply asking from the respondents stating reason what had happened in this regard.

Administrative and quasi-judicial bodies were established with the development of concept of welfare state and it should not be taken otherwise because such agencies only exercise the power delegated by the law. Such agencies use judicial conscience while exercising judicial power as per the recognized principles of law and such decisions are checked by a competent court through the medium of an appeal. So far as petition’s claim is concerned that legal provision of the Clause 5 of Some Public (Crime and Punishment) Act, 2027 BS contravenes with the Interim Constitution 2063 BS, is concerned, just claiming that the provisions of laws and regulations contravene

with the Constitution is not sufficient. The petitioner should have stated the basis and reason of *ultra vires* claims, but as the petitioner fails to do so, the writ petition deems necessarily to be quashed. These explanations are stated in the written reply submitted by the Government of Nepal, Office of the Prime Minister and Council of Ministers.

The petitioner is not able to state clear basis and reason behind making the Legislature Parliament as defendant. A notice was issued in the name of Legislature Parliament following a mistake of a concerned department of the respected Supreme Court in course of implementing the order. The written reply furnished on behalf of the secretariat of the Legislature Parliament states that it is humbly requested that it is not necessary to explain further in detail as the court has not issued such order to bring written reply from the respected court.

The petitioner's argument that states judicial authority delegated to the Chief District Officer as per the provision of law contravenes with the constitution, is not logical. Generally, the judicial jurisdiction delegated to any agency of executive body is a common exceptional principle of separation of power. Legal provision is managed of providing judicial power to a Chief District Officer, he/she can take judicial decision and there shall be a right to appeal over the judicial decision of the Chief District Officer in a competent court. The claim of the writ petitioner is meaningless because the judicial right to appeal is vested on the court and the court shall have right to review the case.

It is found that the Interim Constitution, 2063 has provisioned that any dispute including relating to criminal case shall be heard and settled by the courts and other quasi-judicial bodies. The phrases 'Right to Hear Case' stated in Article 24(3) and 'Judicial Institutions' stated in the Sub-Article 9 and Article 100(1) of the Interim Constitution has proved this statement. In fact, every disputes and crimes are not heard from the regular court of law and it cannot be

possible and practical. Quasi-judicial bodies and specialized courts or tribunals should be constituted for that purpose and it is a recognized principle of jurisprudence. Notwithstanding the provision stated in the constitution of the land, nobody can move the court by invoking the provision of the International Convention. Thus, the petition deems necessary to be quashed as it is filed against such provision which is stated in the written submission of the Ministry of Law and Justice.

It is requested that there is no confusion that the laws contravening with the constitution deem necessary to be *untra vires*. However, considering the circumstances that all disputes cannot be resolved through judicial process and that may not be practical also, it is apparent that the Legislature has assimilated the universal concept of constituting quasi-judicial bodies through law and delegating judicial authorities to administrative officers. The concept provisioned in the law and accepted by all cannot be taken otherwise. So far as following due process of law during the period of trial is concerned, it can be improved. So, the legal provision followed to materialize the concept of rule of law cannot be appropriate to interpret differently. Thus, the writ petition deems necessary to be quashed, it is stated in the written submission of the Ministry of Home Affairs.

Presented before the bench as per the rule, the summary of written submissions by learned legal counsels on behalf of writ petitioners and respondents are as follows:

On Behalf of the Petitioner:

Petitioner Advocate Ambar Bahadur Raut repreented on behalf the petitioner maintained that the administrative and judicial works are not same. Whereas provided in the constitution, judicial jurisdiction can only be exercised by the court and judicial institutions, different Acts have delegated authority to Chief District Officer to conduct hearing on criminal cases. Since Chief District Officer is not independent and competent judicial body, the hearing process of criminal cases by him/her is against the principle of fair trial and that

violates the rights of the accused. The legal provision of the Acts to delegate judicial power to Chief District Officer is against Article 24 of the Constitution and Article 14 of the ICCPR. The 32nd Comment of the Human Rights Committee under ICCPR has stated that handing over judicial power to administrative officer is against the concept of independent judiciary. A writ petition was also filed under the Constitution of the Kingdom of Nepal, 2047 BS. The petition was quashed on the ground that the formation of quasi-judicial bodies is not against the Constitution. But, this precedent cannot be relevant to this dispute because that constitution had not clear provision of fair trial as of Article 24 (9) of the Interim Constitution recognizing it as fundamental right.

There is no rational reason that a theft case, which has one month jail punishment, is heard by the court whereas the case related to arms and ammunition, which has up to seven years of jail term, is heard by Chief District Officer. The presentation of law practitioners is not ensured in the case being heard by the Chief District Officer. Practice of sitting regular bench is also not found. That's why, there should be an order of declaring the laws that contravene with the constitution null and void, which provides judicial power to Chief District Officer, and such cases should be heard from the regular court.

Advocate Govinda Sharma Bandi argued that the judicial power delegated to quasi-judicial bodies is not compatible with the Constitution and International Law. As per the Article 100 of the Constitution, rights relating to justice shall only be exercised by the court, is stated. Right to get fair trial from competent court has been put under fundamental rights as per the Article 24 (9). The Supreme Court has recognized the fair trial from the cases of Yagya Murti Banjade and Benjamin Peter. Article 14 of the ICCPR, 1966, has stated that it is the right of a citizen to get fair trial from a competent independent and impartial court. Chief District Officer is neither a competent court nor hearing is conducted in his/her bench. A Chief District Officer might have obtained legal education, but it is not

mandatory. He/she has no functional and institutional freedom as he/she is appointed, transferred and promoted by the Government of Nepal. The investigation of the ICJ has also stated that judicial rights should be vested only on the court. Standard has been set at the international level regarding the competent judicial body. Issues regarding cases are not prioritized and interested areas of the Chief District Officer. Situation is that his/her major time is spent by conducting daily administrative works. Hence, handing over the power to conduct hearing on criminal cases to Chief District Officer is against the Constitution.

Advocate Hari Fhuyal maintains that the Chief District Officer does not fall under the category of judicial body stated in the constitution. The post of Chief District Officer is created mainly for daily administrative work under the jurisdiction of the executive. Montesquieu has said that judge should be impartial third party. The United Nations system has presented the principle of competency in addition to third party. Chief District Officer is neither third party nor competent one. Judiciary extends its jurisdiction in liberal democratic system. The Royal Commission was dissolved under this principle in the case of Rajib Parajuli. Some basic fundamental principles have functioned behind the principle that criminal cases should be heard only from the court. It cannot be considered judicial that principles of criminal justice will be breached when chief district officer conducts hearing of criminal cases. The legal provision of Chief District Officer was managed since 2028 BS. The then governance system and constitutional provision is not relevant in the present constitutional context. Recently developed constitutional concept and awareness towards human rights cannot accept such provision. Opportunities can be provided to reform in the process if legal vacuum arises while declaring null and void immediately. So, there is no reason of not adopting another system if there is no possibility of making an improvement in the existing system. There should be serious attention of the bench as precedents are there that laws are improved when bench issues judicial stricture. Although some limited

laws are demanded to be *ultra vires* in the petition, the judicial jurisdictions, which are serious criminal cases in nature, that handed over to administrative officer is extended subject of public interest. So, extended order should be there, not just only looking at particular Act and officer but also should be applicable to improve other subjects which are similar in nature.

Advocate Hari Krishna Karki puts forth his opinion that the legal provision are delegating rights to hear criminal cases to Chief District Officer is not compatible with the theory of separation of power as the Chief District Officer is a local representative of the government. As handing over judicial rights to administrative officer is against the constitution and such legal provisions deem necessary to be declared *ultra vires.*

Advocate Sita Sharan Mandal states when given the rights to chief district officer to impose jail punishment through legal provision, the rights of the accused guaranteed by the constitution has been curtailed. Such provisions which are not proper from any perspective should be declared null and void. He presented such submission before the bench.

Learned advocates Harikrishna Karki, Govinda Sharma Bandi, Hari Phuyal, Bhoj Raj Acharya, Ambar Bahadur Raut and Sitasharan Mandal have also presented written submissions before the bench.

Joint Attorney Dharmaraj Paudel represented on behalf of the respondents argued different Acts have delegated judicial rights to Chief District Officer. This is called administrative adjudication. Legal system cannot be called unconstitutional only just looking a single constitutional provision. The constitution has not banned constituting judicial and quasi-judicial bodies other than the court. The provision of the Interim Constitution that was introduced after a long interval that Nepal had ratified the ICCPR, should not be looked going beyond the constitution. Administrating judicial rights by the quasi-judicial bodies is accepted worldwide. The welfare state of the present day cannot function when we stick on the concept of that

only court can conduct the judicial process. Page 157 of NKP 2027 BS has well defined the issues related to judicial, quasi-judicial, and administrative decisions and functions. Under these principles, it is clear that the decision taken by administrative officer regarding judicial function is quasi-judicial decision, the constitutionalism of the legal issues raised in the writ petition had already examined by the Supreme Court in the previous petition filed twice in the Court, declaring them not contravening with the constitution. It is not necessary to hold judicial review time and again in the same issue. There is a legal provision that an appeal can be filed over the decision of the Chief District Officer and there is a legal provision that his or her judicial works can be re-examined by the appellate court, he pleaded that there is no situation of declaring the laws null and void as claimed by the petitioner.

Learned Joint Attorney has also presented a written submission in support of his pleadings and claims.

Today being the date preseribed for rendering a verdict, the bench upon perusal of the pleadings and submissions presented by learned legal counsels, written deliberations, writ petition and written replies, and by studying related constitutional and legal provisions, the Bench deems that decision should be rendered on the following issues:

1. What kinds of functions, duties and power have been entrusted to Chief District Officer as per law of Nepal? As to whether or not the judicial jurisdiction to look after criminal cases has been granted to him/her.
2. Whether or not there is and difference or limitation regarding nature and procedures among judicial, quasi-judicial and administrative jurisdiction. And, as to whether or not it can be compatible with the theory of separation of power adopted by the constitution to hand over judicial jurisdiction

to look after criminal cases, which are serious in nature, to the administrative officer.

3. As to whether or not the legal provision to hear criminal cases, which are serious in nature, by the administrative officer has affected the right to criminal justice of an accused to have fair trial from a competent and independent judicial body.
4. As to whether or not legal provisions authorizing Chief District Officer to conduct hearing of criminal cases, which are serious in nature, are compatible with the Constitution, and as to whether or not order should be issued as demanded in the petition.

While considering towards decision, the Clause 5 of the Local Administration Act, 2028 BS has clarified without controversy that Chief District Officer is the chief administrative officer of the district. There cannot be a controversy that district administrative office is a body of the executive. It is a common practice that Chief District Officer is transferred as per the change made in the government to assist the government in the daily administrative act because he/she is the district representative of the government. He/she is an administrative officer delegated administrative responsibilities to implement policies and directives of the governments. Chief District Officer, by his/her working nature, shall engage with the common citizens of the district daily in different works and actions. Claims have been made that handing over rights to hear criminal cases is not compatible to justice, as fair adjudication is not possible from him/her in this situation. While considering written replies of the defendants, necessity of quasi-judicial bodies cannot be ignored because resolving all disputes only from formal judicial system in the present welfare state is not possible. The Interim Constitution has also provisioned that rights related to justice of Nepal shall be exercised through courts and other judicial bodies as well. Although

Chief District Officer is administrative officer, it is stated that it should not be taken otherwise that different laws of Nepal have assigned him/her judicial rights related to administrative works and actions as well. Learned law practitioners, who pleaded and presented written submissions on behalf of petitioner and defendants, have also been found raising these issues stated in the petition and written replies.

In this context, firstly, it is appropriate to be clear regarding the first question to be decided that what kinds of functions, duties and judicial jurisdictions have been handed over to Chief District Officer as per the recognized law of Nepal. It is relevant to consider the legal provision stated under Local Administration Act, 2028 BS this is the Act to state the provision of Chief District Officer. As stated in the Preamble of the Local Administration Act, 2028, it is seen that the Act is promulgated to amend and integrate the laws related to local administration in pursuant to the provision of decentralized administration, and to maintain law and order. The language as stated in the Preamble of the Act is clarified that the law is enacted with the aim of managing legal provision relating to local administration and maintaining law and order. Clause 3 of the Act has stated the provision of the classification of development regions, zones and districts while the Clause 4 has incorporated the provision of regional administration. Similarly, Clause 5 has managed the provision of district Administration Office while sub-Clause 1 states that there shall be a district administration office in each district to run general administration of the district. Nepal government shall appoint a chief district officer in each district to work as chief administrative officer of the office as well. It is also stated that chief district officer shall work as a representative of Government of Nepal remaining under the recognized law, policies, rules and direction of Government and under the supervision of regional administrator.

As per the provision stated in the Act, the chief district officer is appointed with the principal objective of running general administration of the district, representing the government at the local level. Besides other issues, Chief District Officer, as

provisioned in the Act, will perform responsibility remaining under the policy, rules and direction of the Government of Nepal, thus, it is clear that Chief District Officer is the local administrator, who works remaining under the control and guidance of the Government of Nepal. Sub-Clause (5) of Clause 5 has assigned following functions, duties and powers to the Chief District Officer:

1. To maintain law and order in the district;
2. To assist in development works conducted by the Government of Nepal, District Development Committee, Municipalities, Village Development Committees in the district;
3. To monitor, protect and maintain all properties of the government remained in the district and;
4. To perform other activities as ordered and directed by the Government of Nepal in different times.

It is observed that, as assigned in the above mentioned functions, duties and powers, Chief District Officer is focused on peace, security and running daily administration. The additional grounds and circumstances of exercising basis and situation of using above mentioned powers stated elaborately in the Clause 6, 7, 9 and 10 respectively of the Act.

The sub-Clause (1) of the Clause (8) of Local Administration Act has granted power to Chief District Officer to take initial action and decide cases related to petty theft cases with fine up to Rs 500, pick-pocketing, cheating by using incomplete measurement, and killing female beasts except sacrificing in recognized gods and goddesses. As per sub-Clause (1), the decision of the Chief District Officer shall be final without having appeal provision of the cases with maximum fine of Rs 500 and the cases which shall not be deemed repeated while sub-Clause (2) has a legal provision that there shall be a provision of an appeal over the decision of the Chief District Officer

regarding the case decided by him/her in the issues that have fine provision above Rs 500 and those cases related to repeated offenders. In this way, the legislative intention is that the Chief District Officer has been assigned jurisdiction of looking into the cases of having right to impose fine up to Rs 500. Similarly, under sub-Clause (6), chief district officer should adjudicate cases as per Act or recognized law of Nepal and decide cases within the time limit of the recognized law by stating the same Act under which Act the case should be adjudicated and decided, and following these provisions, it is known that he/she is assigned judicial power to look into cases as per the recognized law of Nepal. Despite the provision stated in the sub-Clause (6) of the Act that chief district officer should follow certain procedure as prescribed in the Act while adjudicating cases under the judicial jurisdiction, there is no separate provision of procedure to be followed.

By studying legal provision of the Local Administration Act, 2028 BS, it is clear that the major duty of the Chief District Officer is to maintain law and order in the district and to conduct works related to daily administration of the government. It is noticed that the Local Administration Act has handed over judicial power to Chief District Officer authorizing him/her to punish up to six months and fine in course of conducting daily administration and maintaining law and order. By the nature of his/her key functions of maintaining peace and security, the judicial power of sentencing minimum jail term is found natural.

In addition to these, Children Act, 2048 BS, Compensation against Torturous Act, 2054 BS, Prison Act, 2019 BS, Ancient Movements Protection Act, 2013 BS, Nepal Citizenship Act, 2020 BS, Forest Act, 2049 BS, Motor Vehicle and Transport Management Act, 2049 BS, Marriage Registration Act, 2028 BS, Organization Registration Act, 2034 BS, Commission for the Investigation of Abuse of Authority Act, 2048 BS, Public Security Act, 2046 BS, Education Act, 2012 BS, and other recognized laws of Nepal have designated Chief District Officer as *ex-officio* president and member of the committees

constituted under above mentioned Acts. Some laws have handed over judicial rights to the Chief District Officer, in addition to the administrative works. In addition to other Nepal laws, the following Acts have given judicial power to the Chief District Officer:

1. Some Public (Crime and Punishment) Act, 2027 (having power to fine up to Rs 10,000 and punish 35 days of jail sentence and to punish not exceeding two years referring for approval to appellate court.)
2. Essential Commodities Protection Act 2012 (Power punish not exceeding one year and fine as per amount, power to punish two counts to the repeated offender)
3. Black Marketing and Some other Social (Crime and Punishment) Act, 2032 (Power to punish life imprisonment and fine at the rate of principal amount).
4. Social Behaviour (Reform) Act 2033 (Power to fine up to Rs 30,000 and award 30 days jail sentence).
5. Arms and Ammunition Act, 2019 (Power to impritson for seven years, fine up to Rs. 1,40,000 or both)
6. Birth, Death and other Personal Events (Registration) Act, 2033 (Power to fine up to Rs 600 and imprison not exceeding three months).
7. Aquatic Animals Protection Act, 2017 (Power to fine up to Rs. 5,000).
8. Nepal Standards (Certification Marks), Act 2037 (Power to fine up to Rs 5,000 or punish not exceeding one year jail term or both).
9. Veterinary and Livestock Service, Act 2055 (Fine up to Rs 25,000).

10. Motor Vehicle and Transport Management Act, 2049 (Managing expenditure to conduct rituals after death and managing proper compensation to the victims).
11. Essential Commodities Authorization (Control) Act, 2017 (Fine up to 15,000 and imprisonment up to five years).
12. Food Act, 2023 (Imprisonment up to three years, fine up to Rs 25,000 and managing compensation).
13. Press and Publication Act, 2048 (Fine up to 1,000 or six months jail or both).
14. Land Acquisition Act, 2034 (Fine up to 1,000, imprison up to one month or both).
15. Statistics Act 2015 (Fine up to Rs 5, 00 or punishment up to five months jail or both).
16. Feed Act (Dana Padartha) Act 2033 (Fine up to Rs 1,000 fine or six months jail for the first time and up to Rs 2,000 fine and two years jail regarding recidivist in each time).
17. Education Act, 2028 (Recovering the bailment and fine up to Rs. 25,000)
18. Railway Act, 2020 (Up to Rs 1,000 fine and up to one year jail for the first time regarding the damage made through rail accident, up to Rs 3,000 fine and up to three-year of jail term from the second time, maximum 20 years jail term from the third time by adding three years from the previous punishment in each time).
19. Cinema (Production, Release and Distribution) Act, 2026 (Fine up to Rs 5,000 and repeal of certificate of work permission).
20. Local Administration Act, 2028 (Fine up to Rs 10,000 and jail up to six months or both).

The petitioner, in the claim section of the petition, however, has demanded limited laws that handing over judicial rights to Chief District Officer only should be declared null and void, it is noticed in the petition that the petitioner has raised a question of public interest and concern that issues related to handing over judicial power of punishing maximum jail term in serious criminal cases to administrative officer is against norms, spirit and provision of the constitution. In course of pleadings, the issues have been raised that the judicial rights delegated by law to the Chief District Officer and other administrative officers to hear serious criminal cases, is against the concept of independent judiciary and that contravenes with the constitution while looking at provisions in other Acts relating to this, Forest Act, 2049 BS has handed over District Forest Officer to fine up to Rs.10,000 and to punish one year jail term. Similarly, National Park and Wildlife Conservation Act, 2029 BS has handed over judicial power to concerned officer to fine up to Rs.100,000 and sentence up to 15 years of jail term. Forest and Conservation officers can be experts on the subject matter related to their post, but major responsibility of the Chief District Officer is to maintain law and order in the district and running daily administration remaining under direct control and direction of the government.

There should be a discussion on the issue to be decided on whether or not the legal provisions of handing over jurisdiction to Chief District Officer to hear serious criminal cases is against constitutionalism and the theory of separation of power in the context of differences while exercising judicial and quasi-judicial rights. Among three functions of the state respectively, executive, legislative and judicial are performed from the three major organs of the state: Executive, Legislature and Judiciary. Concept of devolution of state power and division of power is based mainly on the principles of separation of power. Every constitution has adopted the principle of separation of power in one way and the other. It should be taken as an exception of this principle that absolute separation of power is impossible and some duplication may be

there in some functions of each other. Despite being this situation, it should be kept in mind that the judicial functions should be kept free from the interference and influence of other two organs of the government and it is the central motive spirit of this principle. It is not necessary to interpret and analyze additionally that there is not a solution of being confused about this principle which is an important instrument to stop abuse of power in the democratic constitutionalism by dividing the state power among the organs of the state.

Resolving disputes between individuals, and government and individual as per the constitution and recognized law, falls under the purview of judicial works. It is assumed that judicial jurisdiction of the state is under court and judicial bodies. Formal procedure conducted by the court is called judicial process. Regarding the nature and characteristics of judicial process: due respect of natural law of justice, objective analysis of the facts of the disputes and laws attracted regarding this, use of judicial mind, decision following basis and reason, open hearing, binding force of decision and assurance of implementation are the major elements. The rights regarding of getting impartial and prompt justice from independent and competent judicial body has been accepted assurance of implementation are the major elements. Rights regarding of getting impartial justice has been accepted today worldwide as human and fundamental rights.

Generally:, the works done and decisions taken by the executive and officials under it, in course of running daily administrative works, are administrative actions and decisions. Specially, executive formulates policies; and the policies of the government are exercised by the administrative system. Similarly, the decision taken by the government official is understood as administrative decision. Discretionary power is more than judicial mind in administrative decision. In this process a system is developed to come to a conclusion by presenting level-wise comment. Administrative official uses some judicial power in some issues related to his/her working

nature. But, the power exercised by the administrative official is defined, limited and controlled by the administrative law.

This court has already explained clearly in many times regarding what kind of action and decision is called judicial, quasi-judicial and administrative. In a *certiorari* petition non-gazetted officer Mukti Sharma versus Superintendent of Police Tek Bahadur Rayamajhi, the court, in its decision, has said about judicial, quasi-judicial and administrative decisions (NKP 2017, decision no. 108, page no.100). Similarly, in the *habeas corpus* case of Yagya Murti Banjade versus Durga Das Shrestha including Bagmati Special Court, clarifying additionally in this issue, "Any issue which is heard with judicial mind, such decision will be judicial. The decision taken by administrative official with judicial mind and judicial process is called quasi-judicial decision. Or, judgment made by justice is called judicial decision, judicial decision taken by administrative official is called quasi-judicial decision and decision made by administrative official relating to administration (in which discretionary power is higher) is called administrative Decision (NKP, 2027, decision No. 547 page No. 157)." This principle has been established.

Defining quasi-judicial actions and procedure, Black's Law Dictionary states,' "A term applied to the action discretion etc. of public administrative officer or bodies, who are required to investigate facts or ascertain the existence of facts, hold hearing weigh evidence and draw conclusion from them as a basis for their official action, and to exercise discretion of a judicial nature." Following above mentioned definition, it is seen that the judicial decision related to their own working nature taken by using their discretionary power by the administrative officials and similar kinds of other bodies, is quasi-judicial decision. Constitutional expert Wade states, "A quasi-judicial function is an administrative function which the law requires to be exercised in some respect as if it were judicial. That's why; the quasi-judicial decision made by administrative official can be understood as administrative adjudication.

System of handing over some judicial issues related to daily administrative works to administrative official has been increased because of the increase of social welfare works in regulating and the increase of welfare works in today's developed and democratic world. Specially, administrative law had developed as separate branch of law many years ago in the continental legal system. This concept has got important place in the common law system also, in recent time.

That's why with the change in the traditional concept that the monopoly of court in the justice delivery system, structures, bodies and provisions are also established outside the formal court system, which have functioned in the field of settling disputes daily in various subject of disputes. The judicial works conducted by the agencies outside the court are known as administrative adjudication, quasi-judicial decision or decision of tribunal and other names. Data show that the number of dispute settlements outside the court is higher than the nature and situation of the numbers of settlement of disputes from formal justice system.

It is found that the concept of administrative adjudication was started in France. There are evidences that Droit Administrative, council de Etat and regular courts were in existence in France in a parallel way from many years ago. Initially, the practice of administrative court of France had taken as exercise against rule of law because in Britain, there was a concept that all should have common access to general court. The subject matter relating to administrative law could not have become the matter of interest.

Forming tribunals in nominal level was in practice in Britain before World War-I, however, the concept got chances to spread in all Europe and America after the World War-II. With the rapid expansion of industrialization, necessity of special kind of structure was realized to settle disputes between the workers and managers. Similarly, the issue regarding insurance and compensation of workers also needed to be settled at the earliest possible. It was the

situation to settle properly the issues regarding tax administration at the earliest possible to maintain industrial environment. It was appropriate to follow specialized knowledge and importance of time to settle the disputes relating to telecommunication, transportation, insurance, banking, contract and Company Corporation. Proper address from the traditional court system to cope with the every new issue generated with the development of science and technology. The common law following countries including Britain itself had no situation to ignore the presence and role of tribunals and quasi-judicial bodies following different reasons along with the increase in the role of welfare function of the state.

Establishment of National Insurance Tribunals through Insurance Act in 1911 is taken as starting point of quasi-judicial body in Britain. It is found that Pension Tribunal was formed in 1919 to look after disputes related to pension, at the end of the First World War. The subject was taken seriously in Britain with the maximum growth of trend of establishing tribunals. Following the issue raised that the rule of law was challenged through this, a committee on Ministers' Power was constituted in 1929 AD to study this subject. The concept of tribunals got concrete shape when the committee presented a report in 1932 AD. A committee under the chairmanship of Sir Oliver Franks was constituted in 1955 AD to conduct additional study on the subject. The report of the committee published in July 1957 AD had mainly focused that the tribunals should be associated in the judicial system gradually. The committee had found mainly proposed three principles—openness, fairness and impartiality—regarding the operation of the tribunals. Similarly, the Fulton Committee constituted in 1968 had found contributing in the development of administrative law. As a benchmark of above mentioned reform, an umbrella law named Tribunal, Court and Enforcement Act 2007 was found introduced in Britain under latest reform in law. In this Act, concrete legal provisions were found regarding formation of tribunals, operation and procedure to be followed in the trial and appeal level. Despite this situation, no administrative officials and

tribunals are authorized to hear criminal cases which deserve punishment of imprisonment, in nature. County Courts and Magistrate Courts which are called lower structure of judiciary are found authorized the rights to hear minor criminal cases.

Article 3 of the Constitution of United States of America has assimilated the practical system of separation of power with constitutional assurance that the rights relating to justice shall only be exercised by the Supreme Court of America and Federal Courts. Similarly, due process of law and fair trial has been adopted as backbone of judicial process. However, a developed system of administrative law is in practice in that country. The then President had found making huge effort to increase executive power as an effort to minimize the impact of global economic recession of 1930. In this way, practice is increased to hand over rights to administrative officer, bodies, and board to hear the disputes relating to labour, insurance, tax, pension, industrial relation, contract, company, revenue, social security, narcotic drugs and regulating immigrants.

In the United States of America, Administrative Procedure Act, 1946 was enforced with the aim of systematizing the process regarding administrative adjudication. The Act is found systematizing procedure to be followed from the beginning to the end while administering administrative justice. The Act has specially managed clear legal provisions on registration diary, hearing, decision process and implementation of the decision. Similarly, law has provisioned separate Administrative Law Judge to hear administrative disputes and, his /her appointment, terms and conditions, disciplinary action, appeal and others are also managed in the law. Likewise, the Act has also incorporated bases and situations of getting compensation by the affecting party due to the miscarriage of justice made by the mistake of the administrative justice in judicial process. These kinds of Acts have been formulated in the state-wise level. In the United States of America, along with handing over judicial power to administrative officer, effective system of judicial review has also

developed simultaneously to check it. Whether or not the administrative officer, in its actions, has followed due process of law is checked through the medium of judicial review. But, like in Britain, the jurisdiction to hear serious criminal cases having jail punishment is not handed over to administrative officer in America also. Nobody can be punished in serious criminal cases having jail sentence without holding fair trial in the presence of jury.

Article 323 A and B of the Constitution of the Republic of India have constitutionally accepted the concept of tribunals and quasi-judicial bodies. System is there in India to constitute tribunals and boards to look after issues related to tax, revenue, insurance, labour, loan recovery, banking, railway, deposit, social security and so on. Among Executive Magistrate and Judicial Magistrate, the latter one is handed over the rights to look after judicial cases. It is observed that there can be a situation of following judicial norms in the cases and actions functioned by the judicial magistrate because judicial magistrate is a person who has attended legal education, obtained substantial training in the subjects of law, and justice is under supervision and control of high court.

Following above mentioned analysis of legal exercise of other countries, the trend of constituting tribunals, boards and special courts besides regular courts has been increased to look after disputes relating to banking, insurance, company corporation, labour, tax, revenue, forest, environment, guarantee, loan recovery, welfare of consumer, technical administrative and other issues which need subject wise expertise with the aim of delivering prompt decision and action. However, it is found that no administrative officer alone is handed over judicial jurisdiction to look after serious criminal cases having the right to punish maximum jail term.

So far as Nepalese context is concerned, the differences regarding executive, legislature and judicial jurisdiction was not found accepted by the state till the early stage of *Rana* regime. All judicial powers were vested on the king during *Lichchhabi* period despite some

rights that were vested in the agencies like *Panchali* to settle some minor disputes at the local level. Similarly, during *Malla* period, institutions like *Purbadhikaran, Paschimadhikaran*, *and Sarbadandanayaka* had used to perform administrative as well as judicial duties. Evidences are also found that the officials like Badahakim had to perform administrative as well as judicial duties. Likewise, some judicial works were handed over to the institutions like Pancha Kachahari, Guthi, Guthiyar, Amalkot, Jagirdar, Birtawal, Mal, Bazaar, Adda, Ban Janchaki, Rakam Bandobasta Adda, Kumari Chowk and so on. Although some judicial officials like Diththa and Bichari were provisioned, they were not free from executive. With the establishment of Pradhan Nyayalaya from the Sanad of 12th Asar 1997 BS, efforts were made to accept differences between judicial and administrative functions.

Old system of Rana regime and its reminiscence had worked to maximum level because of the lack of the institutionalization of concrete democratic system after the change in 2007 BS. Although the Pradhan Nyayalaya Act, 2008 had tried to establish the existence of judiciary as an independent entity, the efforts could not sustain for a long. The control and interference over judiciary from executive had exposed till the time of the enactment of Supreme Court Act, 2013 BS. In this way, the impact of Indian experiences while conducting administration and formulation of laws is found that the management of magistrate had also made as chief of the district administration. Due to the failure to manage transition in 2007 BS properly, long time continuation of political instability, the step of 2017 BS was taken at a time when the constitution of 2015 BS and the elected government under this was yet to function in a full-fledged manner, no role, minimum or ineffective role of two organs in the state affairs, the exercise of using all rights by the executive was found developed.

The incident of 2017 BS which had reversed the change of 2007 constitutionally and that centered all power and extended the rights of the executive from the centre to the local level, had handed over

maximum rights to the Chief District Officer. Nepal was divided into 14 zones and 75 districts in 2018 BS. The provision of appointing Chief District Officer as administrative chief of the district was provisioned with the enactment of Local Administration Act, 2028 BS.

Among the Acts formulated after 2007 BS, Essential Commodities Protection Act 2012, Statistics Act 2015, Aquatic Animal Protection Act 2017 BS, Essential Commodities (Authorization) Act, 2017 BS, Arms and Ammunition Act, 2019, Railway Act 2020, Food Act, 2023, Cinema (Production, Release and Distribution) Act, 2026 BS, Some Public (Crime and Punishment Act, 2027 BS. Black Marketing and Other Social Crime and Punishment, Act, 2032 BS, Social Behavior Reform Act 2033, Birth, Death and other Personal Incident (Registration) Act, 2033 BS, Nepal Standards (Certification Marks) Act, 2037 BS, Public Security Act, 2046 BS and other Nepal laws have handed over judicial power to Chief District Officer to award jail term in criminal cases.

The backbone of judicial process is independence, competency and impartiality. Faith towards judiciary shall enhance with citizens' access to justice, with fair and prompt hearing. There should not be interference and pressure from outside in course of performing duty independently by any institutions and officers. For that, both institutional and functional independence is needed. There shall be required proper knowledge of concerned subject matter and substantial law, proper experience and training to conduct judicial procedure, to perform judicial works efficiently. Other subject-wise laws including Local Administration Act, 2028 BS have not stated these issues like handing over judicial jurisdiction to administrative officer. Appointment and terms and conditions of officers to look after cases including Chief District Officer have been determined in the equal manner of other civil service officers as per Civil Service Act, 2049 BS, Civil Service Regulation, 2050 BS. There is no compulsory provision of having education of substantial law and judicial procedure and substantial training of such subject to be a Chief

District Officer. Nepal government has direct control over the appointment, transfer, promotion and departmental action of Chief District Officer. The defendants could not state in their written replies that the promotion, professional upgrading of Chief District Officer shall be determined with separate evaluation of judicial works performed by the Chief District Officer and on the basis of that. That's why it is the situation that Chief District Officer shall exercise judicial jurisdiction as delegated to him/her equal to other administrative functions.

It could be an exception of the theory of separation of power to hand over judicial power to non-judicial bodies to settle issues that resemble with the working nature, the issues which need technical knowledge and experience, and the issues that need early settlement. But, it could not be compatible with the principle of separation of power to hand over judicial power to administrative officer regarding the issues that fall under basic judicial characteristics from the perspective of the nature of the cases, the cases that need to follow fundamental issues that cannot be accepted of reducing or demarcating judicial jurisdiction.

Now, it is to consider on the third question to give decision on whether or not the right of an individual to get fair trial from independent and competent judicial body is curtailed with the provision of handing over jurisdiction of serious criminal cases having jail punishment right to Chief District Officer. In the petition, following issues have been raised: With the handover of judicial rights to Chief District Officer, individual's fundamental rights guaranteed by the Articles 100, 101, and 24 (9) of the constitution of getting fair trial from an independent and competent judicial body have been curtailed. The Article 14 of International Covenant on Civil and Political Rights 1966, which is also ratified by Nepal, has also recognized these principles. Chief District Officer cannot be accepted as independent judicial body because he/she is under direct control and direction of the government. The constitution has recognized the right to get fair trial in criminal cases. But, the rights

have been breached when the Chief District Officer hears criminal cases. Chief District Officer does not follow any legal procedure while hearing cases. There is no system of publishing cause list, and sitting bench while conducting hearing by the chief district officer. It is the situation that law practitioners hesitate to go before Chief District Officer for pleadings. There is no rational basis of handing over jurisdiction of simple cases of theft to the court while Chief District Officer is given the right to look after serious criminal cases of having the right to punish 20 years of jail term. That's why, claims have been made that the Chief District Officer should not be given judicial power to hear criminal cases. While looking at written explanations of defendants, it should not be taken as a breach of right to have fair trial from independent and competent body as guaranteed by the Constitution with the power handed over to Chief District Officer to hear cases relating to administrative works. There is a provision of appeal in related appellate court over the decision of chief district officer. There is a situation of judicial control because of the legal provision of having supervision and review by the appeal court. It is impossible to hear all cases from the court. Claims have been made that the provision has helped minimize maximum work load remained in the court.

In this context, it is relevant to discuss on the nature of furnishing judicial works and independence needed for that. History of independent judiciary in Nepal is not so long. Despite accepting, for the first time, separate existence of judiciary with the Sanad related to Pradhan Nyayalaya in Asar 12th, 1997 BS, this could not fully assimilate the concept of independent judiciary. The Pradhan Nyayalaya Act enacted in 2008 BS had provided some rights to then *Pradhan Nyayalaya*. But these rights had also reduced after some time. In constitution of the Kingdom of Nepal 2015 BS and Constitution of Nepal 2019 BS, the judicial powers were exercised by the king and there was no due exercise of the concept of independent judiciary because the executive had direct control over appointment and termination of justices. Although some bold

decisions were made despite unfavourable time, the Constitution of the Kingdom of Nepal 2047 BS, for the first time had constitutionally guaranteed judicial independence. Independent and competent judiciary was accepted as basic structure of the constitution and had made non-amendable.

The Interim Constitution of Nepal 2063 BS, which was enacted with the annulment of the Constitution of the Kingdom of Nepal 2047 BS, has not ignored the concept of independent judiciary. The concept of independent judiciary has been accepted in the preamble of the constitution. Part X of the constitution has incorporated the provision of judiciary. In the main heading of the Article 100 of the constitution has stated "Court shall exercise power relating to justice". Clause 1 of the Article 100 has stated that power relating to justice in Nepal shall be exercised by courts and other judicial bodies in accordance with the provisions of this constitution, laws and the recognized principles of justice. Article 101(1) of the constitution had constitutional provision of three-tier of regular courts: Supreme Court, Appellate Court and District Court. In sub-Article (2) of the same Article, it is stated that, in addition to the court referred to in Clause (1) for the purpose of hearing special types of cases the law may establish and constitute special types of courts, judicial institutions or tribunals.

In addition to this, Article 24 of the Interim Constitution has provisioned rights regarding justice. The Article 24 has included the basic principles of criminal justice as rights regarding justice. In addition to other provision, Clause (9) has a constitutional guarantee, "Every person shall have right to hear from competent court and judicial institutions'.

Although Clause 2 of the Article 100 of the Constitution has only stated about the concept of independent judiciary, the Article 24 (9) has clearly expressed that there should be competent court and institution which hears criminal cases for the protection of getting fair trial, there should be additional clarification regarding the issue.

Likewise, it is relevant to analyze the subject on what kinds of rights should be there under fair trial provision.

For that, it is relevant to take help from provisions of international instruments and explanations and comments made on them. Specially, after the establishment of the United Nations, measures are being prepared for free and competent judiciary for fair trial with the leadership, initiation, support and cooperation from this international organization of sovereign nations. Situation is that the world should give high priority to the initiations made in the field of international sector because of the affiliation of the nations to the United Nations and effect of globalization in all affairs. Article 10 of the Universal Declaration of Human Rights (UDHR) 1948 has ensured, "everyone is entitled in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), 1966 to which Nepal is a signatory on May 14, 1991, states that all persons shall be equal before the courts and tribunals. In the determinations of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established the by law.

Similarly, Article 6 (1) of European Convention for the Protection of Human Rights and Fundamental Freedom, 1950, Article 8 (1) of the American Convention on Human Rights, 1969 and Article 7 (1) of African Charter on Human and People's Rights, 1981 have incorporated similar kinds of provisions of Article 14 (1) of the ICCPR. The Regional courts established under regional provisions have explained the right to have hearing from independent, competent and impartial judicial institution as unbreakable civil rights. In this way, it is clear that the issue has been recognized at the regional level.

United Nations Basic Principles on the Independence of the Judiciary, 1985 has put personal independence (appointment, eligibility, training, security of services) along with structural independence of the court, as internal matter of independent judiciary. Important declarations and commitments have been made in the international conference of justices at the initiation of national and regional level organizations that judicial independence is inevitable for rule of law and for the protection of civilian rights.

Justice will be elusive when pressure and interference of somebody else on court and justice is accepted. Situation shall be created finally by suppressing the civilian rights to get justice when judicial decision comes on the basis of access and influence, not by the recognized principles of justice. There might be deviation in the judicial function when the agencies and officials, which have the jurisdiction to decide important issues like life of the citizen, freedom and rights, have been put under interference, pressure and influence from others. That's why judicial independence is inevitable for the respect and assurance of the rights of the citizen to get justice, not for the interest protection of the judicial institution and officials. That's why, international treaties and agreements and constitution of the state have accepted the principles that the judicial institutions should be kept free from direct and indirect interference from other institutions and officials.

The concept of independent judiciary is directly associated with the rule of law and democracy. Judicial independence is our inevitable element to keep existence of living and practical democratic system intact. Judicial institution should remain free from state agencies including from the executive and officials who maintain rule of law. Democracy does not accept the supremacy of a particular individual like in the dictatorial system. Direct representation of people and supremacy of law in the state power are the foundations of democracy. Control of majority in the state mechanism including executive and legislature is there as democracy is the system that is handled by the majority. Possibility of breaching the rights of minority

is high by using state mechanism on the ground of majority. That's why, the constitutional principles of keeping judicial institutions free have been developed to stop this situation and to face effectively if such situation exists.

Chief District Officer is an administrative officer who performs duties under direct control and direction of the executive. The District Administration Office and Chief District Officer, who is under the system of executive structure, could not be expected as a separate institution from the government and searched for independent existence or could not be imagined its different role. The Chief District Officer, who is presented as the representative of the government as an administrative chief, could not be imagined that he/she could work going beyond the policies and directives of the government. It is not necessary to comment regarding the implied purpose and utility behind handing over judicial rights to Chief District Officer in the past dictatorial ruling system in which the concept of independent judiciary was not accepted. But, giving continuity to such past practice in the present democratic system is surprising itself. Under the given situation that the administrative officer of the government is given the judicial jurisdiction of sentencing a person for an unlimited time, such exercise cannot be considered as of the values and norms of independent judiciary as it shows the possibility of encroachment of the rights of the citizens from the state level itself.

The logic that judicial agency can function efficiently just being independent cannot be true in all circumstances. Contemporary knowledge of justice and law on judicial rights and sufficient practical experiences on judicial process are necessary for that. Knowledge and skills are gained through human efforts, study and experiences are not the unlimited matter acquired with birth. That's why, it is common and natural of having specialized education and experience to furnish any work in perfect and efficient manner. With disciplined and dignified implementation of knowledge gained through education, experience, training, it is possible to complete any work in

a professional and efficient manner. Judicial work is special one in comparison to other works as it is also a technical and professional work associated with the rights of the citizen. The human resource involved in this work needs legal education and practical experiences and infrastructure and mechanism for its quality implementation. It cannot be said that judicial institution can function efficiently if it is free in a technical ground in the absence of proper knowledge and experience of justice and law in the person who is involved in judicial works. In addition, no professionalism and efficiency can be found if eligible individuals failed to be appointed through an objective and proper selection procedure. There should be an environment of exchanging experiences and proper training to understand the nature of judicial works although it can be expected that theoretical knowledge can be gained through legal education. There should be a mechanism and system to evaluate work, security of services, disciplinary actions and other systematic instruments to implement the acquired knowledge in a responsible and disciplined manner. It cannot be natural and rational expectation that a person having different nature of knowledge, experience, responsibility and context can bring different result. Under the situation that the Chief District Officer and other administrative officers, who do not need to attend compulsory legal education, and legal and judicial procedures, are given jurisdiction of announcing jail sentence after conducting a hearing of serious criminal cases, and will not be a situation that they can perform the judicial works efficiently.

Under the provision of Article 14 (1) of the ICCPR, the Human Rights Committee has made different recommendations by making contemporary comment on practical exercises seen around the world on the background of theoretical concept of independent and competent judicial institution and tribunal. It should not be taken otherwise when comments on Article 14 (1) of the ICCPR, constitutional and legal provision made by signatory states for their implementation and regarding its situation of practical

implementation on the basis of worldwide experiences are presented as evidences in this context.

Committee, through general comment No. 13, had expressed its opinion for the first time in 1984. It announced general comment through 32nd comment on 23rd August 2007 by replacing the 13th comment. Although, in the initial comment of the committee Article 4 has not recognized the Article 14 as non-derogable rights, when the rights to get fair trial from independent and competent judicial institution are suspended in the name of emergency, the non-derogable rights of Articles 6 and 7 of the Convention will be suppressed. Important declaration was made that the rights of the citizen of getting fair trial from independent and competent judicial institution should not be curtailed in any unfavorable circumstances.

Similarly, in second part of the comment, it stressed that equality before courts and tribunals also requires that similar cases are dealt through similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction.

In the third part of the comment, it is stated about fair trial from competent, independent and fair tribunals. Moreover, it is stated that the notion of a “Tribunal” in Article 14, Paragraph 1, designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision.

Likewise, it is stressed that the requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, Paragraph 1, is an absolute right that is not subject to any exception.

The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until compulsory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.

The committee has developed the measures whether or not the judicial bodies are independent and competent. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. The rational basis cannot be considered that the Chief District Officer and other administrative officials, who are under the control and direction of the executive and having minimum level of judicial nature, can use judicial jurisdiction in a free and efficient manner.

The requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor act in ways that improperly promote the interest of one of the parties to the deterent of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of judge who, under domestic statute, should have been disqualified cannot normally be considered to be impartial, it is stated.

Likewise, all important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in Paragraph 3 (c) of Article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behavior of the parties from the principle of a fair hearing enshrined in paragraph 1 of this provision. The respondents

are not found criticizing the data stated in the petition that the number of criminal cases is maximum in some district administrative offices where a single chief district officer works in comparison to the cases registered in the district court and district judges assigned for that purpose. In this situation, imagination cannot be made of having prompt and fair trial.

Another important element of fair trial is to express own opinion. Accused person should get sufficient opportunities to express his/her opinion regarding the charge labeled upon him/her. For that, some basic rules have been formulated regarding the hearing. Submitting evidences in support of own argument or getting sufficient opportunities to criticize or defend the claims are the matter come under fair trial. In public hearing, it is expected that there is a transparency and representation of wider welfare of an individual and the society. That's why the comment of the Committee on dissemination of information and proper management regarding hearing and so on are indicated. All trials in criminal matters or related a suit at law must in principle be conducted orally and publicly. The publicity of hearings insures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the cases and the duration of the oral hearing. But, the above mentioned principles regarding hearing have been ignored while implementing judicial jurisdiction by the chief district officer, it is stated in the writ petition. Specially, system of publishing weekly and daily cause list is not followed, no system of given information to the defendant detainee of that, no management of hearing room and bench with necessary infrastructure, there is no situation of participation of stakeholder as the hearing is conducted in the chamber and it is the situation that practicing lawyers hesitate to go there for pleadings.

Above mentioned issues are taken as bases in the writ petition. The bench's attention has seriously drawn that the defendants are found lacking to put arguments with criticism against the claims made in the petition.

With the analysis of above mentioned constitutional provision, the provision incorporated in international and regional instruments and analysis of developed situation, the relevancy to hand over judicial jurisdiction to Chief District Officer and other administrative officer, through different Acts, having right to sentence up to 20 years in the grievíours criminal cases, could be proved. There would not be guarantee of citizens' fundamental human rights to get fair and impartial justice at a time when executive or government's administrative officer is given rights through law, to look after serious criminal cases of crime prosecuted by the government without minimum critreions of judicial independence, fairness and control.

Besides this, the petitioner has found raising the issue regarding right to equality. Claims have been made that there is no substantive ground to deal with the serious criminal cases like arms and ammunition by the Chief District Officer while persons having minor theft case undergoing trial from the court, this provision has discriminated among the citizens for enjoying criminal justice. The defendants have argued that powers have been given to Chief District Officer to hear cases related to the official post and as it falls under quasi-judicial concept, there is no possibility of curtailing right to equality. It might be a situation to hand over judicial rights to Chief District Officer to hear case related to his/her working nature and the cases having minimum six months to one year. Through the evidences presented by the petitioner, there is no relation between the provision of some Acts and the official responsibility of the Chief District Officer, thus, there is no situation of not breaching the right to equality guaranteed by Article 13 of the constitution of getting the justice by the accused from similar court and judicial institution in similar kinds of disputes.

Now, it is the time to consider on final question on whether or not the order should be issued as per the demand of the petition. Regarding other questions, analysis has been made in above mentioned points. Petitioner mainly has made following claims: Chief District Officer is the administrative officer of the government and his major works are mainly related to run daily administrative work, the power to hear serious criminal cases should not be given to him/her, and with the situation of giving such rights from Nepal law including Arms and Ammunition Act, 2019 BS, such provision has curtailed citizen's fundamental and human rights to get fair justice from independent, competent and impartial judicial institution as provisioned under Article 14 of the International Covenant on Civil and Political Rights, 1966, and Articles 24, 100 and 101 of the Constitution. While considering written submission of the defendants the necessity of quasi-judicial bodies cannot be ignored as settlement of all disputes from only formal justice system is impossible in today's welfare state. It is also stated that writ petition should be quashed because the Interim Constitution has also provisioned that the power relating to justice in Nepal shall be exercised by courts and other judicial institutions.

It is found that Nepal laws have delegated jurisdiction to hear criminal cases to administrative official in security of the state, forest and wildlife conservation, monitoring, controlling and licensing and in other areas relating to daily administrative works. The subject has been seen serious because such Acts has given rights to Chief District Officer alone to award maximum 20 years of jail term along with the provision of slapping fine.

Criminal courts have been constituted by delegating jurisdiction of criminal law on the basis of criminology and criminal cases and ability, capacity and experience to administer criminology and criminal law, with the aim of ending state of impunity and generating the feeling of security in the society and an individual could enjoy freedom. As stated in the petition, while looking the situation of Chief District Officer and other officials having quasi-judicial jurisdiction, it

is found that the jurisdiction has been handed over to them without maintaining minimum requirements like minimum educational qualification, training, experience, and proper procedure to give justice, situation and environment.

It is not appropriate to hand over criminal jurisdiction to any administrative officer that the state functions through different departments by keeping in mind of departmental proximity and easiness with the aim of using justice as a tool without managing basic things like capacity to take judicial decision, proper procedure, physical infrastructure, human resources, mechanism to implement decision, judicial discipline, responsibility and evaluation. Realization of delivering justice cannot be there without using and following basic norms and feelings of judicial process, this issue seen serious from the perspective of judicial system.

It is a policy level question of constituting what kinds of institutions are needed to settle criminal disputes, but the approach of handing over the responsibility of serious criminal cases to anybody having no basic knowledge and experience on criminal law and procedure and judicial process, cannot be acceptable. It is universal practice of delegating regular criminal courts to settle dispute erupted under special criminal laws and laws, but the trend of constituting tribunals has been developed as a modern trend, as an alternative to regular criminal courts in some cases that include cases of administrative, security, public interest issues and the cases that need specialization and cases need to give prompt decision and that need the involvement of persons related to the concerned subject, and specialist and legal expert.

It is taken natural in today's context of welfare state that such institution can use judicial power at a time when practices of resolving disputes through tribunals that consists of administrative officers and legal experts from the perspective of necessary subject-wise expertise and from the perspective of working procedure that needs early settlement which are monitoring, controlling, licensing

and cases that relating to daily administration like banking, insurance, tax, revenue, company corporation, industrial dispute, labour, social security and so on, are increasing.

As per the provision of Article 101 of the Interim Constitution 2063 BS, particular court and tribunal for particular subject can also be constituted along with the establised court. Practices are there of constituting different tribunals and courts like labor court, juvenile court, revenue collection tribunal, revenue tribunals and so on, in the situation of being impractical and impossible through regular court. It is also found that the practice of constituting consumer court, administrative court and separate tribunals in the issue of environment and security to address the need of different service groups and sector, as per the necessity, it is not seen of not handing over such responsibility. It is also in practice of searching for solutions by constituting court of experts by targeting concerned crime and law in the above mentioned sectors in particular crimes that should be decided on the basis of the evidences related to particular crime.

The practice of authorizing officials, who have got purely administrative responsibility, to deliver justice or particular crime and subject is looked from critical view from the measure of judicial efficiency, impartiality and independence. There shall be a disruption to complete administrative accountability at a time when administrative officer is deprived of deciding crime related works, which is related closely, during the course of administering departmental works and it is acceptable, as per necessity, to hand over accountability of administering justice to the subject relating to working area in the situation in which common people are denied to get prompt administrative and judicial service. Handing over unlimited and broader judicial rights to an administrative officer, who has a duty to function solely as administrative role, which will replace the regular courts or tribunals that are unrelated to working nature, specialization and departmental responsibility, shall be inappropriate in terms of accepted principles of justice and constitutional provision,

international standards and practicality. Major consideration must be there to limit the administrative officer to the judicial accountability related to short term jail or departmental action that consists of fine.

Such approach is found incorporated in the laws that are formulated recently. As per the Clause 10 of the Public Security Act 2046 BS, the chief district officer is given jurisdiction to punish up to six months of jail sentence while Clause 6 of the Some Public (Crime and Punishment) Act 2027 BS, he/she is handed over rights of putting person under custody up to maximum 35 days in course of investigation and should be referred to appeal court for testing in the cases of awarding two years of jail sentence, that's why, a condition is put that upper court should approve, not the initial decision comes into effect automatically. In this way, it is in practice with the approach that administrative officer should not be given unlimited criminal jurisdiction but limited rights with cautiously or having power to punish from six months to one year under the provision of judicial review and appeal, can be provided. However, in the laws that have provision of handing over judicial jurisdiction to Chief District Officer, there is a lack of certain standard that some laws have given rights to punish extensively and some have limited rights without maintaining uniformity in such standards. In fact, the above mentioned basis of giving power to punish more than one year to administrative officer cannot be matched in case the situation comes there to give such judicial power to the Chief District Officer.

In this way, in the situation of delegating judicial power in some limited subject, it should be considered about the breach of constitutional provision of judicial control and balance as unlimited power, through unaccountable means should not be given to administrative officer. Specially to stop the abuse of given power, the judicial jurisdiction exercised by administrative officer should ensure the basis of independency, competency and impartiality and it should along with guarantee the due process of law and judicial review, too.

As per the legal provision including of Local Administration Act, 2028 BS, it is found that Chief District Officer is appointed as local representative of the government with the main aim of running daily administration in the district and he/she should bear responsibility relating to daily administration remaining under the policies, rules and direction of Government of Nepal. Similarly, there is no legal provision of positional and departmental privilege, special facilities or adequate working freedom to Chief District Officer while administrating judicial works. Similarly, it is not found that there is a compulsory need of knowledge of related law, training and experience to work as a Chief District Officer and there is no basis of transfer, promotion and departmental action by making an evaluation of judicial work that he/she has performed. Besides this, there is no provision of separate procedure relating to judicial process conducted by Chief District Officer and there is no physical and managerial provision that needed to hear cases. The situations of other administrative officer who are handed over judicial rights are not found distinct. Likewise, from the working nature of the official having quasi-judicial jurisdiction also exercises judicial jurisdiction relating to forest and wildlife protection, although they have found having minimum knowledge on related subject, the subject matter having power to award jail term to maximum level by the concerned power should be taken seriously. Specifically, there is no situation of having theoretical and practical knowledge to concerned forest and conservation officials regarding to conduct judicial process and there is also no situation of exercising jurisdiction given by the law being free from the vention of the government.

Before authorizing judicial jurisdiction to any administrative officials, it should be considered that the subject should whether be separated from the judicial jurisdiction or such power should not be misused or the legislator should pay serious attention that there would be basic or minimum standards to ensure performance of such works in an independent, competent and impartial manner. The

work of authorizing only jurisdiction in the absence of that, it cannot be taken as constitutional.

Constitutional provisions including Articles 100 and 101 and preamble of Interim Constitution, 2007 have constitutionally guaranteed that judicial jurisdiction in Nepal shall be exercised by independent, impartial court and judicial institution while Article 24 has put the rights to get fair trial from independent, competent and impartial court and judicial institution under fundamental rights. From the comments made by international and regional level human rights instruments and committees and institutions formed under these instruments including Article 14 (1) of the International Covenant on Civil and Political Rights 1966 (ICCPR) that Nepal become a party on May 14, 1991 have put right to get fair trail from independent and competent institutional under non-derogable rights of not being suspended during the emergency period, having given such high respect to these rights has clarified the importance and inevitability of these rights.

On the basis of the analysis of above mentioned constitutional provision and international instrument regarding human rights and accepted principles, the situation is not seen and cannot be said that, as claimed in the petition, the legal provisions to hand over judicial rights to Chief District Officer are compatible with the norms, values and standards of the constitution and international human rights law. In this case: Although question has been raised regarding the jurisdiction of Chief District Officer, this has been seen as a representative case. There is no substantive difference between criminal justice jurisdiction and other administrative jurisdiction which have given judicial jurisdiction, thus, it is relevant to consider entire context of administrative justice. Situation has emerged to match the jurisdiction of administrative justice with contemporary international treaties related to human rights, interim constitution of Nepal and recognized principle of justice. Petitioner has demanded for immediate declaration of these provisions relating to jurisdiction unconstitutional and to be declared null and void. But, while doing

so, the question can be raised that who will entertain such jurisdiction immediately. There will be legal vacuum to declare such legal provision null and void as per the demand of the petitioner in this context, in which, alternative provision may not be seen possible. Fulfillment and management of such legal vacuum is not possible through judicial decision or order. It is not appropriate and rational to declare laws *ultra vires* because that may invite more complexity and anomalies in the present transition as fulfillment of judicial vacancies could not be made through the judicial decision or order and certain time may consume to make necessary improvement and amendment to the related laws by the legislature, and appropriate arrangement from the executive. That's why, order has been issued in the name of respondents to do following in the following subjects:

1. The following directive order has been issued in the name of Government of Nepal, Council of Ministers, Office of the Prime Minister and the Council of Ministers and Legislature Parliament to constitute a study committee by incorporating specialists from law, justice and administration sector to submit suggestions within six months by reconsidering the jurisdiction that Nepal Law has delegated the jurisdiction solely to administrative officials including Chief District Officer to hear criminal cases, and to manage appropriate legal and legislative provision, what kinds of reforms and amendments are needed to the existing legal provision, by conducting a study on existing legal system, social structure and including a comparative study of the practices of other countries in this regard to make necessary arrangements to implement immediately by making an improvement in such laws as per the recommendations made by such committee.

    a. To consider transfer of jurisdiction and transfer of cases by studying possibility of constituting such

administrative officer and tribunals, jurisdiction, by considering the limit of punishment that what jurisdiction of judicial settlement of what kinds of cases should be handed over to particular administrative officer solely, besides regular court to make compatible with the principle of rule of law, in which cases judicial jurisdiction to be handed over to specialized courts and tribunals.

    b. To determine constitutional and objective standards that tribunals and administrative officials, having judicial power, can conduct judicial process in independent, competent and impartial manner in the working level.
    c. To create faith and situation of access of citizens in the judicial process administered by the administrative officer.
    d. To establish system of evaluating works of administrative officer on the basis of judicial works also and associate it with his/her professional growth.
    e. To formulate separate laws relating to procedure having the provision of following fair trial and due process of law and effective provision of judicial review while exercising judicial jurisdiction.

2. Besides other issues, as stated in point 1, to fix qualification of the official who hears cases in such laws while managing such laws and to include the provision of having substantive training compulsorily relating to judicial process to perform judicial work efficiently, and proper arrangement of professional growth and security of services of administrative judicial officers.
3. It is seen that some time shall be needed to manage legal and legislative provision as stated in the point No. 2, till the management of such provision, possibility of works shall be

continued against right to justice as per Article 24 of the Interim Constitution and shall be against the spirit of the provision of the Articles 100 and 101 of the constitution while handing over such responsibility without having knowledge of related subject and judicial process, by stopping such situation immediately and necessity has been there to create infrastructure to perform judicial work in an effective, impartial and competent manner in the practical level, give such responsibility to competent individual by selecting among the persons having graduate degree in law and having master level degree in concerned subject, having experience of related field or having other above mentioned qualifications, but, regarding individuals of not having minimum three-month training from national Judicial Academy or recognized training institute on the concerned subject related to law and judicial process, to implement and make implementation compulsorily within one year by arranging necessary management, mandamus order has been issued in the name of defendants including Government of Nepal, Office of the Prime Minister and Council of Ministers, and Home Ministry.

It is hereby directed to provide a copy of this order to the respondents through the Office of the Attorney General. And to provide a copy of this order to Judgment Enforcement Directorate of the Supreme Court to manage of presenting periodical report by conducting regular monitoring of the implementation of the order and to submit the file to the Record Unit as per the rule.

We concur with the above decision
Justice Girish Chandra Lal
Justice Sushila Karki
Done at this day of 5th Ashoj 2068 BS (September 22, 2011)
Translated by Shyam Kumar Bhattarai, Liladhar Upadhyaya

Generally, the matter pertaining to the regulation of Visa and Visa fees falls under the domain of domestic law of each country. The Court of law has nothing to do with the policy matter of the government.

Supreme Court, Special Bench

Hon'ble Justice Kalyan Shrestha

Hon'ble Justice Girish Chandra Lal

Hon'ble Justice Gyanendra Bahadur Karki

Writ No. 2067-WS-0007

Subject : Certiorari, mandamus and others.

Petitioner: Advocate Meera Dhungana, a resident of Ward No. 11, Kathmandu Metropolis for her own behalf and on behalf of Women, Law and Development Forum and Others

Vs.

Respondents: Office of the Prime Minister and Council of Ministers and Others

- **Since, visa fee is to be collected from a foreign national; it is not plausible to expect a foreigner be equally treaded like a Nepali citizen.**
- **It is a universal practice that each country of the world collects visa fee from a foreigner on prescribed rate. It is managed by the domestic law of each country and cannot be otherwise challenged.**

- **Since the provision prescribes different categories of visas and visa fees, the difference on visa fees on the basis of category of visa cannot be said unreasonable. Since visa fees is to be prescribed taking into consideration inter alia the purpose of entry of the foreigner in Nepal, the different treatment based on that cannot be compared with right to equality.**
- **The matter of prescribing a visa fee depends on the policy decision of the government. Generally, the court does not intervene on the policy matter.**
- **It cannot be challenged the present legal provision as discriminatory on the ground that it continues the privilege obtained under the repealed legal provision.**

Decision

Kalyan Shrestha; J: The facts and decision of the present writ petition—praying to declare the provision of Clause (e) of No. 4 of Schedule 9 to the Immigration Rules, 2053 since it is inconsistent with right to equality and prays for an order of mandamus to make legal arrangements consistent with right to equality—lodged as per the Article, 32 and 107(1) and (2) of the Interim Constitution of Nepal, 2063(2007) is as follows.

The petition claims that the Clause (h) of Rule (9) (h) No. of 4 of Schedule 9 to the Immigration Rules, 2051 provides that a foreign national who produces a marriage registration certificate married to a Nepali citizen may obtain non-tourist visa. To obtain such visa a foreigner is required to pay a visa fee as prescribed under Schedule 9 of Rule 29 (1) on the assumption that it is related to Section 29. No. 4 of the Schedule 9 prescribes visa fees for the issuance and extension of non-tourist visa. Clause (b) of No. 4 of the Schedule prescribes a visa fee equal to USD 5 in equivalent Nepali currency to

a foreigner of Nepali origin or a foreign passport bearing children born to a Nepali father or mother but a foreign national who marries to a foreign national of Nepalese origin and is residing in Nepal with family is required to pay higher fee. This provision of higher fee to a foreign national married to a foreign national of Nepali origin has lowered the status of marital relation in comparison to other relations. Thus, this legal classification has created discrimination among a foreign national within family relation and a foreign national of Nepali origin bearing a foreign passport. This discrimination has ridiculed the equality provisions under international law and constitution. Therefore, on the above mentioned grounds, the provision included in Clause (e) of No. 4 of Schedule 9 to the Immigration Rules, 2051 has created unequal treatment to a person within marital relations who is foreign national of Nepali origin that violates constitutional right, right to equality, international norm including right to equality under international law and be declared *ultra vires* through an order of certiorari. Further, an appropriate order be issued to make necessary legal arrangements based on the principle of equality.

The Court had passed an order directing to issue the show cause notice in the name of the opposite parties asking them as to what the matter was and why the order is not to be issued? The order further had directed to serve a notice of 15 day to the opposite parties to submit written replies through the Office of the Attorney General and let the Office of the Attorney General be informed of the matter.

The Department of Immigrations in its reply claims that at the time of commencement of Rules Pertaining to Foreigners, 2034 there was provision to encourage the foreigners enter into Nepal as well as grant free visa to a woman of foreign nationality married to a Nepali citizen who intends to adopt Nepali nationality. However, at the time of commencement of the Immigration Act, 2049 and Immigration Rules, 2051 it was found that a large number of women of foreign nationality have entered into Nepal, but instead of adopting Nepali nationality those women used the provision of marriage only to avoid

the visa fees. Thus, to discourage such practice the provision of the Immigration Rules was designed. The privilege granted under the old legislation was continued on the ground that in some cases it is not just to abrogate the privileges granted under the old legislation. The different provisions under the old legislation and prevailing legislation cannot be a ground for a claim of violation of fundamental rights guaranteed under the constitution. The provision under the Rules Pertaining to the foreigners that provides a free visa to a foreign woman married to a Nepali man but not to a foreign man married to a Nepali woman is designed to avoid adverse effect on revenue to be collected from the foreign tourists. Thus, since the policy favoring the national interest that is included the provisions of Clause (e) and (h) of No. 4 of Schedule 9 to the Immigration Rules is in line with the spirit of the Constitution, the writ petition be dismissed.

The Ministry of Home Affairs in its written reply argues that there is no discrimination under the Immigration Rules, 2051 to issues non-tourist visa. In case of the persons who had already obtained free visa under the Rules Pertaining to Foreigners, 2031 continues to enjoy the privilege. Once one enjoys a privilege on the conditions provided under a particular legislation continues even after the repeal of that legislation. After the commencement of the Immigration Rules no one is discriminated on the amount of visa fee. The Government of Nepal is ready to reform if any case of different treatment under the same law is reported. Thus, the present writ petition be dismissed.

The Ministry of Law and Justice in its reply argues a free-visa obtained by a foreign national married to a Nepali man under the Rules Pertaining to Foreigners, 2032 is continued on the ground of impracticability to ask for visa fee later on. Clause (e) of No 4 of Schedule 9 of the Immigration Rules, 2051 has provided a single amount of visa fee to a foreign national married to a Nepali citizen. Since, the provision does not provide different treatment among

woman nor among man and woman, the claim of the petitioner is unreasonable. Thus, the petition be dismissed.

The Office of the Prime Minister and the Council of Ministers in its reply states it is found that the Immigration (Fifth Amendment, 2064) Rules, 2051 has enshrined the principle of equality on the ground that provides for same treatment among equals and different treatment to unequal. The judicial scrutiny of a Rules can be made on the ground it its consistency or inconsistency with the parents Act as well as whether it has been promulgated through re-delegation of delegated authority. It cannot be challenged that the Rule is inconsistent directly to the constitution nor the court conduct a judicial review of the Rules on that ground. On this basis, since there is no claim of the petitioner that the Immigration Rules is inconsistent to the Immigration Act, or is beyond the authority delegated by the Act or issued under the re-delegation of the authority; the Court cannot test whether the provision of the Rules is inconsistent to the Constitution or not. Even in the case of declaration of the provision of the Rules inconsistent to the Constitution, it happens useless till the Immigration Act, 2049 remains in force. Thus, the writ petition be dismissed.

The case file was brought to this Bench as per the rules for hearing today. During the hearing on behalf of the petitioner advocate Meera Dhungana argued that the legal provision is erroneous, since it discourages to the woman who wants to contribute to our country as well as creates a situation of deprivation to live with family. She further argued this indirectly violates a reproductive right of a woman. Similarly, learned advocate Sushma Gautam appearing on behalf of the petitioner argued that since the Ministry of Home Affairs has assured for reform in case of discriminatory treatment under the same law and the receipts furnished with the petition has proved different treatment, the provision of the Immigration Rules be declared void as claimed in the writ petition. Learned Joint Government Attorney Yuvaraj Subedi appearing on behalf of the respondent the Government of Nepal argued since the matter to

prescribe the amount of visa fee falls in the government policy, the court cannot invoke writ jurisdiction and intervene in this matter. Further, he argued that the claim of the writ petition that there is discrimination is baseless, since the Immigration Rules, 2051 has not categorized as man and woman.

Upon perusal of the case file and deliberation from both the sides, it seems that the decision should be made mainly on the following questions and reach a conclusion on whether or not the order sought by the petitioner need to be issued?

(a) As to whether the provision of Clause (e) of No. 4 of Schedule 9 under Rule 29 of the Immigration Rules, 2051 is inconsistent with right to equality granted by the Constitution?

(b) As to whether or not the order sought by the petitioner need to be issued?

With regard to the decision, Schedule 9 which is related to Rule 29 has mentioned various visa fees. Rule 29 provides for visa fees. It provides that the fee for issuing visa to enter into or stay in Nepal, extension of visa, regularization of visa of the overstayed foreigners, issuing travel document or conversion of one class of visa into another type of visa or other fees related to visa shall be as prescribed under Schedule. On that basis the schedule has mentioned visa fees in detail. In No. 4 of Schedule 9 there are a number of provisions for visa fees to issue or extend non-tourist visa. It deems appropriate to consider the Clauses (b) and (e) in the context of the claim of the petitioner that the provision of Clause (e) in comparison to Clause (b) requires a Nepalese woman married to foreigner to pay higher fee and it ultimately results in unequal treatment. Clause (b) requires a foreigner of Nepali origin or foreign passport bearing children of Nepali father or mother to pay a sum equal to US D 5 in Nepalese currency for a period of one month.

Clause (e) requires a foreigner married to Nepalese citizen to pay a sum equal USD 10 in Nepalese currency per month. It does not seem discrimination based on man and woman since both of those provisions do not prescribe different visa fees to man and woman. It seems same visa fee for persons on equal footing. Since, visa fee is to be collected from a foreigner national, it is not plausible to expect a foreigner be equally treaded like a Nepali citizen. It is a universal practice that each country of the world collects visa fee from a foreigner on prescribed rate. It is managed by the domestic law of each country and cannot be otherwise challenged.

Whereas, Clause (e) of No. 4 of the Schedule 9 of the Immigration Rules, 2051 of Nepal is concerned, although the legal professional appearing on behalf of the petitioner has claimed in her deliberation that it (receipt) has been furnished with the petition, no such document or instance of discriminatory treatment between man and woman is found. Since the provision prescribes different categories of visas and visa fees, the difference on visa fees on the basis of category of visa cannot be said unreasonable. Since visa fees is to be prescribed taking into consideration inter alia the purpose of entry of the foreigner in Nepal, the different treatment based on that cannot be compared with right to equality. Right to equality does not advocate for absolute equality. Thus, the claim for equal treatment amongst unequal is not acceptable.

In the context of challenge of the petitioner to the non-tourist visa, it is necessary to study the Rule 14 that gives a list of 14 categories of foreigners for the issuance of non-tourist visa. In that list Clause (h) includes a foreign national who is married to Nepali citizens and furnishes the marriage registration certificate. There is not different classification as a man or a woman.

The matter of prescribing a visa fee depends on the policy decision of the government. Generally, the court does not intervene on the policy matter. Additionally, the Ministry of Home Affairs has assured on the written response that in case of proof that an unequal

treatment is resulted due to the provision of the Regulations, it is ready for reform of the policy. Thus, it does not seem appropriate and reasonable to this court to enter into the subject-matter and render a judicial decision.

It seems that in the present petition on the basis of a provision for free visa under the Rules Pertaining to Foreigners 2043, it is contended that the provision of the Immigration Rules as discriminatory. Although due to repeal by the Immigration Rules, 2051 the Rules Pertaining to Foreigners do not exist now, Clause (i) No. 4 of the Schedule 9 related to Rule 29 of the Immigration Rules provides for the continuation of the free visa obtained by a foreigner national married to a Nepali man shall exist till the marriage continues. In this content, it cannot be challenged the present legal provision as discriminatory on the ground that it continues the privilege obtained under the repealed legal provision. Taking into consideration of the past practice of granting concession to a foreign woman married to a Nepali citizen, it seems that provision is indented to avoid the economic hardship of such woman to stay in Nepal as well as to facilitate a Nepalese man to continue his family life and reciprocal proximity with spouse. In the light of recognition of right to family life under International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights that consideration seems appropriate. However, it cannot be ruled that on the basis of repealed Foreigner's Rules a provision of a prevailing Immigration Rules is discriminatory.

It is natural for a Nepali citizen tied on marital knot with a foreign national to expect that his/her spouse do not feel suffered or is not deprived of family rights due to visa fee. However, a holistic study of visa fee provisions of Immigration Rules, 2051 does not seem that the provisions are discriminatory against a particular person or a particular group. It has classified various categories of visas and has fixed visa fee on category basis. Since, it is the domain of legislature and executive to adopt family-friendly legal and policy measures help maintains family relations of a Nepali citizen married to a

foreign man or woman, this court cannot enter into this subject-matter.

On the basis of above analysis it is found that the visa fee provisions are not discriminatory to either man or woman, nor only woman are adversely affected by those provisions. Further, visa fee determination is the policy matter of the government beyond the judicial domain. Thus, the court does not agree with the contention of the writ petition that the provision of Clause (e) of No. 4 of the Schedule of the Immigration Rules, 2051 has adversely affected right to equality and personal liberty. Hence, the demand made in the petition cannot be materialized. Let the case written off from the registry and case file be handed over as per rules.

We concur with the above decision.

J. Girish Chandra Lal
J. Gyanendra Bahadur Karki

Done on the 29th Mangshir, 2068 BS (BS) (December 15, 2011).
Translated by Reshikesha Wagle

The state shall have power and privilege to prescribe national dress code award medals and decorations to any individuals and set out the decorum of state level functions and ceremonies.

Supreme Court, Special Bench

Hon'ble Justice Prem Sharma

Hon'ble Justice Girish Chandra Lal

Hon'ble Justice Prof. Bharat Bahadur Karki

Writ No.2067-ws-0020

Subject : Certiorari mandamus & others

Petitioner: Advocate Sunil Ranjan Singh

Vs

Respondents: Office of the Prime Minister and Council of Ministers

- **Indeed, the state shall have the power and privilege to specify the standard and types of dress for officials and dignitaries attending in the ceremonies, occasions and festivals as symbol of their authority and grace and also upholding the significance of such state level functions. The pattern of the dress prescribed for such special ceremony can not be defined as national standard dress binding to all.**
- **The officials of civil service, Nepali Army, Nepal Police and Armed Police Force and any other individuals who are conferred with the decorations, they must be given**

information about what type of dress they are required to wear while attending in ceremonies, occasions and festivals to be organized by the state can not be the subject matter that can enter into the purview of the extra ordinary judicial process of this court assuming that it is concerned with the rights and interest of the public at large.

- **The government of Nepal, in exercise of the power of delegated legislation has promulgated the Decorations Rules, 2065 and the petitioner refers its Rule 38 contradictory to Article 13 and the sub-Article (3) of Article 17 of the Interim Constitution of Nepal, 2063 with the motive of entering into the precinct of extraordinary power of this court under Article 17 (1). He quotes Rule 38 of the Decorations Rules, 2065 simply touching the issue of validity in surface. His this deduction can not be the ground for conducting review of the given issue exercising the power of judicial review under Article 107 (1) of the constitution.**
- **It can not be claimed that the provision of the dress determined for the officials and individuals necessary to be attended in national ceremonies and festivals can not be perceived as that they will remain unchanged for a long period. The executive shall have power to effect necessary changes in them, indeed. Hence, the issue relating to the dress determined by targeting only to the officials and individuals conferred with the decorations who are necessary to attend such ceremonies and festivals prescribed by the executive in view the honor, rationale and decorum of the national festivals and ceremonies can not be the subject of judicial intervention.**

Decision

Prem Sharma, J : The fact of the present writ petition filed in this court pursuant to Article 107 (1) and (2) of the Interim Constitution of Nepal, 2063 and the decision reached thereto is as follows:

I, the petitioner, am a legal practitioner and have been working for the welfare and protection of rights and interests of the Madhesi Community of people. Madhesi communities have their own language, traditions and culture to reflect their identity. All the Nepalese races have the language traditions and culture of their own. The preamble of the Interim Constitution 2063, have dreamt for a moderate state restructuring in order to address the problems based on class, tribe, region and gender. The Article 17 guaranties the right relating to education and culture as a fundamental right. Article 17 (3) has provided to every community living in Nepal with right to preserve their language, script, culture, civilization and the heritage.

So was the case, but the Ministry of Home of the government of Nepal, ignoring the above fact has mentioned in Note- 'B' of the notification dated 2067/5/7 published in Nepal Gazette Vol.60, No 19, part V, that the Nepali dress shall mean" in the case of women their formal wears may that be a Choli (bodice), Sari (skirt) along with shoes, notwithstanding their style; and for men a Labeda (a cloak), trouser and coat along with a cap. The notification further states that this notification has been issued for the knowledge of all concerned about the dress and decoration required to be worn by the civil servants, Nepali Army, Nepal Police, the Armed Police Force and other individuals conferred with decorations while attending in the national ceremonies and festivals. This notification which defines the Nepali dress contradicts with the preamble and the Articles 3, 13, and 17(3) of the interim constitution of Nepal, 2063 and has left a serious effect to those Nepalese people who do not wear Daura, Suruwal, Cap and Coat as well as Choli, Sari and Shoes. There is a possibility of abolishing the traditional attire and

culture of various castes of people living in Nepal. The said notification published in exercise of the power granted by Rule 38 of the Decorations Rules, 2065 to infringe the fundamental rights of preserving one's own tradition and culture, contrary to the constitution. Hence, the definition made in regard to the Nepali dress as above and the said Rule 38 is subject to quash.

Every society nurtures its own special type of culture and may vary to each other. Men in hills wear Bhoto (vest), Kachhad (a lion cloth), and Choli (bodice) and Patuka (a girdle) whereas in Terai men wear Kurta, Dhoti, Gamchha (towel) and women a thin Sari and a bodice. Daura and Suruwal is the wear of specific tribe of people. So this attire could not be the dress of all tribes. The Universal Declaration of Human Rights, 1948, International Convention on Economic, Social and Cultural Rights 1966, International Convention on the Elimination of all forms of Racial Discrimination 1965 and other international instruments have prohibited to discriminate, exclude, restrict or to give priority on the ground of region, tribe, color, descent or on the ground of national and of the tribal origin. Nepal has been the signatory to all these instruments and has binding effect as the national law of Nepal in pursuant to Section 1(2) of the Treaty Act, 2047.

Against all those constitutional and legal provisions, the Rule 38 of the Decorations Rules, 2065 which authorized the Home Ministry to bring the said notification in 2067/5/7 and the definition it has given to Nepali dress would like to declare the dresses of other castes and creeds as 'non-Nepali dress' recognizing only Daura, Surwal, cap and Sari, Choli as dress. Now therefore, the definition made in Rule 38 of the Decorations Rules has violated the Articles 1(1), 3, 13 and 17(3) and the preamble of the Interim Constitution, 2063. Hence, an order of certiorari be issued to invalidate the given notification and an order of Mandamus is sought for an interim order not to forward any action proceedings in accordance with that notification until the writ petition is finally disposed of. Also, since this matter involves the

issue of the public interest let it be heard giving first priority. This was the content of the writ petition filed in 2067/8/29.

This court has issued an order inquiring what had happened in this relation? Why an order as requested by the petitioner should not be issued? The respondents are notified through the office of the Attorney General requiring them to submit their reply in writing within 15 days excluding the time limit to be consumed for journey.

The Office of the Prime Minister and the Council of Ministers in its written reply submitted in 2067/10/18 had a mention that the petitioner has been unable to state about what action or decision made by this office has infringed his fundamental rights. The writ petition which has no connection with this office should be quashed. The notification published by the Ministry of Home in Nepal Gazette dated 2067/5/7 Vol. 60, No. 19, Part- V, pertaining to the definition of Nepali dress is challenged by the petitioner alleging it as contrary to Article 17 (3) of the constitution. In this, we would like to clear that Nepal is a country with its multi-tribal, multi-lingual, multi-cultural and multi-religious richness with various castes and creeds of people as indigenous, ethnic and others. So, the Article 17(3) of the constitution is solely motivated to the promotion and preservation of the language, script, culture, civilization and heritages of all classes and communities of people living in Nepal. This constitutional right is possible only because he/she is a citizen of Nepal. The dress which the said notification has defined can be used by all without any distinction. The provision relating to the dress as claimed by the petitioner is not a mandatory provision. It is concerned only with the officials of the government agencies constituted under Article 153 of the constitution and other distinguished personalities who are conferred with decorations and are necessary to be attended in national level ceremonies and occasions that's also to maintain the national dignity. By this, it does not mean that the Article 17(3) has imposed restrictions or abridged to the rights of any class or community of people. In order to maintain national pride, glory and nobility of the government ranks and files, certain provisions

pertaining to national decorum and dress in honor to the dignitaries who have acquired national decorations was desirable for the government service formed under Article 153 of the constitution. The provisions relating to dress compulsory only at the occasions of national ceremonies and festival for dignitaries having public face should not be considered against Article 17(3) of the constitution. Hence, no order as requested in the petition should be issued. The writ petition is subject to cancellation.

The Ministry of Home has responded that it was fixed by the Government of Nepal to the individuals who are conferred with Decorations under Decorations Rules, 2065 and are attending in the national level ceremonies and occasions. This decision has not abridged the constitutional and fundamental right of the petitioner. The writ petition should be quashed.

This writ petition which is duly presented to this bench for decision, the learned advocate Mr. Sunil Ranjan Singh, who is also the petitioner in this writ petition and the learned advocate Mr. Madhukar Pathak mentioned that the said decision of the Home Ministry has defined the Nepali dress. The Home Ministry has not delegated any right by the Decorations Rules to define the dress. The definition has neglected the traditional wears and culture of the different people and their dialects and is motivated to enhance the dresses and culture of any particular community and race, which contradicts with the preamble and Article 17 (3) of the Interim Constitution and therefore, quash able. Constitutionally, the state is liable to preserve and promote the languages and cultures of all tribes. Labeda, Suruwal, Coat and cap which is familiar only in a particular race should not be referred as a compulsory dress of all the castes. It is against the spirit of the constitution to compel all to wear the one and the only dress. Hence, the notification published by the Home Ministry as to define the dress is unconstitutional and therefore the said notification should be invalidated.

The learned joint Attorney General Mr. Kiran Poudel represented on behalf of the respondents the Office of the Prime Minister and the Council of Ministers argued that the notification published by the Home Ministry in 2067/5/7 has stipulated the dress for dignitaries required to be attended in various National Days and Ceremonies. The stipulation of dress is meant for the officials of civil service, army, Nepal police and armed police as well as the individuals who have acquired decorations and medals from the state while they attend in the ceremonies. It does not force any other person to wear the said dress. Nobody should feel otherwise. The particular class of officials and the individuals honored by the national level medals only are require to wear such dress while they appear in the national level ceremonies and occasions. Hence, it is not an issue involving public interest. This notification has no effect to the petitioner nor does any other person have any concern to it. So the petitioner has no locus standi to file this writ petition. Therefore, such a meritless petition should be quashed.

The arguments put forth by the learned counsels heard and the file of the case studied.

Precisely, the following questions are involved in this case:

(a) Whether or not the present case involves any issue of public rights or interests? Is there any scope of locus standi to institute this petition?

(b) Whether an order as demanded in the petition should be issued or not?

Primarily, the need lies in settling the first question. While considering upon the said notification published by the Ministry of Home, it is found focused mainly on decorations and dress required to be worn by the officials of civil service, Nepali Army, Nepal Police, armed police force as well as by other dignitaries while attending in

the ceremonies and festivals of national importance and in Page 7 under the heading : 'Decoration and Dress Number' of the same notification and in Number 1 of which regarding the dress of civil service it is found noted as- " the Nepali dress of one's own choice" and in Note (B) " the Nepali dress " shall mean a dress which is conventionally in use. In case of women it will be Cholo, Sari along with shoes, notwithstanding of its style and in the case of man, it will be Labeda Suruwal, Coat and a cap". The petitioner has problem with the said "note-B" and claims such definition contrary to the Articles 13 and requests for its invalidation since according to him, it involves the public interest and therefore had locus standi under sub- Article (1) and (2) of the Articles 107 of the constitution.

For the enjoyment of the fundamental right provided by the constitution or where there is no provision of alternative remedy for the enjoyment of any other legal rights or there is provision of alternative remedy but such remedy is inadequate or ineffective, or for the settlement of any constitutional or legal question involved public interest or concern, the Supreme Court, in exercise of its extraordinary jurisdiction provided in Article 107(2) shall issue an order as it may deem necessary and appropriate for the enforcement of such right or settle the issue.

Since the petitioner has raised the issue of clarification made in regard to Nepali dress as an issue of public concern, which appears in Note (B) of the notification published by the Home Ministry in Nepal Gazette in 2067/5/7, now therefore, it has been necessary to settle the question about whether or not there is any consistency of entering into the extraordinary jurisdiction of this court with a writ petition by the petitioner complaining it as an issue of public concern? While pondering upon this matter, the right to plea for a remedy entering into the extraordinary jurisdiction of this court in any issue of public interest or concern provided in Article 107 (2) can not be available to all persons and in all cases. Any person who enters into this court complaining any matter as public issue, he is required on the face of it to establish the fact that the given issue is an issue

which involves entirely the public interest or the concern. Apart from conspicuously establishing the meaningful relation and substantial interest of the petitioner with the matter in question, he is required meaningfully and effectively represents the will of the public and entered the issue in the extraordinary jurisdiction of this court for the judicious settlement of the issue in question. Neither the host of each and every details of unimportant things with which the ordinary mass have no meaning and concern can become the subject of extraordinary jurisdiction of this court nor to file the petition of this kind just to arouse curiosity to provoke public sentiment could realize the objective of this constitutional provision. The Special Bench of this Court has enunciated a much convincing principle after an elaborative discussion and brainstorming in a writ petition (No 989, 2047) run between Radheshyam Adhikary and the Council of Ministries (Nepal Law Bulletin, 2048, Vol. 12, Decision No. 4430, Page 810). The question of locus standi about what sorts of public issue involving rights and interests of the people could entertain this scope has been settled by this court in a number of cases, thereafter. There is no reason to disagree with those interpretations and principles.

While going through the content of the said notification published by the Ministry of Home, which reads: "Since the Government of Nepal, in exercise of the power conferred by Rule 38 of the Decorations Rules, 2065 prescribed the dress and decorations as described in the list of particular enclosed herewith require to be worn by the officials of the civil service, Nepali Army, Nepal Police, the armed police force as well as other individuals while attending in the national level ceremonies and festivals, now therefore, this notification has been published for the knowledge of all concern." The names of various national level ceremonies and festivals are mentioned from serial No. 1 to 47 and Nos. 1,2,3,4,5 and 6 are related with those officials and individuals stated above. In the clarification of dress No. 1 it mentioned that in the case of civil service "dress of one's own choice" and in its 'Note B' defining

Nepali dress it is said: the dress traditionally used by Nepalese people according to which in the case of woman it will be Cholo, Sari along with shoes notwithstanding the style, and in the case of man Labeda, Suruwal, coat and a cap.

The notification which the petitioner claims for invalidation referring it an issue of public interest and concern is not a notification aimed at general public. It is related with the dress and decorations of officials and individuals of the above mentioned ranks and files who are necessary to attend in national level ceremonies and festivals. The clarification made in Note B has not given further elaboration and interpretation of Nepali dress making it binding to all. The state, no doubt, shall have the power and privilege to specify the standard and types of the dress of officials and dignitaries attending in the national level ceremonies, festivals and occasions as the symbol of their authority and grace and also for upholding the significance of such state level functions. The pattern of the dress prescribed for such special ceremony can not be defined as national standard dress and binding to all. The officials of civil service, Nepali army, Nepal Police and of the armed police force and any other individuals who have conferred with decorations, the information shared to them about what type of dress they were required to have while attending in ceremonies, festivals and occasions to be organized by the state shall have no effect or concern to the general public and can not be the subject matter that could come under the purview of the extraordinary judicial process of this court assuming that it is concerned with the rights and interests of the public at large.

Nothing substantiates that the petitioner belongs to that categories of persons who required to attend in the national level ceremonies and festivals and is conferred with any decorations such as the officials of civil service, Nepali Army, Nepali Police and of the armed police force do. The given 'Note' in question contained in the notification of the Ministry of Home which has made classification of the dress does not seem to have made any negative impact on any class or community of people including the petitioner himself. Moreover, the

petitioner has been unable to prove his capacity that he is representing the officials and dignitaries of the class who are required to be attended in the state level functions following that notification. If those officials and individuals were affected by the subject matter contained in that 'Note', they were free to knock the door of this court themselves. The petitioner has been failed also to prove that such persons were remained hesitant to appear themselves for redress. Similarly, no situation exists as to hamper in organizing such national festivals or ceremonies or its decorum because any officials or individuals who had to comply with that notification declined it and did not participated in the program. In such a situation, the clarification made through a 'Note' in regard to the Nepali dress defined to be worn by the officials or the persons who have acquired decorations from the state while attending in the national level festivals and occasions can not be the subject matter concerned to the public interest and the petitioner has no right to file the writ petition enjoying this jurisdiction and challenge the notification.

It is a discretionary power of the executive or is purely a policy-based matter to specify by the executive about what sorts or styles of dress the officials and individuals should wear while attending in national level ceremonies and festivals. The Decorations Rules, 2065 was promulgated by the Government of Nepal in exercise of the power delegated by Section 28 of the Decorations Act, 2064 and in Rule 38 of which there is a provision that the decorations and dresses required to be worn by the officials of the civil service, police, Nepali Army and other officials as well as individuals shall be as prescribed by the Government of Nepal and the said notification was published by the Home Ministry only for the knowledge of the concerned officials and individuals who are essential to attend in the national festivals and occasions wearing the dress and decorations so specified.

Here in this case, the questions of legitimacy of the provision contained in Rule 38 of the Decorations Rules, 2065 formulated by

the government in exercise of the power of delegated legislature is found raised just slightly touching its context with the motive of entering into the extraordinary jurisdiction of this court under sub-Section (1) of Article 107 referring it contrary to Article 13 and sub-Article (3) of Article 17 of the Interim Constitution of Nepal 2063. This alone does not allow this court to exercise its power of judicial review under sub-Article (1) of Article 107 of the constitution.

The petitioner has the problem with the Note-B of the notification published in 2067/5/7 by the Home Ministry in Nepal Gazette and the said Note-B which clarifies about the Nepali dress is found determined by using executive wisdom, intellect, experience as well as the rationale. It can not be claimed that the provision of the dress determined for the officials and individuals required to be attended in the national level ceremonies and festivals can not be perceived as that they will remain unchanged for a long period. The executive shall have power to effect necessary changes in them, indeed. Hence, determining the dress by the executive, in view the decorum and the significance of the national festivals and the occasions targeted only to the officials and individuals conferred with decorations and are required to attend in such festivals and occasions can not be the subject of judicial intervention. In addition to this, it will not be reasonable for this court issue directive or speak about whether the dress specified by the executive decision for the officials and the individuals of the above ranks and files is appropriate or not. Now therefore, there is no sufficient ground available to materialize the claim of the writ petition nor there is a need to hold further discussion since the petitioner has no locus standi to file it and thus the writ petition is hereby cancelled. The file of the case be handed over removing it from the regular proceedings.

I concur with the above deceision.

J. Dr. Bharat Bahadur Karki

The opinion of Justice Mr. Girish Chandra Lal: (a dissenting opinion)

After observing the claim of the petitioner in this writ petition there is a need to consider upon the following three points:

(1) Whether or not the petitioner has the locus standi to seek the order of a writ? What basic structure (social fiber) are required to be studied before defining the Nepali dress?

(2) Whether or not the Decorations Rules is competent enough to define Nepali dress?

(3) Is it proper to issue an order as demanded by the petitioner?

The first and foremost thing to be taken into account is whether or not the petitioner has the locus standi. Since the objective of filing this writ petition is to get remedy under Article 13 and sub-Articles (1) and (2) of Article 107 because he has his fundamental right provided by Articles 1(1), 3, 13 and 17 (3) of the Interim Constitution of Nepal, 2063 infringed. While going through those Articles, in 1(1) of which states that this constitution is the fundamental law of the land. Any law contradicting to this constitution shall be declared invalid to the extent of their inconsistency. Article 1(2) provides that it will be the duty of all persons to abide by this constitution. In like manner, the Article 3 defining the nation states that the nation is the composite whole of all Nepali people consolidated in one fiber of the unity and committed towards the multi-tribal, multi-cultural and multi-religious, characteristic having common aspirations and are remained faithful to the independence, integrity and prosperity of the nation. Under the right of equality in Article 13 the sub-Article (1) states that all the citizens are equal before law. No one shall be deprived of the equal protection of law. Sub-Article (2) states that no discriminations shall be made to any citizen on the ground of religion, color, sex, caste, creed, origin, language or ideology faith or

in any one of them. Similarly, Article 17(3) provides that every community living in Nepal shall have the right to preserve and promote its language, script, culture, cultural civilization as well as heritage. Article 107(1) provides if any unlawful imposition laid so as to infringe or hinder the fundamental right provided by this, constitution or if any law contradicts with this constitution by any reason and to declare such law or any part thereof invalid, every Nepali citizen shall have right to file petition in the supreme court and in case any law found contradicting to the constitution as claimed, the supreme court shall have the extra ordinary power to declare such law null and void from the date of its commencement or from the date of decision.

There is no room for dispute on the fact that the country or the nation is the common ground for all the citizens, and the Nepali dress is matter of common concern of all the citizens. The petitioner as a Nepali citizen, it is natural to him to take concern as and when there has been a new provision on Nepali dress and at the same time it also can not be said that he will have no effect either directly or indirectly by such new developments. All are required to be informed of the law and can not be denied also the fact that the petitioner among others is one of the potential candidates to receive decorations. There may arrive such a situation when he will have any way either directly or indirectly to be informed of the Nepali dress and is under compulsion to be abide by the law, and according to him, his eagerness to know about the traditions, dress, civilization, culture and history of his own or of the Nepali people living elsewhere within the country, and to preserve those common heritages as well as to make efforts for the purpose of safeguarding the right of equality of all citizens shall not be justifiable to assume that it is not the subject of his concern. Hence, this writ petition brought by the petitioner alleging the provisions made by the respondents on Nepali dress as contrary to the existing constitution shall not be lawful to term it incompetent for registration in this court under Article 107 (1) of the Interim Constitution of Nepal, 2063. Now

therefore, this writ petition should be accepted as a public interest litigation and consider on whether or not an order of writ as demanded by the petitioner should be issued.

Prior to give notice to the main claim of the petitioner as we look into the basic structure required to keep in mind while defining the Nepali dress, we need to contemplate with the fact that the preamble of the 2063 Interim Constitution of Nepal has abolished the monarchy and declared the country a federal democratic republic, and the Article 4 (1) has introduced Nepal an independent, indivisible, sovereign, secular, inclusive federal democratic republican state. It must not also, forgotten that its territory extends to the river Mechi in the east and river Mahakali in the west which incessantly flow water all the years. On the north lies a glorious Himalayan range and below to it there has been stretched a great hilly region. To the south to it there is a huge vegetation field, the green forest and on the bottom, there is a large plain named Terai which is known also as the granary of the country. The people who live within this boundary constitute the nation indeed which is nicely phrased in Article 3 of our constitution. The natives of here are the people of Nepali race and Nepali is reflected in their religion, language dress and culture. Hence, while we talk about the Nepali wears or dress, we must not forget the Sherpas living in Himalayan regions, Hyalmo-Yolmo, Tamang, Rai, Magar, Gurung as well as Limbus and others scattered throughout the Mahabharat range, Newars of Kathmandu Valley, Rajbanshi and Satar of the east. Dotelis of the west and Tharu, Danuwar, Rajbanshi living in inner- Terai and Terai region also must not be ignored. The way of life, traditional wears and culture of Brahmins and Chhetriyas and the followers of Hindu, Muslim, Sikh, Christian, since Nepal is a secular state are all Nepali people and their traditions and culture are Nepali so are the originals which must not thought never as factional attitude. Now therefore, while making any provision on Nepali dress, the overall scenario must be given due respect. This alone could be the democratic ideals, timely step and justifiable. These various castes and creeds introduce their own respective

costume and dress and their wears developed according to the climatic conditions and weather present a beautiful mosaic and contribute to our emotional unity. The proper dress which could be accepted and fitted to all from east to west and north to south should be given due recognition of a Nepali dress and to inculcate this truth alone could be referred as judicious.

While considering whether or not the Nepali dress could be defined in relevance to the Decorations Rules, the Rule 38 of the said Rules has provided that the decorations and the dress needed for the officials of civil service and the police, Nepali army and other office bearers as well as the individuals who have conferred with decorations while attending in the national level festivals and occasions shall be as prescribed by the government of Nepal. By this, the government of Nepal, which may prescribe the appropriate dress also in the case of other persons, the reason behind to recognize only Daura, Suruwal and a cap to be used only in a limited community as a Nepali dress shall mean to declare other traditional dress as non-Nepali. Though the provision contained in the said Rules says that it is only for specifying the dress however, it can not be assumed that its purpose is just to define the dress or define or establish Daura, Suruwal and a cap as a Nepali dress. This definition may not only injure the self-dignity of different community living in Nepal but also may hinder our national unity based on multicultural characteristics, indivisibility, and to the democratic norms and values as well. So, such a definition could not be accepted as consistent to the constitution and the law.

Now therefore, the notification of 2067/5/7 published by the Home Ministry, Government of Nepal in Nepal Gazette Vol. 60, No. 19, Part V as per the decision of Council of Ministers by exercising the power conferred by Rule 38 of the Decorations Rules which prescribes the Nepali dress and the definition of Nepali dress given in the 'Note' of that notification is not only contrary to the constitutional provision but also against the norms and values internalized by our Constitution. The said provision of Nepali dress

and the Rules thereunder is hereby declared null and void by the order of the writ of certiorari from the very date of its commencement. Now it is also decided so as to issue an order of writ of Mandamus in the name of the respondents to bring a new provision in that relation keeping in view the multi-ethnic, multi-religious, multi-lingual as well as multi-cultural fiber of our society established by the constitution and constitutional system. As I could not concur with majority decision of vacating the writ petition, I have made my own judgment of things. The file of the case is handed over removing it from the list of regular proceedings.

Justice Girish Chandra Lal

Done on the 1st Bhadra, 2068 BS (August 18, 2011)

Translated by Bhim Nath Ghimire

The words and phrases used in the statute are required to be interpreted in a way that they give clear meaning what the legislature has intended to be.

Supreme Court, Full Bench

Hon'ble Justice Sushila Karki

Hon'ble Justice Tarka Raj Bhatta

Hon'ble Justice Gyanendra Bahadur Karki

Criminal Appeal No. 067-CF-0024

Case: Trafficking of Illegal Timber.

Appellant/Plaintiff: Government of Nepal by the Report of Ranger Bijaya Kumar Gupta and *others.*

Vs.

Respondent/Defendant: Bel Bahadur Thapa Magar, a resident of Kerbani Village Development Committee Ward No. 6, Rupandehi District and others

- **In a situation, when vehicle owner himself/herself has not been involved in the trafficking of illegal forest products, or he/she has no intention to do that, and had no information or knowledge that the vehicle would be used in such acts; and, it did not appear that the vehicle owner's permission, acceptance or agreement is existed in such acts, confiscation of his/her vehicle, neither from the viewpoint of justice nor from rationality, seems reasonable.**

- **The general principle of the interpretation of the statute is that, primarily it is (court) to draw general meaning of words and phrases used in the law to the extent that the meaning of such words or phrases appear to be clear, pragmatic, just and rational. If such meaning cannot be drawn through the literal interpretation, it will be inappropriate to follow the rule of literal interpretation**
- **The intent of the phrases "where it is established an offence...has been committed" cannot be construed that an incidence or offence that took place under this Act need not any relation with the owner of the load carrier seized in the incident.**
- **In case, the involvement of vehicle owner himself/ herself is established, or that the vehicle has been used in an offence committed under this Act in his/her agreement, approval, acceptance or knowledge; confiscation of such vehicle is not only lawful but also just and reasonable.**

Decision

Tarka Raj Bhatta J.: This case submitted to the full bench as per the Rule 3(1) (b) of the Supreme Court Rules, 2049 by an order of Division Bench of this Court, with differing the previous principle laid down by another Division Bench; the brief facts and verdict thereupon is as follows:

The report submitted by Ranger Bijaya Kumar Gupta and other eleven persons to the Bardaghat Forest Area Office, dated 2060/04/26, states: as we received pre-information from our confidential, we found cutting down trees of Sal wood (sorea robusta) making its pieces and attempting to traffic by loading in tractor trolley, at night 1:00 o'clock on the date of 2060/04/25; that lies within the four boundaries of the national forest: north from Sunawal 7, Jyamire highway in Jyamire village, south from jyamire

drainage, east from the way to Lokeshwor and west from Jyamire Abadi.When we tried to arrest them with backings though it was nighttime, we were able to seize a Tractor with loaded timber, No. Lu. 1. Ta. 5013, while unloading. We also did arrest from the crime scene one person Mr. Roka Bahadur Thapa Magar, resident of Kerbani 6, Rupandehi district, involved as informant for the acts of trafficking of timbers, and we seized his Hero Honda Splendor Motorcycle No. Lu. 2. pa. 261, used for the same acts. Due to the nighttime and absence of necessary weapons, other accused person could not be arrested. Hence we, along with the arrested persons, deed of recognizance of recovery crime scene, proofs and material evidences, receipt of material evidences enclosed herewith have submitted this report requesting to take action under Forrest Act and Rules.

A deed of recognizance of recovery showing tractor, timbers, motorcycle, and arrested person, dated 2060/4/25 at night, about 1.00 o'clock is enclosed with case file.

Mr. Ganesh Bahadur Tamang from Arms Forest Guard Camp, Bardara Nawalparasi has given the receipt taking in his charge the of seized materials including tractor, timber and motorcycle is also enclosed.

A letter to Ranger Bijaya Kumar Gupta, employee Sunawal Range post, written by Bardaghat Forest Area Office, in 2060/4/26, asking to have taken responsibility of further investigation and prosecution by drawing information from the report (registered number 180) enclosed with this letter arresting Bel Bahadur Thapa, a resident of Kerbani 6 of Rupandehi District, along with tractor, timbers and motorcycle, during patrol at the night of the 2060/4/25, in national forest from north side of Jyamire, situated at Sunawal; that had been submitted by the personnel including himself.

Statement of defendant Bel Bahadur Thapa, made before District Forest Office Nawalparasi, in 2060/4/26, states; Teju Bahun had promised him to give Rs 500/-, and told that a tractor trolley No. Lu.

1. Ta. 5013, owned by Indra Bahadur Thapa went to the forest of Jyamire, 7 Sunawal, Nawalparasi in order to bring timbers. So Teju and I went to Jyamire, Nawalparasi riding my motorcycle in order to trafficking timbers loaded in the tractor. There were other two people named Hari Kuwar and Bhim Bahun for trafficking of timbers. I, Bel Bahadur Thapa Magar and Teju have been involved in trafficking of those timbers by riding motorcycle back and forth. After seeing forest employees, Teju jumped out and ran away, but they arrested me.

Statement of defendant Bhim Pandey before District Forest Office Nawalparasi, in 2060/4/28, states: Teju Bahun had come to my home and promised me to give Rs 500/- for bringing Sal timbers in tractor trolley from Jyamire jungle.Thus I was in Jyamire jungle in order to traffic timbers that night. Hari Kuwar was also present there for the trafficking of timbers. Having seen forest employees, I, Bhim Pandey and Mr.Hari Kuwar fled. Teju Sharma might know the name of person who was involved in cutting of timbers. We had intent to traffic that timbers by this tractor to the sawmill situated at Ramnagar, 2Chhodki, Rupandehi; owned by Moti Kuwar. Teju Sharma had told this and I knew that.

Statement of defendant Indra Bahadur Thapa made before authorized officer, in 2060/4/29, states: Teju Sharma had asked me to provide trolley tractor in order to traffic Sal timbers from the Jyamire jungle at the night on the date 2060/4/25. So that I sent tractor driver Chitra Bahadur BK with my tractor, No.Lu. 1. Ta, 5013 on the rent with Rs.2,500/ per trip. On the next day morning, 2060/4/25, my driver come to my home and said that tractor and timbers had been seized in Jyamire Jungle in Nawalparasi. I came here running away. I came to know that from Chitra Bahadur. I have no information who had cut the woods. Nevertheless, those were as ordered by by Teju Sharma. Thus, he will know the person who cut the trees. Teju Sharma did not say me about the place where was going timbers so I do not know.

A deed prepared in 2060/5/29 on the spot in the presence of the people of that locality along with Mr.Udaya Gurung, and others resident of Sunawal, 7 of Jyamire village stated in the similar version that in 2060/04/25 around 1:00 o'clock at night, in Jyamire Jungle, north from Sunawal 7, as the timbers were being trafficked by the tractor trolley the forest official traced and recovered a tractor, No. Lu. 1. Ta. 5013, loaded with timbers. Mr.Bel BahadurThapa Magar as well as Hero Honda Splendor Motorcycle No. Lu. 2. pa. 261, by following them. Tractor driver and other people run away. Arrested person could name the other people who were involved in trafficking. We do not know the trafficked timbers where it is going. Arrested person can describe about that.

Charge sheet stated that on the date of 2060/4/25, at nighttime, Sal timbers had been trafficking in illegally by loading tractor, from the national forest in the order and involvement of Bhim Pandey, Indra Bahadur Thapa Magar, Teju Sharma, Hari Kuwar, Tracktor driver Chitra Bahadur BK, Tej BahadurThapa and Moti Bahadur. Some accused arrested red hand from the crime spot and other five have remained absconded. Tractor, timbers and motorcycle have been seized. The acts of accused including Bhim Pandey, Indra Bahadur Thapa Magar and Moti Bahadur proved to be an offence under Section 49(d) and (e) of Forest Act 2049. Hence, it is hereby charged against seven people, mentioned above, for initiation of action and impose punishment under Section 50(1)(d)(4) of the same Act, for the damage of 6 piece of 60.32 sq. ft. Sal timbers worth Rs.12,064/-. Furthermore, Bel Bahadur Thapa among the accused, should be punished according to Section 54 and confiscation of seized Sal timbers 60.32 sq. ft. pursuant to Section 50(1) (d), as well as due to being more than 10000/- damage amount, seized tractor No. Lu. 1. Ta. 5013 used in trafficking timbers, should be confiscated according to Section 66 of the same Act. Defendant Bel Bahadur Thapa, Indra Bahadur Thapa and Bhim Pandey are submitted along with the charge sheet. And, absconding accused Teju Sharma, Hari Kuwar, Chitra Bahadur, Tej Bahadur and

Moti Bahadur should be punished pursuant to Section 50(1) (d) (4), for the offence against Section 49(d) and (e) of the Forest Act 2049, by issuing summon by the court itself.

Statement of defendant Bel Bahadur Thapa made before the court of first instance, states: forest officials were arrested him in Khaireni while going through the way to his home after taking meal a round 8/9 o'clock of the night of 2060/04/25 and brought him here. He doesn't know why they have arrested him. They arrested and beaten up taking me in jungle. After that, they blamed me for trafficking of timbers from the jungle. I did not do the act of trafficking. I did not commit any offence as claimed in the charge sheet, so, I should be free from the false charge.

Statement of defendant Indra BahadurThapa made before the court of first instance, states: he was in brother in law's home in Butawal during day and night of 2060/04/25. Chitra Bahadur is his driver. He does not have any knowledge about him. He was not involved in trafficking of forest products. Charge against him is false. He should be free from the false charge.

Statement of defendant Bhim Pandey made before the court of first instance, states. He was staying in the own home on the date of 2060/04/25, day and night. He had met with Hari Kuwar and Bel Bahadur in Khaireni at the evening about 7 o'clock, and he went home leaving his those friends at the same place from motorcycle. They arrested and brought him from the teashop in Khaireni Chauraha. He was staying that day on his own home. He was not involved trafficking of timbers. He had no knowledge about the incident. He is innocent, so, charge against him is false. He should be acquitted from the false charge.

Statement of defendant Tej Bahadur Thapa made before the court of first instance, states: he, being an elderly person was sleeping at home at the night of 2060/04/25, when incident took place. He was not involved in timber trafficking with the tractor No. Lu. 1. Ta. 5013,

registered in his name. The charge against him is false. He should be free from the false charge.

Defendant Teju, Sharma, Hari Kuwar, Chitra Bahadur and Moti Bahadur did not come to the court, on the date appointed for appearance.

As per the order of the court witness Nirjala Aryal and Gopal Rayamajhi, Sher Bahadur and witness of defendant Tej Bahadur, and Krishna Prasad Sharma, Bel Bahadur have been tried and enclosed with case file.

The District court on 2062/02/12, decided that defendants have denied the allegation on their statement before the court, their statements made before authorized officer have not been proved by the independent evidences, and on the basis of testimony of the claimant, the defendants Bel bahadur Thapa Magar, Bhim Pandey, Teju Sharma, Hari Kuwar, Moti Bahadur and Tractor owner Tej Bahadur and Indra Bahadur are declared to be free from the charge. Defendant Bhim Pandey seems to have been absence on the prescribed date of the court, so that bail amount deposited by him is confiscated. It seems, that timbers had been seized from the tractor, the evidences enclosed with case file shown that Chitra Bahadur has driven the tractor, he was unable to appear before the court to present proof of being his innocence and remained absconded. Hence, it is hereby decided that driver Chitra Bahadur is sentenced for one month imprisonment and liable to pay fine two times more of the damage amount under Section 50(1) (d) (4) of the Forest Act 2049.

Filing an appeal before appellate Court plaintiff Government of Nepal contended that the court of first instance ignored the facts that the defendants Bel BahadurThapa and Bhim pandey on the their Statements before authorized officer had confessed offence, defendant Bel Bahadur was present as witness in the seizer deed, testimony of Gopal Rayamajhi before the court.Teju Sharma, Hari Kuwar and Moti Bahadur Rana are not appear before the court as

summon issued by the court. Defendant Bel Bahadur had made his statement against them saying that they were also involved in the incident. Defendant Indra Bahadur made his statement before authorized officer saying that he had sent Chitra Bahadur with tractor for bringing timbers. Absconded Chitra Bahadur also not punished as demanded in the claim. Section 66 of Forest Act, 2049 also ignored by the court of first instance. Hence, the appellant prayed for the justice by correcting faulty decision of the court of first instance.

Defendant Chitra Bahadur has been punished because of the statement of defendant Indra Bahadur though other defendants who had admitted their offence before authorized officer have been acquitted. Tractor that involved is not confiscated. Hence, Appellate court passed an order, in 2062/09/17, requiring the appearance of the defendants before the court as the decision made by court of first instance seems to be untenable and may be altered.

Appellate Court, Butawal delivered its judgment partly reversing the decision of Nawalparasi District Court, dated 2062/02/12, to the extent of not convicting defendant Bhim Pandey and Indra Bahadur Thapa, who were to be convicted. Hence, defendants Bhim Pandey and Indra Bahadur Thapa are also liable to pay fine twice of the damage amount, under Section 50(1) (d) (4) of the Forest Act, 2049. For other things, the decision of the trial court seems to be appropriate and the appeal of the plaintiff cannot be realized.

Plaintiff Government of Nepal, filing an appeal against appellate court decision, contended that the decision of the Appellate Court Butawal is faulty to the extent that defendant Tej Bahadur Thapa is acquitted from the charge while he admitted the commission of offence by not appearing before the court within the time of summon issued by the court. And, did not decided to have confiscation of tractor involved in bringing illegal timbers, while, Section 66 of Forest Act, 2049 clearly mention that all vehicles involved in carrying illegal forest products loaded exceeding Rs.10,000/, shall be confiscated.

Since bail amount deposited by the defendants who were absent in the court on the prescribed date have not been confiscated, according to Section 124 of the Chapter on Court is Procedure of Country Code (*Muluki Ain*); tractor involved in carrying illegal timbers has not been confiscated, and absconded defendants are given acquittal by the appellate court. Thus, this Court passed an order requiring the appearance of the defendants before the court, because the decision made by appellate court seems to be untenable and could be altered.

Division Bench of this Court passed an order in 2067/10/07 stating that while considering the issue raised in appeal that appellate court's decision is not consistent on its judgment part and particular part judgment part wrote defendants Indra Bahadur and Bhim Pandey have been imposed fine twice to that of damage amount whereas in execution part mentioned only Rs.12,064/ fine against them. Charge sheet mentioned that defendants are responsible for the damage of 60.2 cu.ft. timbers worth of Rs.12,064/. Among the defendants, defendant Indra Bahadur though he denied the charge against him in his statement before the court; nevertheless, he had admitted the fact that Chitra Bahadur has driven the tractor involved in carrying timbers. Another defendant Bhim Pandey seems to have denied the charge against him in his statement before the court. However, he had admitted the fact in his statement before authorized officer that he was involved in loading illegal timbers on the tractor, and ran away from there after forest employees saw him. In addition, nor he has made any plea that he was unduly forced to make such statement against his will, neither any evidence enclosed with case file proved that. In this situation, appellate court decided conviction of offence against both defendants with imposition of fine double to that of damage amount and decided to recover equally from each could not be said otherwise.

While considering upon the issue raised in the appeal that appellate court's decision is faulty because total bail amount had been confiscated from defendant Bhim Pandey because he was failed to

appear before the court on prescribed date however, appellate court decided to deduct fine amount from that deposited amount. According to the order of the court of first instance, dated 2060/5/12, defendant Bhim Pandey was asked to deposit Rs.15,000/ as bail. Following the court order defendant Bhim pandey deposited that amount and signed a bond made according to Section 124 of the Chapter on Court's Procedure, being agree to confiscation of that deposited amount if failed to appear in a place and time as prescribed by the court. It appears from the case file that he had failed to appear before Nawalparasi District Court on the prescribed dates that is 2060/07/25. In this situation, appellate court should have decided to confiscate total deposited amount according to Section 124 of the Chapter on the Court's Procedure, however, appellate court decided to confiscate only Rs.3,386/ after deduction of fine. Therefore, appellate court decision is not correct to that extent, so, it is decided to be partly reversed.

While considering upon an issue raised in appeal that appellate court's decision is faulty to the extent that its decision did not confiscate vehicles involved in carrying illegal forest products worth above than Rs.10,000/, that should have been confiscated under Section 66 of the Forest Act, 2049. It seems undisputable fact that the tractor No.1.Ta 5013 had been seized with illegal timbers, which is registered in Tej Bahadur's name. It does not seem from the proofs enclosed with case file that the tractor used in transportation of illegal timbers in the consent of tractor owner Tej Bahadur. On the other hand, alleged charge has not been proved against tractor owner Tej Bahadur, from the case file, and, he has been given acquittal from the charge. To decide dispossess on of property from his ownership does not seem just, when such property has been used by anybody without his agreement or knowledge or such property was given for one purpose is used in another purpose. In this way, where the tractor was used for trafficking illegal timbers without permission and knowledge of vehicle owner and the charge of trafficking of illegal timbers against tractor owner has not been

proved, appeal of the claimant for confiscation of vehicle does not seem appropriate.

Learned deputy attorney in the course of pleading cited a precedent of this court in *appellant / plaintiff Nepal Government* Vs. *respondent Tara Prasad Devkota*et. al. (NKP 2066 decision No., 8254) that held involvement of vehicle in the offence of trafficking of forest products itself is a crime. The act of involvement in such act is sufficient to establish crime, whether or not there was the consent of vehicle owner. This Bench can't agree with the already set principle of the Division Bench of this court, dated 2066/06/26, that held that the involvement of vehicle in trafficking of illegal timbers is sufficient ground for confiscation of vehicle even if that has been taken place without permission or agreement of vehicle owner. Hence, this case be forwarded to the Full Bench under Rule 3(1)(b) of the Supreme Court Rules, 2049.

The case is duly presented before this Bench. The entire case file, including appeal is studied.

Learned joint-Attorney General Raj Narayan Pathak and Deputy Attorney Sankar Bahadur Rai onbehalf of the appellant Government of Nepal pleaded that the principle already propounded by Division Bench of this court, dated 2066/06/26, in a case *appellant / plaintiff Nepal Government* vs. *respondent Tara Prasad Devkota*et. al. (NKP 2066 decision No., 8254) held that involvement of vehicle in the offence of trafficking of forest products itself is a crime. The involvement of vehicle in trafficking of illegal timbers is sufficient ground for confiscation of vehicle is consistent with letter and spirit of Section 66 of the Forest Act, 2049, so, this principle should be upheld. Learned advocate Mukunda Prasad Paudel on behalf of the respondent/ defendant Bel Bahadur Thapa and Tej Bhadur Thapa contended that the the said principle of the Division Bench of this court, in the case of Government of Nepal vs. Tara Prasad Devkota et. al. is not just. That held that the vehicle ipso facto confiscated if it has been used in trafficking of illegal forest products in any situation,

even if such vehicle has been used in complete absence of involvement, agreement, knowledge or consent of vehicle owner.

Charge sheet seems to have claim that the defendants Bhim Pandey, Indra Bahadur Thapa Magar, Teju Sharma, Hari Kuwar, Chitra Bahadur BK, Tej BahadurThapa and Moti Bahadur should be punished under Section 50(1)(d)(4) of Forest Act, 2049, for the offence under Section 49(d) and (e) of the same Act. Defendant Bel Bahadur Thapa Magar should be punished according to Section 54, and seized tractor No. Lu. 1. Ta. 5013, should be confiscated according to Section 66. The court of first instance Nawalparasi District in its judgment, 2062/02/12, seems to have decided that defendants Bel bahadur Thapa Magar, Bhim Pandey, Teju Sharma, Hari Kuwar, Moti Bahadur and Tractor owner Tej Bahadur and Indra Bahadur are acquitted from the charge. Defendant Chitra Bahadur is punished under Section 50(1) (d) (4) of the Forest Act 2049 as demanded by the claim, and, bail amount deposited by defendant Bhim Pandey is confiscated due to his absence on the prescribed date of the court.

On appeal by the Government of Nepal, against the judgment of Nawalparasi District Court, Appellate Court Butawal seems to have decided with partly reversing the decision of Nawalparasi District Court, to the extent of non-conviction of defendant Bhim pandey and Indra Bahadur Thapa, who should have to be convicted. Defendants Bhim Pandey and Indra Bahadur Thapa are convicted so as to pay fine of double of the damage amount, under Section 50(1) (d) (4) of the Forest Act, 2049.

Plaintiff Government of Nepal filing an appeal in this court against appellate court decision and submitted to the Division Bench for hearing. Because the decision of the Appellate Court Butawal was not appropriate, because judgment part has mentioned fine two times of damage amount to the defendants Indra Bahadur and Bhim Pandey, whereas, in execution part did not mention so. Appellate Court Butawal did not decide to confiscate total bail amount

deposited by defendant Bhim Pandey because he was failed to appear before the court on prescribed date however, appellate court decided to deduct fine amount from that deposited amount. And, Appellate Court decision did not decide to confiscate vehicles involved in carrying illegal forest products. Division Bench of this Court decided partly reversing appellate court's decision, to the extent that appellate court should have decided to confiscate total deposited amount Rs.15,000/ deposited by defendant Bhim Pandey due to his failing to appear before the court on prescribed date according to Section 124 of the Chapter on the Court Procedure. However, appellate court decided to confiscate only Rs.3,386/ after deduction of fine. On the issue of confiscation of vehicle involved in trafficking of illegal timbers, differing with the already set principle of the Division Bench of this court, dated 2066/06/26, in the case of *appellant plaintiff Nepal Government* vs. *respondent / defendant Tara Prasad Devkota*et. al. (NKP 2066 decision No. 8254); Division Bench seems to have decided to submit this case to the Full Bench under Rule 3(1)(b) of the Supreme Court Rules, 2049.

In regard to the appeal for confiscation of seized tractor Lu. 1. Ta 5013 Division Bench of this court dated 2067/10/04 decided the tractor No. Lu.1.Ta 5013 had been seized with illegal timbers, which is registered in Tej Bahadur's name. It does not seem from the proofs enclosed with case file that the tractor used in transportation of illegal timbers in the consent of tractor owner Tej Bahadur. On the other hand, alleged charge has not been proved against tractor owner Tej Bahadur, from the case file and he has been given acquittal from the charge. To decide to dispossess of property from his owners his does not seem just, if such property has been used by anybody without his agreement or knowledge or such property was given for one purpose and used in another purpose. In this way, where tractor had been used for trafficking of illegal timbers without permission and knowledge of vehicle owner and the charge of trafficking of illegal timbers against tractor owner has not been proved, appeal of the claimant for confiscation of vehicle does not

seem appropriate. Learned deputy attorney in the course of pleading put forwarded the precedent of this court of a case *appellant plaintiff Nepal Government* vs. *respondent Tara Prasad Devkota* et.al. (NKP 2066 Decision No. 8254) that held that involvement of vehicle in the offence of trafficking of forest products itself a crime. The act of involvement in such an act is sufficient to establish crime, whether there was agreement of vehicle owner or not. This Bench can't agree with the laid down principle of the Division Bench of this court, dated 2066/06/26, that held that the fact of involvement of vehicle in trafficking of illegal timbers is sufficient ground for confiscation of vehicle, even if that has been taken place without permission or agreement of vehicle owner. Hence, this case be submitted to the Full Bench under Rule 3(1) (b) of the Supreme Court Regulations 2049. In the context of this order, this case has been submitted to this Bench. Therefore, this Bench concentrating only on a question has to decide whether the principle laid down by the Division Bench in Decision No. 8254 should be upheld or not.

In this connection, first, the provision of Section 66 of the Forest Act, 2049 has to be seen. Section 66 of the Forest Act, 2049 has the following provision:

> *In case where it is established that an offence punishable under this Act has been committed, all the Load Carriers, Tools, Quadruped and any other equipment seized in connection with the offence shall be confiscated.*
>
> *Provided that, any tractor, truck, lorry, motor and other vehicles carrying Forest Products of less than Rupees Ten Thousands such vehicles shall not be confiscated, but an additional fine of upto Rupees Ten Thousands in addition to the penalty to be imposed by other Section shall be imposed.*

The Division Bench of this court, in a case of *appellant plaintiff Nepal Government* vs. *respondent Tara Prasad Devkota* et.al. (NKP 2066 Decision No. 8254 page 1751); while construing the aforesaid legal provision, Section 66 of the Forest Act 2049; the following principle has been enunciated:

Involvement of vehicle in the offence of trafficking of forest products itself a crime. The involvement in such an act is sufficient to establish a crime no agreement of vehicle owner is required. While having seen on the legal provision, Section 66 of the Forest Act, 2049 mentions in case an offence punishable under this Act has been established to have committed all the load carriers, tools, quadruped and any other equipment seized in connection with the offence shall be confiscated. Provided that, any tractor, truck, lorry, motor and other vehicles carrying Forest Products of less than a value of Rupees Ten Thousands such vehicles shall not be confiscated, but an additional fine of upto Rupees Ten Thousands in addition to the penalty to be imposed by other Section shall be imposed."In this case damage amount has been determined Rs. 5,676/. In this damage amount exceeds Rs.10,000/ so the vehicle used in the act of trafficking as of timbers have to be confiscated according to the provision of this Section. While statute itself has made provision that a load carrier which is used for carrying timbers of worth more than Rs.10,000/- damage amount shall be confiscated court should not decide otherwise by using its discretion.

While considering on the aforementioned principle laid down by the division bench of this court, it appears, division bench has construed the legal provision of Section 66 of the Forest Act 2049, that the load carrier is confiscated, without question, if two facts have been established, - the loaded forest products is illegal and the damage amount of forest products is more than 10,000/. It does not matter whether the load carrier is used in trafficking of forest products, anyway, without participation, knowledge, information, agreement or consent of the owner of the vehicle. Division Bench has interpreted the Section 66 of Forest Act, 2049, against the recognized principle

of the criminal justice giving effect to creating a criminal liability against him/her without criminal act (actus reus) and criminal mind (mensrea) of the concerning vehicle owner; saying that it is meaningless, whether the involvement, will, intention, agreement or acceptance of vehicle owner in connection of uses of vehicle is exist or not.

In this context, it is appropriate to mention some definite situations where factual ignorance or innocence of concerning vehicle owner or vehicle user is inevitable, to which Division Bench did not forethought. Such situations could be when theft or robbed vehicle is used in illegal acts by third party; and, when vehicle is used as a means of public transportation; illegal substance could be loaded in such vehicle without knowledge or having criminal mind of the vehicle owner or responsible person of such vehicle.

Whereas, vehicle owner himself/herself involved in illegal trafficking of forest products, or if he/she willfully give permission to use vehicle or having information that the vehicle would be used in trafficking of illegal forest products, though vehicle owner himself/herself did not involve; confiscation of such vehicle according to law would be reasonable. However, in a situation, when vehicle owner himself/herself did not involve in illegal trafficking of forest products, or he/she has no intention to do that, and have no information or knowledge that the vehicle would be used in such acts; and, it did not appear that the vehicle owner's permission, acceptance or agreement is existed in such acts, confiscation of his/her vehicle, neither from the viewpoint of justice nor from rationality, seems reasonable.

As Forest Act, 2049, prohibits consumption, sell, distribute, transport and export of illegal forest products, likewise, Narcotic Drugs (Control) Act, 2033 has prohibited consumption, sell, distribute, transport and export of illegal narcotic drugs; that made the legal provision that involvement, agreement or acceptance of vehicle owner require to establish for confiscation of vehicle used in

trafficking of narcotic drugs. In this connection, following legal provision contains in Section 15 and 18;

Section 15. Punishment for Permitting Prohibited Acts in ones Building, Land or Vehicle:

In case the owner of any building, land or vehicle or the person in possession thereof willfully permits any act to be committed in any building, land or vehicle as is prohibited under Section 4, he/she shall be punished with an imprisonment for a term which may extend from six months to five years or with a fine upto ten thousand rupees. If the owner of the building, land or vehicle has committed such offence or has permitted to commit such offence, such building, land or vehicle may be liable to confiscation.

Section 18. Confiscation of Materials Connected with the Offence:

All narcotic drugs connected with any offence punishable under this Act and all materials and equipment used in the manufacture or production of such narcotic drugs shall be confiscated and any vehicle used for the transportation of such narcotic drugs, other than railway train and aeroplane, shall also be confiscated.

Provided that, no vehicle shall be confiscated if the owner of the vehicle is able to prove that he/she was not aware of the fact that his/her vehicle would be or had been used for committing such offence.

Similarly, in the case of trafficking of forest products, Plaintiff *Government of Nepal vs defendants Niraj Singh and et.al. criminal appeal No. CR-0003,*of a similar facts to this case, Division Bench of this court, dated 2065/10/28, already seem to have decided that "vehicle owner can't be punished or confiscated his vehicle under Section 66 of the Forest Act 2049; in the situation, when neither truck owner Niraj Singh was present in the truck, nor he did order to

bring timbers; merely truck driver had brought timbers for a rent, on a timber owner's request."

It is the general principle of the interpretation of the statute is that, firstly, (court) should have to draw general meaning of words and phrases used in the statute while interpretation of law, to the extent that the meaning of such words or phrases appear to be as clear, pragmatic, just and rational. However if it can not draw reasonable, pragmatic, just and rational meaning through the literal interpretation, that should not appropriate to follow. In this situation, by adopting other rules of interpretations, like Golden Rule and Mischief Rule (court) ought to interpret the words and language used in the law in a way that could be drawn the meaning suitable to the context. According to the provision of Section 66 of the Forest Act 2049, it seems that the load carriers shall be confiscated where it is established an offence punishable under this Act has been committed. The intent of the phrases "where it is established an offence...has been committed" cannot be construed that an incidence or offence that took place under this Act need not any relation with the owner of the load carrier seized in the incident. By the construction and words of Section 66, direct or indirect involvements of the vehicle owner also expected in order to confiscate the means of load carrier. Therefore, In case, where vehicle owner himself/herself involvement is established, or that the vehicle has been used in an offence committed under this Act in his/her agreement, approval, acceptance or knowledge; confiscation of such vehicle is not only lawful but also just and reasonable.

While interpreting the provision of Section 66 of the Forest Act 2049, "Involvement of vehicle in the offence of trafficking of forest products itself is a crime. The act of involvement in such an act is sufficient to establish crime, whether there was agreement of vehicle owner exist or not. When damage amount has been determined more than Rs.10,000/ according to the Section 66 of Forest Act, 2049, the vehicle used in the act of trafficking of timbers must have to be confiscated according to the provision of this Section. While statute itself made provision that the load carrier shall be confiscated, which is used for carrying timbers worth more than of Rs.10,000/- damage

amount, court should not decide otherwise by using its discretion" *appellant plaintiff Nepal Government* vs. *respondent Tara Prasad Devkota* et.al. (NKP 2066 Decision No., 8254 page 1751); the literal interpretation of the Division Bench of this court, in a aforementioned case not appears to be just, rational and reasonable due to inconsistency with the recognized principle of criminal justice, similar context of other prevailing laws and precedent of this court; since this principle can not be upheld, hence, hereby declared overruled.

Particulars

Since, the Division Bench of this Court, while delivery of judgment, dated 2067/10/04, have decided with partly reversing the appellate court's decision, to the extent that appellate court should have to decide confiscation of total amount Rs.15,000/ deposited by the defendant Bhim Pandey a remand during trial at the court of first instance, while Appellate court has decided to confiscate only Rs.3,386/, after deduction of fine. Therefore, the S.No. 1 of the execution part of the judgment of the Appellate Court Butawal, dated, 2063/08/03 shall not be sustained. Hence, it is ordered to notify in writing to the court of first instance, Nawalparasi District Court to confiscate and submit total deposited amount Rs.15,000/ to the revenue fund; and, to recover the punishment of fine Rs.12,064/, levied to defendant Bhim Pandey, by keeping separate record. 1

Let the case file be submitted pursuant to the rules. 2

We concur with the above decision.
Justice Sushila Karki
Justice Gyanendra Bahadur Karki

Done on the 30th Asar, 2068 BS (July 14, 2011)
Translated by Kamal Pokharel

Employees involved in financial institutions are required to demonstrate their activities clean and transparent so that nothing as corruption and miscarriages of law could be smelt in their character and behavior.

Supreme Court, Division Bench

Hon'ble Chief Justice Khil Raj Regmi

Hon'ble Justice Sushila Karki

Criminal Appel No.064-CR-0466, 0569, 0489

Case: Corruption.

Appellant: Shri Krishna Shrestha, a permanent resident of Ward No. 27, Kathmandu Metropolitan City, Kathmandu District, Manager Rastriya Banijya Bank, New Baneshwor Branch Office

Vs.

Appellant: Bharat Bahadur Basnet, a permanent resident of Ward No. 5, Gothatar V.D.C., Kathmandu District, Account Officer at Rastriya Banijya Bank, New Baneshwor Branch Office

Appellant: Birendra Nath Lohani, a permanent resident of Ward No. 1, Kathmandu Metropolitan City, Manager at Rastriya Banijya Bank, New Baneshwor Branch Office

Vs.

Respondent: Government of Nepal

- **Contrary to the official responsibility of an officer holding the responsible position of a Branch Manager to mandatorily invest in a secure manner by obtaining collateral when issuing a loan, Letters of Credit (“L/C”s) were repeatedly opened and additional credit granted to**

a party without obtaining collateral in spite of the fact that previous credit was outstanding from the same party. The opening of the disputed L/Cs cannot be viewed as having been executed with bonafide intention, and it has to be deemed that such act was carried out by colluding with the borrower Defendant with a malafide intention to cause loss and damage to the bank.

- **While opening Back-to-back L/C relating to Advanced on Credit (“AOC”), payment for L/C amount it was to be release only after receiving payment from the importer for the goods exported by the borrower’s firm. If the L/C amount is released prior to payment of the amount by the importer, it cannot be said that there was desired degree of alertness in securing the amount owed to the bank.**
- **If a collateral that had already been pledged for a previously issued loan is used as the basis for opening subsequent L/Cs, additional L/Cs are opened one after another and credits continuously granted without obtaining separate collateral that is adequate to cover such credit and interest accrued thereon till the repayment period specified by the bank, then it cannot be deemed that Defendant has bonafide intention.**
- **Facts regarding whether or not an officer follow the procedures prescribed by prevailing laws with bonafide intention to secure the investment of the bank, determines whether or not the officer in the business of issuing loans acted with bonafide or malafide intention when issuing the loan.**
- **Merely based on recovery of the loan subsequently, Defendant cannot escape liability for loan issued in an irregular manner at the time of issuance.**

Decision

Khil Raj Regmi, CJ: The facts and decision of the present appeal which filed by Defendants challenging the decision of Special Court, Kathmandu dated 2064/3/12 BS (June 26, 2007 AD) pursuant to Section 17 of Special Court Act 2059, is as follows:

As per the decision of Administrative Department, Central Office of Rastriya Banijya Bank dated 2058/4/19 BS (August 3, 2001 AD), files relating to customer M/S Nepal Professional Garment Pvt. Ltd. ("NP Garment") which carried out transactions through Rastriya Banijya Bank's Branch Office, Baneshwor ("Baneshwor Branch Office") and Main Branch Office, Kathmandu, were received through the letter dated 2058/5/29 BS (September 14, 2001 AD) bearing Letter No. 14/21/37 and Dispatch No. 132. The order stated therein is as follows. There was obstruction in the operation of the factory because the Managing Director of NP Garment, Kewal Krishna Khanna had suddenly disappeared. Limits regarding credits of NP Garment had been determined by several decisions of the Central Office. Transactions of credit facility within the approved limit should have been executed or caused to be executed, subject to the limit, policies and rules approved by the aforesaid office, only after fully securing Rastriya Banijya Bank loans and regulating overdue loans; however, they were not duly executed. Loss and damage was caused to Rastriya Banijya Bank by collusion between Rastriya Banijya Bank employees and the borrower. The approved limit was exceeded to illegally benefit the borrower and Rastriya Banijya Bank employees. Credit was issued and received with malafide intention, and acts of corruption had been committed. The total outstanding loan to Rastriya Banijya Bank was completely unsecured due to the severely inadequate collateral provided by the borrower to Rastriya Banijya Bank. Strict legal action should be taken against employees who acted contrary to Rastriya Banijya Bank rules in a manner that caused loss and damage to Rastriya Banijya Bank. Documents,

along with the above mentioned opinion, were filed with the Commission for the Investigation of Abuse of Authority ("CIAA") on 2058/6/6 BS (September 22, 2001 AD).

With regard to the credit provided to NP Garment by Baneshwor Branch Office, request was submitted on 2058/5/29 BS (September 14, 2001 AD), and the file was returned as per the order of CIAA dated 2058/7/1 BS (October 17, 2001 AD). According to the report received on 2059/1/31 BS (May 14, 2002 AD), the initial investigation report states as follows. Directions issued by Central Office of Rastriya Banijya Bank were violated. Instead of effecting repayment or regulation of outstanding amounts, new credits were repeatedly issued. As of 2059/1/30 BS (May 13, 2002 AD), payment of the principal amount of Rs. 7,20,77,764.38 and the interest amount of Rs. 4,42,13,309.92 were outstanding from customer NP Garment on Advance on Credit ("AOC"), Trust Receipt Loan ("TL"), Pre-export Loan ("PXL") and Foreign Bill Negotiation ("FBN"); however, collateral worth only Rs. 1,30,21,588 had been provided. The Credit Transaction Management Mechanism, 2050 provides for the inclusion a manager of the credit committee, an accountant and an incharge of the credit section; however, credits were granted without the presence of an accountant. Although a total of 27 L/Cs had been issued through several transactions, the principal and interest amount of every L/C was outstanding even after expiry of the repayment period. The collateral provided was extremely inadequate. The principal and interest could not have been recovered from the property that was pledged as collateral. Additional credit was issued while overdue amounts were outstanding. Transactions were not conducted as per the rules; rather, the granting and receiving of credits have been executed with malafide intention, and loss and damage was caused to Rastriya Banijya Bank.

Statements made by Defendant Dilip Kumar Shrestha during investigation are as follows. Regarding FBN: bill worth total of Rs. 18,12,882.81 was negotiated; high workload had resulted in the

failure to notice, hence the omission of documents; and FBN was not purchased with malafide intention. Regarding PXL: collateral had already been approved before I issued the three (3) loans equal to Rs. 36,00,000; new credit was issued despite the existence of previous outstanding credit because the customer was a known and credible one; workload at Baneshwor Branch Office resulted in procedural mistakes and failure to notice such mistakes; Rastriya Banijya Bank's outstanding loan was not recovered from the purchase amount of the concerned principal export L/C because of the credibility of the customer; and there is no collusion in this matter. Regarding Usance L/C: in my capacity as Manager, Rs. 5,41,35,482.92 was outstanding on 22 units of AOC; I obtained confirmation from Central Office for 8 of the 22 AOCs because they exceeded the AOC limit of Rs. 2,77,29,261.56; all AOCs were disclosed in the Usance L/C; the L/Cs that were opened were local, Indian and foreign; local Usance L/C was opened on behalf of the applicant and beneficiary from the same branch of Rastriya Banijya Bank, but there was no information prohibiting the opening of Usance L/C; amount was outstanding to Rastriya Banijya Bank's for Back-to-back L/C but I do not know how the amount became outstanding; I made efforts to recover; and there was no collusion. Regarding TL: in my capacity as Manager, I signed documents of TL for loan of Rs. 42,70,361.27 on the basis of the limit and collateral of the customer; and I did not make efforts to recover the credit because I was transferred. Also, I worked in the best interest of Rastriya Banijya Bank.

Statements made by Defendant Shree Krishna Shrestha during investigation are as follows. With regard to AOC; in my capacity as Manager, I signed three (3) AOCs for Rs. 26,78,395.20, staying within the limit; some procedures were not followed because of the lack of employees; it is a general practice to release payment within maturity date to the bank exporting the L/C; new L/C was opened even though there was outstanding amount on old ones, because of

the large volume of transaction with the customer; and there is no collusion as I made efforts to recover.

Statements made by Defendant Birendra Nath Lohani during investigation are as follows. With respect to FBN: three (3) bills equal to Rs.28,85,954.84 were purchased; when purchasing, I sent them to the Section instructing them to properly look into, investigate and review them; the transaction was carried out based on the client being known and credible; I did not have prior experience regarding L/C; and I did not collude and did not have malafide intention. With respect to PXL: I signed one (1) loan; the Section did not observe procedural matters; I do not know about the remaining matters because I was transferred when the outstanding amount was due for recovery; and I worked with bonafide intention.

Statements made by Defendant Bharat Bahadur Basnet during investigation are as follows. As regards FBN: I negotiated bill equal to Rs. 26,50,200; when doing so, an accountant was not present as procedurally required due to workload; Centre did not timely inspect and give directions to rectify error; and I worked in good faith to the best of my knowledge. As regards PXL: I signed on two (2) loan documents for Rs. 10,00,000 in the interim period between taking them from the concerned Section to submitting them to the Manager; due to excessive workload, I did not notice that the shipment date had expired; and the concerned Section did not inform about the amount to be recovered from the PXL while purchasing export bill. As regards AOC: I signed on Back-to-back L/C bearing AOC No. 33/233 for a customer with an approved limit; I do not know how there was an overdue in this regard; due amount should be recovered from the customer; and there was no collusion.

Statements made by Defendant Geeta Parajuli during investigation are as follows: With regard to FBN: I initialed (signed) on the FBN after it was presented to the Manager from the Section, and out of the bill of USD 91,392 that was purchased, presently Rs. 27,47,060.34 is outstanding; the promissory note was not signed

due to high workload; it was duly purchased but among the documents, the bill of lading may have been misplaced later; and there was no malafide intention or collusion. With regard to PXL: I signed four (4) loan documents that were submitted to the Manager; procedures were not followed in the promissory note because of excessive workload; and I have not knowingly worked against the interest of Rastriya Banijya Bank. With regard to AOC: I signed on the voucher of AOC No. 32/587; I do not know about 'Vi.Vi.Ni Form No. 4' because I was transferred; I made efforts to recover the amount outstanding to Rastriya Banijya Bank; and there was no collusion.

Statements made by Defendant Mahendra Bhakta Pradhananga during investigation are as follows: Regarding FBN: bill equal to Rs. 1,54,22,565 that was received for FBN was purchased; some documents were missing in the bills because of high workload; there is provision for purchase of export bill on the basis of cargo receipt, in the absence of bill of lading; I made efforts to recover the amount outstanding to Rastriya Banijya Bank; I have not committed any act inappropriately or with malafide intention; and I have not colluded. Regarding PXL: I signed documents while preparing them for credit amount equal to Rs. 41,00,000 granted through four (4) credits; I approved the collateral for the credits; there was procedural error due to high workload; even though I did not deduct the amount from the PXL when purchasing FBN, I deducted it in other transactions; and I did not collude. Regarding AOC: I signed ten (10) AOCs equal to Rs. 2,01,26,188.45; all AOC Usances had been opened; separate limits were not approved for these, nor was there separate collateral; new L/C was opened despite old outstanding amount because the customer had conducted large transactions; I made efforts to recover outstanding amount; procedural error was made due to high workload; and there was no collusion. Regarding TL: subject to approved limit, I signed documents for two (2) loans equal to Rs. 42,56,399.67 under TL; procedures were not observed in the documents because of high workload; goods were not

misappropriated as they have been found; and there was no collusion of any kind.

NP Garment, an industry established in joint venture with Indian national Kewal Krishna Khanna who was also its Managing Director, was a customer of Baneshwor Branch Office of Rastriya Banijya Bank. NP Garment had been carrying out transactions since fiscal year ("f/y") 2052/53 BS (1995/96 AD) under Baneshwor Branch Office authorisation. By f/y 2054/55 BS (1997/98 AD), Rastriya Banijya Bank's Central Office had approved a limit of Rs. 5,00,00,000 under various headings. Of the loans/facilities granted at various times, amounts under the following headings had not been recovered and were outstanding to Rastriya Banijya Bank till the end of the month of Poush of 2058 BS (Janauary 13, 2002 AD).

Purpose	Approved Limit Amount	Utilised Amount	Remarks
(1) PXL	Rs. 50,00,000	Rs. 46,00,000	
(2) TL	Rs. 50,00,000	Rs. 43,00,000	
(3) AOC	Rs. 3,00,00,000		
(a) Foreign	Rs. 4,85,00,000	Rs. 5,57,00,000 (excess limit utilization approved)	
(b) Indian	Rs. 21,00,000		
(c) Local	Rs. 51,00,000		
(4) FBN		Rs. 55,00,000	

When the total limit of Rs. 4,00,00,000, comprising Rs. 3,00,00,000 for AOC and Rs. 1,00,00,000 for Rastriya Banijya Bank guarantee (bonded warehouse), was approved for the customer for the first time in f/y 2053/54 BS (1996/97 AD) as per the letter bearing Letter No. 'Bai.Bya.Vi.Kha. 91/76/32' and Dispatch No. 1533 issued by Rastriya Banijya Bank's Business Department on 2053/12/7 BS (March 20, 1997 AD), it was stated that transaction shall be effected only after adequate immovable property collateral was passed so that the aforementioned limit amount could be fully secured. Similarly, when the above mentioned limit of Rs. 5,00,00,000 was approved in f/y 2054/55 BS (1997/98 AD), direction was issued to obtain personal guarantee of all directors in addition to collateral; however, personal guarantee was not obtained.

Only on 2055/2/18 BS (June 1, 1998AD) did Baneshwor Branch Office pass registration of Rs. 1,30,00,000 as collateral in Rastriya Banijya Bank's name, out of the Rs. 2,50,00,000 which was the valuation amount for the land including house and shed constructed thereon that was owned by NP Garment and situated at Imadol Village Development Committe- 5, Lalitpur District. As per the letter of the branch dated 2061/4/12 BS (July 27, 2004 AD), the decision of the valuation committee, for purposes of acceptance by Rastriya Banijya Bank itself, determined the value to be Rs. 1,17,00,000. Customer had to repay Rastriya Banijya Bank the principal amount of Rs. 7,10,00,000 as of the end of Poush, 2058 BS (January 13, 2002 AD), and Rastriya Banijya Bank could not recover principal amount of Rs. 5,13,00,000 if confirmed at the aforementioned value. Furthermore, the following inconsistencies in objectives were found in transactions with the said customer.

Central Office of Rastriya Banijya Bank approved PXL limit of Rs.1,00,00,000 for NP Garment in f/y 2053/54 (1996/97 AD), and loans were granted on several dates; however, Rs. 46,00,000 remains outstanding from Loan No. 5. When Baneshwor Branch Office executed FBN under the above mentioned loan: the general banking practice of releasing payment of the remaining amount to customer only after repayment of the previous export credit amount, was not followed; PXL was provided on the shipment date of the export goods; separate collateral was not obtained when granting the aforesaid credit, instead collateral was obtained for overall credits of the customer (collateral was inadequate for an aggregate of all loans); other important inconsistencies resulted in serious mistakes; and Rs. 46,00,000 is outstanding due to collusion of employees.

A loan of Rs.15,00,000 was provided through Loan No. 33/14, on the basis of PXL No. 100292607 issued by Bank of New York. Contrary to the directions from Rastriya Banijya Bank's Central Office, FBN was executed while previous credit was outstanding. While executing FBN, the general banking practice of recovering

existing credit amount before releasing payment of the remaining amount to the customer was not observed and the full amount was released, and the promissory note did not contain the signature of the authorised official of Rastriya Banijya Bank. Such procedurally faulty and illegal granting of credit resulted in principal amount of Rs.15,00,000 becoming outstanding.

A PXL for Rs. 5,00,000 was granted through Loan No. 33/16 on 2054/6/20 BS (October 6, 1997 AD), on the basis of PXL No. 100292606 issued by Bank of New York. When negotiation the PXL document, the general banking practice of recovering existing loan before releasing payment of the remaining amount was not observed and the full amount was released to the customer, the content of the promissory note contains the name of K. K. Khanna but it was signed by Kusum Khanna and yet the document was validated, and the deed of loan and promissory note had not been signed on behalf of Rastriya Banijya Bank. The credit was provided illegally and Rastriya Banijya Bank's principal amount of Rs. 5,00,000 was outstanding.

A PXL of Rs. 7,00,000 was granted through Loan No. 33/17 on 2054/7/10 BS (October 26, 1997 AD), on the basis of Letter No. WHF 3237440F issued by Shanghai Banking Corporation Limited. When negotiation the PXL document, the general banking practice of recovering the concerned previous export credit before releasing payment of the remaining amount was not observed and the full amount was released to the customer, and the promissory note was not signed on behalf of Rastriya Banijya Bank. The credit was granted illegally and loss and damage of its principal amount of Rs. 7,00,000 was caused to Rastriya Banijya Bank.

A credit of Rs. 14,00,000 was granted through Loan No. 33/17 on 2054/8/12 BS (November 27, 1997 AD), on the basis of PXL No. 5817101047 issued by City Bank of New York. When granting the credit, signature on behalf of Rastriya Banijya Bank was missing in the promissory note. The deed of loan was not attached to the file.

The credit was provided without following the procedures for loans prescribed by Rastriya Banijya Bank. The general banking practice of recovering the concerned previous export credit before releasing payment of the remaining amount was not observed and the full amount was released to the customer, and the credit was illegally granted. In addition, whereas goods should be prepared and dispatched within 2054/8/12 BS (November 27, 1997 AD) as per the PXL, the PXL to prepare goods within a maximum of 3 months was issued on the same day. Loss and damage of Rs. 14,00,000 was caused to Rastriya Banijya Bank contrary to Rastriya Banijya Bank's rules and regulations,.

PXL for Rs. 5,00,000 was granted through Loan No. 33/29 on 2055/2/18 BS (June 01, 1998 AD), on the basis of Letter No. PXL 100293160 issued by Bank of New York. When negotiating the PXL document, the concerned previous export credit should have been recovered before releasing payment of the remaining amount to the customer; however, it was not recovered and the full amount was released to the customer. The PXL mentions that goods should be dispatched within 2055/2/16 BS (May 30, 1998 AD), hence the issuing of the loan on 2055/2/18 BS (June 01, 1998 AD), two (2) days after the expiry of the specified period, is a serious error. The content of the promissory note mentions the name of K. K. Khanna but it was signed by Kusum Khanna and yet the document was validated. The credit was provided contrary to rules, and caused Rastriya Banijya Bank to suffer loss and damage of principal amount of Rs.5,00,000.

The FBN principal amount of Rs.54,94,821.84 needs to recovered from the customer. Whereas payment of the credit related to PXL should have been made before releasing the remaining amount, the procedure was not followed. As provided by Section 9 (a) of Foreign Exchange (Regulation) Act 2019, to ensure payment in the foreign currency approved by the principal bank (Nepal Rastra Bank) stated in the customs document by the exporter within the period specified therein, the foreign currency should have been received within six

(6) months, but such foreign currency was not received. Pursuant to Approved Directive No. 186 dated 2053/5/7 BS (August 23, 1996 AD) issued by Foreign Currency Management Department of Nepal Rastra Bank, concerned authorities should be informed about the shortfall, but were not informed; hence, Rastriya Banijya Bank employees participated in the misappropriation of foreign currency too. Therefore, FBN was illegally purchased.

When purchasing FBN 32/621 equal to DM 16,113.60 (Rs.5,37,227.40) on 2054/1/29 BS (May 11, 1997 AD), Clause 15.2.17 of the Internal Audit and Inspection Directive 2052 of the aforementioned bank states that negotiation shall be done only after obtaining guarantee from another confirming party if there is a foreign customer instead of a consignee bank; however, the document which mentions a foreign customer (Gantex Moden GMBH) as the Consignee L/C Applicant was purchased without the guarantee of a confirming party, which is contrary to the directive. Presently, Rs. 37,261.76 in foreign currency is short, and Nepal Rastra Bank has not been notified about the foreign currency that is short. No effort has been made to recover the above mentioned amount. The accountant and manager had not signed on behalf of Rastriya Banijya Bank when executing the promissory note and deed of loan, and the credit was negotiated on the basis of borrower's signature. Therefore, illegal acts resulted in loss and damage of Rs. 37, 261.76 to Rastriya Banijya Bank.

While purchasing goods through FBN 32/710 equal to USD 26,816.15 (Rs.15,21,861.34) on July 1, 1997 AD which were exported via Biratnagar Customs Office, bill of lading and other attached documents should have formed the basis for the transaction; however, the FBN was illegally negotiated in the absence of bill of lading, merely based upon the cargo receipt of Union Freight Pvt. Ltd., Kathmandu. The above mentioned foreign currency should have entered Nepal within six (6) months from the date the document was negotiated, but it has not yet entered Nepal, hence resulting in the misappropriation of foreign currency. There

has been no effort to bring the foreign currency into Nepal. The promissory note and deed of loan, signed by borrower K.K. Khanna, does not mention the amount, date and witnesses, nor did it contain the signatures of the Accountant and Manager on behalf of Rastriya Banijya Bank. Such an illegal purchase of FBN caused loss and damage equal to Rs. 15,21,861.34 to Rastriya Banijya Bank. Furthermore, foreign currency equal to the amount should have entered Nepal but it has not; thus, the illegal act of misappropriation of foreign currency has also been committed.

When negotiating documents for FBN 33/45 equal to USD 12,751 (Rs.69,15,514) on 2054/4/30 BS (August 14, 1997 AD), the document was purchased even though the airway bill stated wrong information instead of the correct STY No. 9553 to 9558/9589 and L/C No. 901/750/24. The visa certificate and export customs document should be included in the L/C opened by the opener, but they were missing. Foreign currency should have entered Nepal within six (6) months from the date of negotiation; however, no effort was made for the same. The promissory note and deed of loan contained only the signature of borrower K.K. Khanna but did contain the signatures of the accountant and manager on behalf of Rastriya Banijya Bank. The act of illegal purchase of bill by violating the procedures, rules and regulations of Rastriya Banijya Bank has resulted in Rs.2,53,759.71 remaining outstanding.

In the course of document negotiation for FBN 33/373 equal to USD 42,000 (Rs.26,50,200) on 2055/1/8 BS (April 21, 1998 AD), the bill of lading with “Shipped on Board” stamp was missing, but a document showing that the goods were booked to the shipping agent were included instead. The L/C copy opened by the opener was missing. Foreign currency was not brought into Nepal within six (6) months, as required, and hence there was misappropriation of foreign currency. No efforts were made to bring the foreign currency to Nepal. The content of the promissory note did not mention the amount. Such procedurally wrong acts caused loss and damage equal to Rs.26,50,000 to Rastriya Banijya Bank.

Of the bill equal to USD 49,392 (equal to Rs. 31,16,635.20) purchased on 2054/1/13 BS (April 25, 1997 AD) through FBN 33/377, foreign currency worth Rs. 96,860.34 is short and has not been received till date. Illegal acts have been committed by not notifying Nepal Rastra Bank about the short amount, not attempting to recover the said amount, and by negotiating the bill on the basis of Combined Transport Bill of Lading which did not contain the “Shipped on Board” label, contrary to the expressed request of the importer stating that the “Shipper Memorande” of Maerskline is “not part bill of lading”. Also, the content of the promissory note did not mention the amount, and the signature of the manager on behalf of Rastriya Banijya Bank was missing in it. Hence, illegal acts were committed and presently loss and damage of Rs. 96,860.34 has been caused.

Bill worth USD 33,075 (equal to Rs. 20,67,187.50) was purchased on 2054/10/8 BS (January 21, 1998 AD) through FBN 33/267. Although report prepared by the Central Office of Rastriya Banijya Bank states that the entire outstanding amount has not yet entered Nepal, the letter bearing Dispatch No. 1358 issued by Baneshwor Branch Office on 2061/7/26 BS (November 11, 2004 AD) states that some amount has entered Nepal and USD 2633.40 (equal to Rs. 1,38,894.50) is short. Nepal Rastra Bank was not notified about the short amount. There was no effort to recover the short amount. The bill was purchased despite the absence of bill of lading that mentions the dispatch of goods. The promissory note does not mention the amount, and signature on behalf of Rastriya Banijya Bank is missing. The purchase of the document with such procedural irregularities is illegal and had caused loss and damage to Rastriya Banijya Bank equal to Rs. 1,38,894.50.

The limit of Rs. 50 lakh for TL had been approved for the customer in f/y 2053/54 BS (1996/97 AD) by the Central Office of Rastriya Banijya Bank. Presently, Rs.42,56,000 has to be recovered from the same customer. With regard to the current outstanding principal amount for the customer, it is seen that the loan was granted with

the approved limit. However, the amount transacted cannot be determined, because Baneshwor Branch Office has not been able to provide the total limit utilization register for the customer. In the course of granting the loan, the concerned AOC documents were not kept on file, rather loan was granted by only attaching the customer's application, deed of loan, etc. When granting the TL, separate collateral was not obtained as required by Clause (a) of Circular No. 31/048/049 issued by Bank Business Department of Rastriya Banijya Bank on 2048/12/30 BS (April 12, 1992 AD). Overall collateral was taken as the basis, without considering whether such collateral was adequate for the loan. The following loans were granted in an inconsistent manner with the participation of Rastriya Banijya Bank employees.

When issuing loan of Rs.14,84,266.27 through Loan No. 33/23, the file for the present loan does not contain any document for the concerned AOC opened by Baneshwor Branch Office. Loan was granted by merely including the deed of loan and application. No one signed on behalf of Rastriya Banijya Bank in the deed of loan that was attached. Documents for L/C transaction were missing. The customs document for the imported goods was missing. 'Vi.Vi. Ni. Form No. 4' that mentions the dispatch of goods from customs should be submitted to Rastriya Banijya Bank within a maximum of three (3) months from the date of the processing of documents, but the said Form was not found in the file. When the required documents were demanded in writing during investigation from Baneshwor Branch Office, invoice and airway bill regarding TL No. 33/23 were provided. With respect to the granting of Rs.27,72,133.13 through TL 33/24, only improperly executed deed of loan and application were found in the file. When other necessary documents were demanded in writing, Baneshwor Branch Office informed through a letter dated 2061/12/10 BS (March 23, 2005 AD) that no other document was found. Therefore, illegal acts committed contrary to Rastriya Banijya Bank policies and rules have resulted in

the loss and damage of Rastriya Banijya Bank's principal amount of Rs.42,56,399.40.

When opening Usance L/C under FBN, Clause 6(5) of Circular No. 5/050/51 of Letter No. 'Bi.7/5/29' issued by Bank Business Department of Rastriya Banijya Bank on 2050/4/21 BS (August 5, 1993 AD) provides that a Baneshwor Branch Office may open AOC within limit by obtaining full additional collateral for remaining amount other than minimum cash margin. However, the act of opening Usance L/C on the basis of inadequate overall collateral is contrary to Rastriya Banijya Bank policies, rules and circulars. Furthermore, although the Central Office of Rastriya Banijya Bank approved the limit of Rs.3,00,00,000 for AOC, the 27 transactions that were conducted, as listed below, utilizes Rs. 2,57,00,000 more than the approved limit. Pursuant to request by Baneshwor Branch Office for confirmation, the Central Office had granted limit of up to Rs.2,77,29,261.56 in several transactions. As regards whether or not the total limit of the customer was crossed, detailed investigation could not be conducted because Baneshwor Branch Office was not able to provide the limit utilization register; however, the suspense accounting amount indicates that the transactions were within the limit.

AOC	**Loan No.**	**Principal Amount**
Foreign	20	4,34,70,431.66
Back to Back	3	49,97,919.88
Indian	3	21,48,191.60
Domestic (Local) 1		51,00,000
Total	**27**	**5,57,16,543.14**

In the context of finding out what amount(s) exceeded the limit at which time(s) when granting the credits as mentioned above, at the time Baneshwor Branch Office intentionally caused the individual limit utilization register to be lost (forefeit), thus it could not be made

available to CIAA. Such was also stated in the inspection report of the Central Office of Rastriya Banijya Bank. There was only ordinary correspondence with the borrower to recover previous AOC amounts; effective measures were not adopted in this regard. New L/Cs were opened inconsistently and contrary to banking practices, when Rastriya Banijya Bank's old outstanding amounts had not been repaid. Where the full limit had already been utilized, transactions were conducted by saying that confirmation would be requested from the Central Office. When opening Back-to-back L/C, payment for the imported raw material, cloth, should have been released from payment from the export of clothes prepared from such cloth, pursuant to Approved Circular No. 154 issued by Nepal Rastra Bank on 2051/12/19 BS (April 2, 1995 AD). However, without receiving foreign currency, payment for Back-to-back L/C was made in India. Credit Department, Valley of Rastriya Banijya Bank has informed, in its Letter No. 2/07/2061/62 dated 2061/8/8 BS (November 23, 2004 AD), that Rastriya Banijya Bank policies, rules or directives or circulars do not allow the opening of Usance L/C with 360 sight for Local AOC. Therefore, serious acts have been committed contrary to provisions. In addition, separate collateral was not obtained when opening such L/C, rather overall collateral was taken as the basis, and it was not mentioned clearly whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to AOC Foreign L/C No. 31/675, Usance L/C was opened in the amount of USD 110,000 and the amended amount of USD 118,500 on May 5, 1996 to import cloth from India. Whereas four (4) 'Vi.Vi.Ni Form No. 4' were issued on various dates, goods worth only USD 85,210.40 were cleared at the customs, certified and the original 'Vi.Vi.Ni Form No. 4' were received back. However, 'Vi.Vi.Ni Form No. 4' for USD 33,289.60 was not received, hence, evidence of import of goods into Nepal was not presented and foreign currency was misappropriated. Since Rastriya Banijya Bank

had already released payment of USD 39,055.17 to the concerned beneficiary but the equivalent amount of Rs. 20,37,861.12 was not recovered, loss and damage was caused to Rastriya Banijya Bank. Furthermore, separate collateral was not obtained when opening such L/C, rather overall collateral was taken as the basis without clearly mentioning whether such basis would be adequate to secure the loan of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 32/116, 45 days Usance L/C in the amount of USD 57,000 was opened on September 5, 1996 AD at the request of the borrower to import cloth from India. Readiness to recover payment from the customer within maturity date was not demonstrated. Whereas expenses should have been noted in the customer's name on the same date that payment was made to foreign bank; however, the same was not written, and Rastriya Banijya Bank's outstanding account was made inaccurate, i.e., payment was made to the foreign bank on 2053/12/13 BS (March 26, 1997 AD) but AOC account in the customer's name was shown only on 2054/3/18 BS (July 2, 1997 AD). The existing principal of Rs.3,81,226.96 is outstanding from the customer. Moreover, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 32/481, 30 days Usance L/C in the amount of USD 46,800 was opened on September 5, 1996 AD at the request of the borrower to import cloth from India. It could not been ascertained whether the amount was within the limit, because the limit utilization register was not available. Of the 'Vi.Vi.Ni. Form No. 4' issued by the customs office for clearance of goods, proof of import into Nepal was not received from the customs office for goods worth USD 4,735.97 and USD 1,272. Readiness was not shown to recover payment from

the customer within maturity date, and existing principal amount of Rs. 18,68,349.36 is outstanding. Also, separate collateral was not obtained when opening such L/C, but overall collateral was used as the basis instead, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 32/502, 45 days Usance L/C in the amount of USD 1,25,715 was opened on April 2, 1997 AD at the request of the borrower to import cloth from India. Readiness to recover payment from the customer within maturity date was not demonstrated. Of the Vi.Vi.Ni. Form No. 4' that were issued, the original copy for USD 34.28 was not received back, and hence imports of goods into Nepal is not seen. Payment was made to the foreign bank after the expiry of the maturity date. Since readiness to receive repayment was not shown and there was irregularity, the principal amount of Rs.27,38,945.93 is outstanding. In addition, separate collateral was not obtained when opening such L/C, but overall collateral was used as the basis instead without clearly mentioning whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 32/552, 45 days Usance L/C in the amount of USD 49,255 was opened on May 1, 1996 at the request of the borrower to import from India. It could not been determined whether the amount was within the limit, because the limit utilization register was not available. There is no proof that the goods were imported to Nepal, because the 'Vi.Vi.Ni. Form No 4' that is issued by the customs office for clearance of goods has not been received. Amount was not recovered from the customer within the maturity date. The principal amount of Rs. 19,91,176.30 that had been released to the foreign bank, is outstanding. Moreover, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, without clearly mentioning whether

such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 32/552, 30 days Usance L/C in the amount of USD 28,172.76 was opened on May 19, 1997 AD at the request of the borrower to import cloth from Hong Kong. It could not been determined whether the amount was within the limit, because the individual limit utilization register was not available. There is no proof that the goods were imported to Nepal, because the 'Vi.Vi.Ni. Form No. 4' that is issued by the customs office for clearance of goods, has not been received back after certification. Amount was not recovered from the customer within the maturity date. Payment was released to the foreign bank and there was irregularity. At present, the principal amount of Rs.19,91,176.30 is outsanding. Furthermore, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 32/604, 45 days Usance L/C in the amount of USD 70,000 was opened on May 29, 1997 AD at the request of the borrower to import cloth from India. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. There is no proof that the goods were imported to Nepal, because the 'Vi.Vi.Ni. Form No. 4' that is issued by the customs office for clearance of goods has not been received back after certification. Readiness to recover payment from the customer within maturity date was not demonstrated.

Whereas expenses should have been noted in the customer's name on the same date that payment was released to the foreign bank; however, the same was not written and there was irregularity. The principal amount of Rs.25,34,642.86 is outstanding. Additionally, separate collateral was not obtained when opening such L/C, rather

overall collateral was used as the basis without clearly mentioning whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 32/653, 90 days Usance L/C in the amount of USD 65,750 was opened on June 20, 1997 AD at the request of the borrower to import cloth from Hong Kong. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. There is no proof that the goods were imported to Nepal, because the 'Vi.Vi.Ni. Form No. 4' that is issued by the customs office for clearance of goods has not been received back after certification, and hence there has been misappropriation of foreign currency too. Readiness to recover payment from the customer within maturity date was not shown. Whereas expenses should have been noted in the customer's name on the same date that payment was released to the foreign bank; however, the same was not done. Accurate expenses were not shown and there was irregularity. The principal amount of Rs. 35,58,202.50 is outstanding. Furthermore, separate collateral was not obtained when opening such L/C, but overall collateral was used as the basis, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 32/693, 30 days Usance L/C in the amount of USD 35,800 was opened on July 11, 1997 AD at the request of the borrower to import cloth from India, subject to application for confirmation from the Central Office because the amount was not within the limit. Business Department of Rastriya Banijya Bank confirmed the amount on 2054/4/4 BS (July 19, 1997 AD). There is no proof that the goods were imported to Nepal, because the 'Vi.Vi.Ni. Form No 4' that is issued for clearance of goods, has not been received back by Baneshwor Branch Office after certification. Readiness to recover payment from the customer within maturity

date was not demonstrated, and there was irregularity. The principal amount of Rs. 20,09,789.85 is outstanding. Moreover, separate collateral was not obtained when opening such L/C, but overall collateral was used as the basis instead, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 33/19, 30 days Usance L/C in the amount of USD 28,230.79 was opened on July 25, 1997 AD at the request of the borrower to import cloth from Hong Kong. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. Readiness to recover payment from the customer within maturity date was not shown. Whereas expenses should have been noted in the customer's name on the same date that payment was released to the foreign bank; however, the expense was not noted and there was irregularity. The principal amount of Rs.17,65,531.21 is outstanding. In addition, separate collateral was not obtained when opening such L/C. Instead overall collateral was used as the basis, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 33/121, 60 days Usance L/C in the amount of USD 40,900 was opened on September 9, 1997 AD at the request of the borrower to import cloth from India. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. Whereas recommendation of Readymade Garments Industry Association of Nepal is necessary before importing raw materials from India for readymade garments, such recommendation was not obtained. Readiness to recover payment from the customer within maturity date was not shown. Whereas expenses should have been noted in the customer's name on the same date that payment was released

to the foreign bank; however, the expense was not written and there was irregularity. The principal amount of Rs.2,07,539.27 is outstanding. Furthermore, separate collateral was not obtained when opening such L/C, but overall collateral was used as the basis, without clearly mentioning whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 33/133, 180 days Usance L/C in the amount of USD 8,250 was opened on September 11, 1997 AD at the request of the borrower to import sewing machine from Singapore. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. There is no clear proof that the goods were imported to Nepal, because the 'Vi.Vi.Ni. Form No 4' that is issued by the customs office for clearance of goods has not been received back after certification, hence there has been misappropriation of foreign currency too. Readiness to recover payment from the customer within maturity date was not demonstrated. Payment was released to the foreign bank, and there was irregularity. The principal amount of Rs.3,01,900.39 is outstanding. Moreover, separate collateral was not obtained when opening such L/C. Rather, overall collateral was used as the basis, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 33/134, 180 days Usance L/C in the amount of USD 4,791 was opened on September 11, 1997 AD at the request of the borrower to import generator machine from Singapore. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. There is no clear proof that the goods were imported to Nepal, because the 'Vi.Vi.Ni. Form No 4' that is issued by the customs office for clearance of goods has not been received back after

certification, hence, there was misappropriation of foreign currency too. Readiness to recover payment from the customer within maturity date was not shown. Payment was released to the foreign bank, and there was irregularity. The principal amount of Rs.2,76,186.70 remains outstanding. Also, separate collateral was not obtained when opening such L/C, but overall collateral was used as the basis instead, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 33/177, Usance L/C in the amount of USD 1,27,500 was opened on October 3, 1997 AD at the request of the borrower to import cloth from Pakistan, subject to application for confirmation from the Central Office because the amount was not within the limit. Since the Central Office confirmed the amount through the letter dated 2054/8/11 BS (November 26, 1997 AD), no irregularity was found with regard to utilization of limit. However, readiness to recover payment from the customer within maturity date was not shown, and there was irregularity in the release of the principal amount of Rs.28,63,954.67 to the foreign bank which is outstanding. Additionally, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 33/143, 60 days Usance L/C in the amount of USD 1,64,880 was opened on September 14, 1997 AD at the request of the borrower to import cloth from India, subject to application for confirmation from the Central Office because the amount was not within the limit. Since the Bank Business Department of the Central Office confirmed the amount through the letter dated 2054/12/19 BS (April 1, 1998 AD), no irregularity was found with regard to utilization of limit. Whereas recommendation of

Readymade Garments Industry Association of Nepal was necessary prior to importing raw materials in the form of fabric, however, such recommendation was not obtained. It was required that cloth should be imported only from an Indian manufacturer/firm/company subject to payment in convertible foreign currency, but the cloth was imported from other individual/firm (Village Connection Exporter). New L/C was opened when previous balance was outstanding. Readiness to recover payment from the customer within maturity date was not shown. Out of the payment released to the foreign bank, USD 5,433.23 should have been noted as AOC expense in the name of the customer, but the same was not written. Acts contrary to the rules were committed on the basis of Bank statement, and Rastriya Banijya Bank's outstanding balance was not accurately shown. Such irregularities caused loss of the principal amount of Rs.84,81,123.18 which is outstanding. Furthermore, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, without clearly stating whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 33/144, 180 days Usance L/C in the amount of USD 99,355 was opened on September 16, 1997 AD at the request of the borrower to import sewing machine from Singapore, subject to application for confirmation from the Central Office because the amount was not within individual limit. Since the Bank Business Department of the Central Office confirmed the amount through the letter dated 2054/12/19 BS (April 1, 1998 AD), no irregularity was found with regard to utilization of limit. The maturity date was six (6) months from the date of acceptance of document by the borrower (date specified in the L/C) i.e., on June 11, 1998 AD, but Baneshwor Branch Office sent the payment through telefax to the concerned foreign bank on May 12 1998, i.e., before the maturity date. However, readiness to recover payment from the customer within maturity date was not shown. The principal amount of

Rs.38,13,560.84 that was the subject of irregularity, is outstanding. Additionally, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, and it was not clearly mentioned whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 33/179, 45 days Usance L/C in the amount of USD 28,200 was opened on October 3, 1997 AD at the request of the borrower to import cloth from Hong Kong, subject to application for confirmation from the Central Office because the amount was not within the limit. Since the Bank Business Department of the Central Office confirmed the amount through the letter dated 2054/11/18 BS (March 2, 1998 AD), no irregularity was found with regard to utilization of limit. However, readiness to recover payment from the customer within maturity date was not demonstrated, and there was irregularity in the payment of the principal amount of Rs.17,94,939 to the foreign bank, which is outstanding. Also, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, without clearly mentioning whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 33/231, 15 days Usance L/C in the amount of USD 4,791 was opened on October 10, 1997 AD at the request of the borrower to import cloth from Pakistan. It could not been ascertained whether the amount was within the limit, because the limit utilization register was not available. Readiness to recover payment from the customer within maturity date was not demonstrated, and there was irregularity in the payment of the principal amount of Rs.17,28,660.13 to the foreign bank, which is outstanding. Furthermore, separate collateral was not obtained when opening such L/C. Overall collateral was used as the basis instead, and it was not clearly stated whether such basis would be adequate

to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 33/261, a Usance L/C in the amount of USD 60,496 was opened on November 17, 1997 AD at the request of the borrower to import cloth from Pakistan. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. Baneshwor Branch Office did not take effective measures to recover the outstanding amount from the customer within the maturity date. There was irregularity in the payment of the principal amount of Rs12,02,095.28 to the foreign bank, which is outstanding. In addition, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, and it was not clearly stated whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to AOC (Indian) L/C No. 31/100, a Usance L/C in the amount of INR 5,00,000 was opened on February 12, 1996 AD at the request of the borrower to import cloth from India. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. No effort was made to recover outstanding amount from the customer within maturity date, and there was irregularity in the payment of the principal amount of Rs. 59,302.24 to the foreign bank, which remains outstanding. Also, separate collateral was not obtained when opening such L/C, but overall collateral was used as the basis instead without clearly mentioning whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With regard to L/C No. 32/66, 45 days Usance L/C in the amount of INR 6,75,840 was opened on March 3, 1997 AD at the request of the

borrower to import cloth from India, which was amended later to add Rs. 6,00,000. It could not been ascertained whether the amount was within the limit, because the individual limit utilization register was not available. No effort was made to recover outstanding amount within maturity date, and there was irregularity in the payment of the principal amount of Rs.14,09,760.24 to the foreign bank, which is outstanding. Moreover, separate collateral was not obtained when opening such L/C. Rather overall collateral was used as the basis, and it was not clearly stated whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it is not seen that the credit was secured by obtaining additional collateral.

With respect to L/C No. 32/69, 45 days Usance L/C in the amount of INR 10,00,000 was opened on April 18, 1997 AD at the request of the borrower to import cloth from India. When opening the L/C, there were provisions for “payment upon presentation of document” and “at sight”; however, the same was amended to “Draft drawn on 45 days sight” based upon an application, through collusion. The original shipment date of May 15, 1997 AD was amended 5 days after its expiry. Proof (custom document) of import of goods (cloth) from India was not found. No effort was made to recover outstanding amount within maturity date. Irregularity was committed. The principal amount of Rs. 6,79,124.24 released to the foreign bank, is outstanding. Furthermore, separate collateral was not obtained when opening such L/C, rather overall collateral was used as the basis, and it was not clearly stated whether such basis would be adequate to secure the credit of the borrower and the L/C amount. Therefore, here, it was not seen that the credit was secured by obtaining additional collateral.

Approved Circular No.176 of Nepal Rastra Bank dated 2053/2/24 BS (June 6, 1996 AD) provides for import of necessary raw material, cloth, through Back-to-back L/C. Pursuant to the above mentioned Circular, under Back-to-back L/C, readymade garment industries, for use in their own industry, may be imported from India by making

payment in convertible foreign currency and not exceeding the amount equal to 50 percent of the export income. Pursuant to Approved Circular No. 154 issued by Nepal Rastra Bank on 2051/12/19 BS (April 2, 1995 AD), payment for the imported raw materials (cloth) should be made from the payment received from export of the readymade garments made from such cloth. Three (3) Back-to-back L/Cs were opened with the condition that "This credit is opened against export L/C and payment will be released after receipt of export doc's by this credit opening bank"; however, contrary to the condition, Rastriya Banijya Bank released payment of foreign currency to India by writing the expenses in its OAC account in spite of the fact that the amount for payment of foreign currency had not received. Such an act violated the policies of Nepal Rastra Bank. Presently, Rs. 49,97,919.88 is outstanding for the customer. Credit was issued in the customer's name and payment therefor released, without clarifying whether or not the previous collateral would be adequate to secure such credit and without obtaining separate collateral, which shows intention to cause loss and damage to Rastriya Banijya Bank.

Under L/C No. 32/379, documents were received five (5) times for Back-to-back L/C of USD 1,70,899.68 and payment was released to the concerned beneficiary. Out of the above mentioned, 'Vi.Vi.Ni. Form No 4' was issued (4) times by the customs office for clearance of goods, thus there is proof of import of goods into Nepal. However, 'Vi.Vi.Ni. Form No 4' was not issued for documents of USD 50,113.76, and there is no evidence of the import of goods into Nepal. As per rules, payment under Back-to-back L/C should be released only after receiving foreign currency from a foreign country. However, Baneshwor Branch Office itself noted the AOC account expense and released USD 50,513.76 to the beneficiary in India, which is contrary to rules and has resulted in the suspense accounting of Rs.25,96,904.52. The payment of foreign currency without importing goods into Nepal is clearly misappropriation of foreign currency. Credit was issued in the customer's name and

payment therefor released, without clarifying whether or not the previous collateral would be adequate to secure such credit and without obtaining separate collateral, which clearly shows intention to cause loss and damage to Rastriya Banijya Bank.

Under L/C No. 32/438, Back-to-back L/C of USD 50,040 was opened to import cloth from India, and documents were received two (2) times and payment released to the concerned beneficiary. Out of the above mentioned, 'Vi.Vi.Ni. Form No 4' was issued by the customs office for clearance of goods worth USD 5,201.76 and hence there is proof of the import of goods into Nepal. However, 'Vi.Vi.Ni. Form No 4' was not issued for the remaining USD 31,779.48 and there is no evidence of the import of goods into Nepal. As per terms of the L/C, payment under Back-to-back L/C should be released only after receiving foreign currency from a foreign country. However, Baneshwor Branch Office itself noted the AOC account expense and released USD 31,779.48 to the beneficiary in India and the suspense accounting of Rs.17,64,689.08, which are contrary to rules. The payment of foreign currency without importing goods into Nepal is misappropriation of foreign currency. Credit was issued in the customer's name and payment therefor released, without clarifying whether or not the previous collateral would be adequate to secure such credit and without obtaining separate collateral, which shows the intention to cause loss and damage to Rastriya Banijya Bank.

Under L/C No. 32/233, Back-to-back L/C of USD 55,000 was opened to import cloth from India, and documents were received three (3) times for USD 57,632.28, and payment of the entire amount, which is USD 2,632.28 more than the original amount for which L/C was opened, was released to the concerned beneficiary. Out of the above mentioned, 'Vi.Vi.Ni. Form No 4' was issued by the customs office for clearance of goods worth USD 21,506.06 , but there is no proof of the import of goods into Nepal. Baneshwor Branch Office should have released payment to India as per the rules, only after receiving foreign currency. However, without receiving foreign

currency, Baneshwor Branch Office noted the AOC account expense and released USD 15,154.13, which is contrary to the rules. Also, it is seen that foreign currency equal to Rs.5,69,683.09 was misappropriated. Credit was issued in the customer's name and payment therefor released, without clarifying whether or not the previous collateral would be adequate to secure such credit and without obtaining separate collateral, which shows the intention to cause loss and damage to Rastriya Banijya Bank.

Regarding AOC (Local) No. 33/02, it is seen that At Sight Usance L/C 360 days was opened for NP Garment on 2054/5/5 BS (August 21, 1997 AD) on 10 percent cash margin to import machinery goods and goods related therewith worth Rs. 51,00,000 through S. D. Impex, an exporter from Thimi, Bhaktapur, as per the order of the Branch Manager of Baneshwor Branch Office stating that the AOC would be opened and then confirmation requested because of the direction from the Central Office, even though the full limit had been utilized. Based on the above mentioned, the exporter, S. D. Impex submitted documents for document negotiation, with Bill of Exchange Invoice and Packing List attached thereto, at Baneshwor Branch Office five (5) times between September 4, 1997 AD and October 2, 1997 AD. Of the five (5) times, Accountant Bharat Bahadur Basnet and Senior Assistant Mahendrabhakta Pradhananga signed the forwarded documents four (4) times resulting in the negotiation of the bills, and one (1) time the bill was purchased without the signature of any employee on the sent document. It is seen that after confirmation was received by Baneshwor Branch Office from the Central Office, payment was released to the concerned beneficiary on 2055/11/14 BS (February 26, 1999 AD).

Description of amount of loss and damage caused to Rastriya Banijya Bank because of loans granted for various purposes, and the involvement of employees involved in such loan transactions.

As per letter with Dispatch No. 1358 dated 2061/7/26 BS (November 11, 2004 AD) issued by Baneshwor Branch Office, Rastriya Banijya Bank, outstanding amount of NP Garment is as follows:

Loan Heading	Loan No.	Outstanding Principal	Outstanding Interest
AOC Local	33/2	48,74,869	68,21,661
AOC Indian	31/100	59,307.24	68,009.20
AOC Indian	32/66	4,09,760.24	20,81,063
AOC Indian	32/69	6,97,124	30,447
AOC Foreign	31/675	22,37,861.24	2,443
AOC Foreign	32/116	3,81,226.96	4,73,096
AOC Foreign	32/379	5,96,904.52	4,43,080
AOC Foreign	32/438	17,64,689.08	6,48,550
AOC Foreign	32/481	18,68,349.36	2,32,878
AOC Foreign	32/502	7,38,945.93	36,37,023
AOC Foreign	32/552	19,91,173.30	8,78,155
AOC Foreign	32/587	14,41,528.02	29,73,668
AOC Foreign	32/604	25,34,643.83	1,49,129
AOC Foreign	32/653	35,58,202.50	66,57,353
AOC Foreign	32/693	20,09,798.85	26,13,160
AOC Foreign	32/695	5,84,360	10,17,304
AOC Foreign	33/19	17,65,331.21	36,27,618
AOC Foreign	33/121	20,75,393.27	6,05,734
AOC Foreign	33/133	1,01,900.39	1,56,628
AOC Foreign	33/134	2,76,186.70	4,41,721
AOC Foreign	33/143	84,81,230.18	1,58,69,244
AOC Foreign	33/144	38,13,560.84	50,89,108
AOC Foreign	33/177	28,63,954.67	50,52,434
AOC Foreign	33/179	19,19,430	22,30,928
AOC Foreign	33/231	17,28,660.13	30,27,161
AOC Foreign	33/233	5,69,683.09	7,99,691
AOC Foreign	33/261	31,82,058.02	19,27,548
TR	33/23	14,84,266.27	26,04,620

TR	33/24	27,72,133.13	48,64,579
PXL	33/14	15,00,000	22,65,258
PXL	33/16	5,00,000	7,54,496
PXL	33/17	7,00,000	10,56,280
PXL	33/18	14,00,000	21,11,669
PXL	33/29	5,00,000	7,37,050
FBN	32/621	37,261.76	-
FBN	32/701	15,21,861.34	-
FBN	33/45	2,53,759.71	-
FBN	33/267	1,38,894.50	-
FBN	33/373	26,50,200	-
FBN	33/377	96,860.34	-
FBN	34/03	100	-
Total	**7,10,73,469.74**		**10,89,58,796.20**

With regard to the factual conditions, legal provisions and employees and borrowers as mentioned hereunder possessing the intention to cause loss and damage to Rastriya Banijya Bank in the loan transactions, the following punishment for offences and recovery of principal have been claimed:-

It is seen from documents available at the CIAA that during the tenure of Defendant Dilip Kumar Shrestha as Branch Manager at Baneshwor Branch Office of Rastriya Banijya Bank, loan transaction of the principal amount of Rs. 6,38,18,727 had been conducted with Defendant NP Garment's Managing Director Kewal Krishna Khanna, which comprised Rs. 36,00,000 under PXL No. 33/14, 33/17 and 33/18, Rs. 18,12,882.81 under FBN No. 33/45, 32/621 and 32/701, Rs. 5,41,35,482.92 under 23 AOCs, namely, AOC No. 33/19, 33/143, 33/121, 32/552, 32/587, 33/179, 33/231, 33/177, 33/144, 32/502, 33/261, 32/69, 32/66, 32/379, 32/438, 32/653, 32/481, 32/693, 32/695, 33/133, 32/604 and 33/134 and AOC Local No. 33/02, and Rs. 42,70,361.27 under TL No. 33/23 and 33/24. Defendant Dilip Kumar Shrestha committed the following acts when carrying out transactions of loans under the following headings.

Under PXL: It is seen that Defendant Dilip Kumar Shrestha did not obtain separate collateral when granting PXL and making loan investment, and granted three new loans one after another without recovering Rastriya Banijya Bank's previous outstanding amount. After goods were exported without fulfilling the specified purposes of the specific L/C for which PXL was providedd, Rastriya Banijya Bank's dues were not recovered from the amount received when borrower Kewal Krishna Khanna executed FBN, and the full amount was deposited in the borrower's account. Thus, additional transactions were caused to be executed with the malafide intention to not recover Rastriya Banijya Bank's outstanding amount, which are violations of Section 12 of Rastriya Banijya Bank Act, 2031 and Circular No. 31 of Nepal Rastra Bank dated 2048/12/30 (April 12, 1992 AD).

Under FBN: The outstanding amount of PXL granted through principal export L/C should have been recovered before releasing the remaining amount to the borrower; but, it is found that the full amount was deposited in the borrower's account, and there was an objective to knowingly cause loss and damage to Rastriya Banijya Bank. Bill of lading and airway bill are required to be mandatorily attached and goods should be sent within the shipdate date when executing FBN on certain bills; however bills were unduly purchased even when such requirements were not met, and it is found that legal procedures were not fulfilled. There was no effort made to deposit into Rastriya Banijya Bank's account the amount to be received from the foreign importer while importing, and additional bills were negotiated without knowledge of receipt of such amount. Thus, complete loss and damage was caused to Rastriya Banijya Bank, and Circular No. 98 dated 2055/9/16 BS (December 31, 1998 AD) issued by Bank Business Work Policy and Recommendations Department of Rastriya Banijya Bank was also violated.

Under TL: Contrary to the obligation to obtain separate collateral when issuing TL, loan was issued without obtaining separate collateral. Additional TL were issued without collateral, in spite of the

fact that previous TL issued to the borrower had not been repaid. When preparing promissiory note and deed of loan to issue TL, all procedures should be completed and the authorized person should sign them; however, loan was issued without fulfilling any procedure and without duly preparing documents. Thus, Circulare No. 26 issued by Bank Business Department of Rastriya Banijya Bank on 2053/12/8 BS (March 21, 1997 AD), was also violated.

Under AOC: Contrary to the obligation to not open Usance L/C without obtaining collateral, Usance L/C was opened without obtaining collateral. Additionally, no other collateral was obtained to secure the recovery of the amount due to Rastriya Banijya in the import and export of goods, thus it is clearly seen that Usance L/C was opened with knowledge that direct loss and damage would be caused to Rastriya Banijya Bank. While the limit for the borrower was Rs.3,00,00,000, credit of Rs.5,41,35,482.92 was granted to the borrower in direct violation of the credit limit, and subsequently it was sent to the Central Office for approval of limit. Although approval of the limit was later obtained, it is proven that at the moment the transaction was carried out with the customer with malafide intention, with the objective to benefit the customer as well. Also, credit should have been issued only after obtaining collateral even when the approved limit was Rs.3,00,00,000. The fact that credit of Rs.5,41,35,482.92 was provided against collateral of Rs. 1,30,00,000 makes clear the malafide intention of the Defendant. It is seen that additional 22 OAC were opened despite the outstanding amounts from previous OAC loans, and Rastriya Banijya Bank's outstanding amounts were not recovered, which caused loss and damage to Rastriya Banijya Bank. Local AOC were opened when such practice is not found in law and Rastriya Banijya Bank, and while doing so L/Cs were opened for the beneficiary and applicant in the same bank, which proves the intention to assist in the act of commiting fraud against Rastriya Banijya Bank. When opening Back-to-back L/C, payment for L/C opened by bank should be released only after receiving money from foreign importer for the

goods exported by the customer; however, the L/C amount was released in the absence of receipt of such amount or proof thereof. Nothing was done to obtain collateral for recovery of outstanding amount to Rastriya Banijya Bank. In violation of the obligation to enter AOC loans in the register on the same day that the L/C amount was released, the entry was delayed, thereby clearly causing loss of the interest amount to be received by Rastriya Banijya Bank from such loan. Similarly, in violation of the requirements of Rastriya Banijya Bank to maintain individual limit utilization register for approved limit of customers and to examine whether or not limits have been violated and how much limit remains while issuing additional credit, it is also seen that such register was either hidden or destroyed with the intention to issue any loan amount to the customer at any time. Thus, the Defendant also violated Circular No. 26 bearing Disptach No. 376 dated 2058//1/20 (May 3, 2001) issued by Credit Work Policy and Recommendation Department of Rastriya Banijya Bank, and Circular No. 32 of Rastriya Banijya Bank dated 2058/3/12 (June 26, 2001).

Defendant Dilip Kumar Shrestha committed the above mentioned illegal, irregular and malafide intention acts and caused loss and damage of Rs. 16,48,82,737 to Rastriya Banijya Bank in violation of Acts, rules, directives, procedures, circulars and other binding provisions related to banks. Loans under various headings that were issued by knowingly violating the laws with the malafide intention to illegally benefit himself and the borrower and cause loss and damage to Rastriya Banijya Bank, which has resulted in the loss and damage of the claim amount of Rs. 16,48,82,737 to Rastriya Banijya Bank, including the principal amount of Rs. 6,38,18,727 and interest thereon till the end of Aswin 2061 (October 16, 2004) in the amount of Rs. 10,10,64,010. Since the Defendant has committed acts of corruption, punishment pursuant to Sections 8 (7) (2), 13 and 29 of the then Corruption Eradication Act 2017, and Sections 8 (1)(f),(g) and (h) as well as Sections 8(3), 12 and 17 of the presently

prevailing Corruption Eradication Act 2059 is requested along with recovery of the loss and damage caused to Rastriya Banijya Bank.

It is seen from documents made available by Rastriya Banijya Bank that during the tenure of Defendant Shree Krishna Shrestha, loan transaction of the principal amount of Rs. 26,78,395.20 had been conducted with Defendant NP Garment's Managing Director Kewal Krishna Khanna. When Defendant Shree Krishna Shrestha signed three (3) AOCs in the course of trasaction loans with the borrower, he was obligated to obtain separate collateral from the borrower when issuing Usance L/C for AOC; however, such Usanc L/C was opened without obtaining such collateral. Collateral was not obtained to recover the amount owed to Rastriya Banijya Bank, even after the imported goods were released to the concerned customer. Despite previous outstanding credit in AOC, new AOCs were repeatedly opened and no effort was made to recover previous outstanding credit. In violation of the obligation to enter AOC loans in the register on the same day that the L/C amount was released, the entry was delayed; thus, the intention to cause loss of the interest amount to be received by Rastriya Banijya Bank from such loan is clearly seen. Similarly, in violation of the requirements of Rastriya Banijya Bank to maintain individual limit utilization register for approved limit of customers and to examine whether or not limits have been violated and how much limit was remaining while issuing additional credit, no attention was paid in this regard and such register was either hidden or destroyed with the intention to issue increasing loan amounts to the customer. Thus, Defendant Shree Krishna Shrestha also violated Circular No. 26 bearing Disptach No. 373 dated 2058//1/20 BS (May 3, 2001 AD) issued by Loan Work Policy and Recommendation Department of Rastriya Banijya Bank, and Circular No. 32 of Rastriya Banijya Bank dated 2058/3/12 BS (June 26, 2001 AD).

Thus, Defendant Shree Krishna Shrestha, in collusion with borrower Khanna, knowingly violated the laws with the intention to provide illegal benefit to himself and other borrowers and cause illegal loss and damage to Rastriya Banijya Bank, which has resulted in the loss

and damage of the claim amount of Rs.82,81946.40 to Rastriya Banijya Bank, including the principal amount of Rs. 26,78,395.20 and interest thereon till the end of Aswin 2061 (October 16, 2004) in the amount of Rs. 55,43,548.20. Since the Defendant has committed acts of corruption, punishment pursuant to Sections 7 (2) and 29 of the then Corruption Eradication Act 2017, and Sections 8 (1)(f),(g) and (h) as well as Sections 3 and 12 of the presently prevailing Corruption Eradication Act 2059 is requested along with recovery of the loss and damage caused to Rastriya Banijya Bank.

Documents made available by Rastriya Banijya Bank show that Defendant Birendra Nath Lohani, during his tenure as Branch Manager Baneshwor Branch Office, had issued to NP Garments' Managing Director Kewal Krishna Khanna the principal amount of Rs. 33,95,954.84, which comprised Rs. 500,000 through PXL No.33/29, Rs. 28,85,954.84 through FBN No. 33/373, 33/377 and 33/367. During the banking transaction with borrower Khanna, Defendant had committed following offences as mentioned herein below.

As per the documentary records, banking transaction with borrower Khanna began long ago and house and land owned by NP Garment is kept as a collateral for PXL, however separate collateral had not been obtained PXL, thus making the loan unsecured. Similarly, subsequent to the export of goods of the borrower obtained pre export credit facility, it is the job responsibility of defendant Birendra Nath Lohani to recover the loan from the amount obtained at the time of negotiating the foreign bills documents, however, defendant had not concentrate him to recover the loan, transaction of loan being done with borrower relying upon sub ordinates even without examining the facts, despite of a employee for such a long period of service. Consequently, it has been clear that his intention was to make benefits to borrower and himself and to make harm/loss to the Bank. Similarly, Section 12 of Commercial Bank Act, 2031, Circular No. 31 of Nepal Rastra Bank dated 2048/12/30BS (12/04/1992AD) being not obeyed.

Towars FBN, rest of the amount remained after deducting from the pre export letter of credit has to be paid at the time of making FBN, however, no enquiry was made for that amount and all the amount received through FBN was deposited to the clients accounts and no efforts was made for the recovery of the Banks outstanding. Consequently, doing additional FBN they have increased the outstanding of the Bank before recovery. It was mandatory to give concentration to the required procedural documents for FBN such as Bill of Lading/Airway Bill and uphold the Shipment Date at the time of doing FBN, however, bills was purchased ignoring all these.

Defendant Birendra Nath Lohani, in the capacity of Branch Manager purchased three Bills and for that has sent to the section for inspection and look after, and as he said in his statement that considering the long business relation and faith with party pre export amount was not recovered even making FBN, thus it has been seen that, duty of Birendra Nath Lohani was to protect the interest of the Bank, but at the time of lending and recovering credit of the Bank he involve himself time and again for lending the credit by ignoring Law, policy rules, circular and direction, by his involvement Bank has suffered illegal loss to the amount of Rs. 41,23,004.84 and had made illegal benefit to the borrower and Defendant and had make a corruption.

Thus Defendant Birendra Nath Lohani had made illegal benefit to borrower and himself and eillegal loss to the Bank, knowingly he ignored the law, capital amount of Bank Rs. 33,85,954.84 and interest thereon up to Aswin end 2061 Rs.7,37,050/- total amount Rs. 41,23,004.84 loss to the Bank and act is the offence of corruption and the action against him be taken as per the then Corruption Control Act, 2017 section 7(2), 13 and 29 currently applicable Corruption Control Act, 2059 section 8 sub section 1(g) (h) (i) and sub section 3, 12 and 17 and recover the amount that Bank had suffered loss.

Defendant account officer Bharat Bahadur Basnet in the capacity of Branch Manager and assistant branch manager of Baneshor Branch

of RB Bank issued loan to M/s Nepal Professional Garment Pvt. Ltd. (MNP Garment) Imadole, main director Mr.Kewal Krishana Khanna of Rs. 500,000/- through export loan no. 33/16 and Rs. 5,69,683.09 under AOC loan no. 33/233 in the capacity of Branch Manager and Rs. 5,00,000/- under the loan no. 33/29, Rs. 26,50,200/- under the loan no. 33/273 in the capacity of assistant branch manager when Birendra nath Lohani was Branch Manager. Thus as per the available documents in CIAA total Rs. 42,19,883.09 loan transaction was made. Defendants Bharat Bahadur Basnet had committed the following.

It has been seen/observe that towards pre export loan, new loan has been issued one after another without having recovering previous/old loan, even not taking any collateral. The objective of pre export loan was to make the export and after completion of such export, loan must be recovered but, the entire amount received was deposited to the borrowers account and thus violated the section 12 of Commercial Bank Act, 2031 and directives' no. 31 of Nepal Rastra Bank (NRB) issued on 2048/12/30 BS ((12/04/1992AD).

It has been observed that, towards Foreign Bill Negotiation during FBN no dues amount of the Bank was recovered from the amount received from the foreign importer at the time of making payments of main export letters of pre export loan and entire amount was deposited to the borrowers account. During FBN it was necessary to submit Bill of lading/ Airway Bill and sent it within the Shipment Date, however, such process has not been followed, but bills were purchased and violated the law. During FBN no efforts was made to recover the Banks dues from the amount received through foreign importer, and even, acknowledging all these, with bad motives additional bills were negotiated and make the loss to the Bank and violated RB Banks Business function policy and recommendations, circular dispatch no. 98, dated 2055/09/16 BS (31/12/1998AD) of the department.

Toward AOC Loan, when opening Back to Back L/C, it was necessary to pay the amount only after receiving the amount of such

L/C from the importer, but the amount was paid to the party even not receiving the money and evidence from the foreign importer and thus not any intention to recover the Banks amount was seen. It was necessary to post same day to the payment of L/C amount, however posting was delayed and make loss even interest to the Bank. Checking the personal limit utilization register, loan outstanding is the responsibility, however, such registrar was hide/ and/or collapsed, which reveals that there was motive of making huge loan transaction, thus Defendant Bharat Bahadur Basnet violated the RB Banks loan working procedure and recommendation, Circular 26 of dispatch no. 376 dated 2058/1/20BS(03/05/1998AD), circular dated 2053/1/28 BS (11/05/1998AD) , Banks circular 32, dated 2058/3/12 BS (26/06/2001AD).

Thus Defendant Bharat Bahadur Basnet had made illegal benefit to borrower and himself and illegal loss to the Banks knowingly, he ignored the law, make loss to the RB Banks and the offence of credit issuance as he committed by his involvement capital amount of Bank Rs. 42,19,883.09 and interest thereon up to Aswin end 2061 Rs.22,91,237/- total amount Rs. 65,11,120.09 loss to the Bank and act is the offence of corruption and the action against him be taken as per the then Corruption Control Act, 2017 section 7(2) and 29 currently applicable Corruption Control Act, 2059 section 8 sub section 1 (g) (h) (i) and sub section 3 and section 12 and 17 and recover the penalty amount of that Bank

Defendant assistant account officer Geeta Parajuli in the capacity of in the capacity of assistant branch manager of Baneshor Branch of RB Bank issued loan to M/s Nepal Professional Garment Pvt. Ltd Imadol, main director Mr.Kewal Krishana Khanna to the loan no. 33/17 and 33/18 when Dilip Kumar Shrestha was Branch Manager and of Rs. 26,00,000/-of loan no. 33/29 at the time of Birendra Nath Lohani was Branch Manager, towards FBN, Bill No. 33/373/ and 33/377 Rs. 27,47,060.34 and under AOC loan no. 32/587 in the capacity of assistant during the period of Dilip Kumar Shrestha was Branch Manager Rs. 14,41,528.02, total principle amount Rs.

67,88,588.36 was traded was seen from the documents available in the CIAA. Defendants Geeta Parajuli had committed followings.

It has been seen/observe that towards pre export loan, new loan has been issued one after another without having recovering previous/old loan, even not taking any collateral. The objective of pre export loan was to make the export and after completion of such export, loan must be recovered but, the entire amount received was deposited to the borrowers account and thus violated the section 12 of Commercial Bank Act, 2031 and directives' no. 31 of Nepal Rastra Bank (NRB) issued on 2048/12/30 BS (12/04/1992AD).

Toward FBN, rest of the amount remained after deducting from the pre export letter of credit has to be paid at the time of making FBN, however, no enquiry was made for that amount and all the amount received through FBN was deposited to the clients accounts and no efforts was made for the recovery of the Banks outstanding. Consequently, doing additional FBN they have increased the outstanding of the Bank before recovery. It was mandatory to give concentration to the required procedural documents for FBN such as Bill of Lading/Airway Bill and uphold the Shipment Date at the time of doing FBN, however, bills was purchased ignoring all these.

Towards AOC credit, Defendant Geeta Parajuli, when opening Usance L/C, it was necessary to obtain separate security, similarly before releasing the imported goods of such parties it was must to insure the repayments, for that no security has been taken. It was necessary to post same day of AOC of L/C amount, however posting was delayed and make loss even interest to the Bank. Checking the personal limit utilization register, loan outstanding is the responsibility, however, such registrar was hide/ and/or collapsed, which reveals that there was motive of making huge loan transaction, thus Defendant Geeta Parajuli, breaks the RB Banks loan working procedure and recommendation, circular 26 of dispatch No. 376 dated 2058/1/20BS(03/05/1998AD), circular dated

2053/1/28 BS (11/05/1998AD) , Banks circular 32, dated 2058/3/12 BS (26/06/2001AD).

Thus Defendant Geeta Parajuli had made illegal benefit to borrower and himself and illegal loss to the Banks knowingly, he ignored the law, make loss to the RB Banks and the offence of credit issuance as he committed by his involvement capital amount of Bank Rs. 67,88,588.36 and interest thereon up to Aswin end 2061 Rs.68,78,667/- total amount Rs. 1,36,67,255.36 loss to the Bank and act is the offence of corruption and the action against him be taken as per the then Corruption Control Act, 2017 section 7(2) and 29 currently applicable Corruption Control Act, 2059 section 8 sub section 1 (g) (h) (i) and sub section 3 and section 12 and 17 and recover the penalty amount of that Bank.

Defendant Mahendra Bhakta Pradhananga in the capacity of assistant branch manager of Baneshor Branch of RB Bank issued loan to M/s Nepal Professional Garment Pvt. Ltd. Managing Director Kewal Krishana Khanna to Rs. 36 Lacs from the loan no. 33/14 and 33/17 during Dilip Kumar Shrestha was Branch Manager, Rs. 5,00,000/ loan no. 33/29 and make total Rs. 41,00,000 during Bharat Bahadur Basnet was Branch Manager, towards FBN, at the time of Dilip Kumar Shrestha 33/45, 32/621 and 32/701 Rs. 18,12,882.81 and under AOC loan no. 32/587 in the capacity of assistant during the period of Birendra Nath Lohani, 33/267 Rs. 1,38,894.50 total Rs. 19,51,777.31 and under AOC during tenure Dilip Kumar Shrestha loan no. 33/02 (Local L.C.) 33/19, 33/231, 33/177, 33/261, 32/69,32/481,32/693,32/695 total 9 no of loan Rs. 1,95,56,505.36 and during tenure of Bharat Bahadur Basnet as a Branch Manager, through the AOC no. 33/233 Rs. 6,69,683.09 including all Rs. 2,01,26,188.45 under the TL loan during the tenure of Dilip Kumar Shrestha as a Branch Manager, through the loan no. 33/23 and 33/24 Rs. 42,70,361.27 thus total Rs. 3,04,48,327.03 transaction was made as seen from the documents available from the Bank.

Mahendra Bhakta Pradhananga's involvement was seen during issuance of those loans. Procedural mistake was made during transaction of those loans; borrower (Party) was reliable, and no efforts was made to recover the old overdue; thus he accepted during statement; thus Defendants duty was to protect the interest of RB Bank but during issuance of loan he violated the Directives No. 31 dated 2048/12/30 BS (12/04/1992AD) of Nepal Rastra Bank (Central Bank), RB Banks Business procedure policy and recommendation, departments circular bearing dispatch no. 98 dated 2055/9/16 BS (31/12/1998AD)and circular no. 26 of RB Banks Banking Business Departments issued on 2053/12/8 BS (21/03/1997AD), law policy rules and directives and provide the loan and through his involvement he made illegal benefit to borrower and himself and illegal loss to RB Banks knowingly, he ignored the law, make loss to the RB Banks and the offence of credit issuance as he committed by his involvement capital amount of Bank Rs. 3,04,48,327.03 and interest thereon up to Aswin end 2061 Rs.4,28,06,804 /- total amount Rs. 7,32,55,131.03 should be recovered from him as per the Corruption Control Act, 2017 section 7(2) and 29 currently applicable Corruption Control Act, 2059 section 8 sub section 1 (g) (h) (i) and sub section 3 and section 12 and 17 and recover the penalty amount of that Bank.

Defendant Bal Prasad Neupane in the capacity of assistant of Baneshor Branch of RB Bank issued loan to M/s Nepal Professional Garment Pvt. Ltd. (NP Garment) managing director Kewal Krishana Khanna to Rs. 2,65,22,559.87 from the loan no. 32/604, 32/552, 32/653,32/587,33/121 33/19,33/133,33/134, 33/144, 33/177, 33/179 total 12 no. of loan during tenure of Dilip Kumar Shrestha was a Branch Manager, under the TL Loan at the same tenure loan no. 33/23 and 33/24 Rs. 42,70,361.27 including all total loan amount of Rs. 3,07,92,921.14 was issued as per the documents available from the Bank.

Defendants Bal Prasad Neupane's duty was to protect the interest of RB Bank but during issuance of credit/loan he must obey the section

12 of the Commercial Bank Act, 2031, however, he violated the Directives No. 31 dated 2048/12/30 BS (12/04/1992AD) of Nepal Rastra Bank (Central Bank), RB Banks Business procedure policy and recommendation, departments circular bearing dispatch no. 98 dated 2055/9/16 BS (31/12/1998AD) and circular no. 26 of RB Banks Banking Business Departments issued on 2053/12/8 BS (21/03/1997AD), law policy rules and directives and involved himself to provide the loan illegally, and for the purpose of investigation, CIAA informed him several times to present the fact but he was absent even in the RB Banks office since long; thus he accepted the offence and through his involvement he made illegal benefit to borrower and himself and illegal loss to RB Banks knowingly, he ignored the law, make loss to the RB Banks and the offence of credit issuance as he committed by his involvement capital amount of Bank Rs. 3,07,92,921.14 and interest thereon up to Aswin end 2061 Rs.5,34,34,182 /- total amount Rs. 8,42,26,103.14 should be recovered from him as per the Corruption Control Act, 2017 section 7(2) and 29 currently applicable Corruption Control Act, 2059 section 8 sub section 1 (g) (h) (i) and sub section 3 and section 12 and 17 and recover the penalty amount of the Bank.

Defendant Professional Garment Pvt. Ltd. Imadole Lalitpur, main director Kewal Krishana Khanna, from the fiscal year 2052/2053 to 2058 during the tenure of Dilip Kumar Shrestha as a branch manager received Rs. 36,00,000/- under the heading of pre export loan no. 33/14,33/17, and 33/18 from the loan no. 33/14 and 33/17 during tenure of Branch Manager Dilip Kumar Shrestha, loan no.33/29 Rs. 5,00,000/- during tenure of manager Birendra Nath Lohani, loan no. 33/16 Rs. 5,00,000/- during tenure of Account Officer Bharat Bahadur Basnet, loan no.33/45, 32/621 and 32/701 through FBN Rs. 18,21,882.81 during tenure of Manager Dilip Kumar Shrestha, loan no. 33/373 , 33/377, 33/267 Rs. 28,85,954.84 during tenure of Birendra Nath Lohani, and towards AOC loan no. 31/100, 31/675, 32/116 Rs. 26,78,395.20 during tenure of Shree Krishana Shrestha, during the tenure of defendant Dilip Kumar

Shrestha loan no. 33/19, 33/143, 33/121,32/552, 32/587, 33/179, 33/231, 33/177, 33,144, 32/502, 33/261, 32/69, 32/66, 32/379, 32/438, 32/635,32/481, 32/693, 32/695, 33/133, 32/604, 33/134 and local 33/02 including 23 loans Rs. 5,41,35,482.92, during the tenure of Bharat Bahadur Basnet loan no. 33/233 Rs. 5,69,683.09 and TL Loan during the tenure of Dilip Kumar Shrestha loan no. 33/23 and 33/24 Rs. 42,70,361.27 total principles amount Rs. 7,10,73,469.74 and interest Rs. 10,89,58,796.20 total principles and interest Rs. 18,00,32,265.94 loan transaction were made as per the sheet of loan.

Toward pre export loan defendant had mortgaged the land and building with registration no. 1550 dated 2054/07/3 by Kewal Krishana Khanna, situated in Lalitpur District Imadole -5 plot no. 832,833, and 28 and all the associated property, since the property was overvalued, similarly same land was double mortgaged by authorized by the Pvt. Ltd. Mr. Sailendra Kumar Singh with registration no. 6066 dated 2055/2/18 in the Banks name, thus theirs intention was clear to harm the Bank. The land was overvalued and even after deducting 50 percent of the valued amount rest amount 21,588/- was exceed the valued. Witness from the Bank and other witness is not seen; loan deed was lack of sufficient details, Kusum Khanna had signed the promissory note however, name written was Kebal Krishana Khanna. Kusum Khanna was not authorized to sign but it was possible due to the involvement of Banks employee too.

It is the responsibility of the borrower to repay the outstanding previous dues during negotiation and/or export bill, however no bill was paid. Towards Export Letter of credit, it is necessary to dispatch the goods within the deadline of Shipment Date, only after that payments schedule shall be managed, therefore, while obtaining loan shipment date of export LC shipment date is to be increased, however that was not managed but at the time of disburse date loan was borrowed with bad intentions. No objective was found while borrowing the loan. Similarly after the expiry of the loan another new loan was disbursed.

Toward Foreign Bills negotiation amount shall be received only after payments of loan issued from main export letter of credit; however, all the amounts was received and make harm to the Bank was the bad intention. During FBN Bill of Lading and Airway Bill must be submitted and shall be send as per the shipment date, however, bill are purchased even after expiry of the goods reaching date and thus violated the law. During FBN, no loan has been settled from the money called to be received from the foreign importer, and even after acknowledging that the money was not received, Banks employee had with bad faith negotiated further bills with the borrower, making financial harm to the Bank and benefit to the borrower, thus violated the RB Banks business working procedure and policy, circular No. 98 dated 2055/9/16 BS (31/12/1998AD) too.

During T L Loan defendant it was necessary to obtain separate collateral, however, he did not obtain, even not receiving the outstanding dues of first TL Loan, additional loan was taken, similarly no authorized persons signatory was provided during TL Loan.

Towards advance on credit (AOC) at the time of opening Usance LC separate collateral is required, but LC was opened without collateral. No security has been provided to the goods imported so that Banks dues could be recovered. It is viewed that Usance LC was opened knowingly to harm the Banks by making illegal alliance with the borrower. Loans were issued even exceeding the LC Limit, before approval of limit; additional loan/ credit were obtained making financial harm to the Bank.

Thus defendant, by making illegal alliance with the employee of the Bank had made illegal benefit to himself and others and make illegal loss to the Banks knowingly, he ignored the law, make loss to the RB Banks and the offence of credit issuance, there was no intention was seen to the repay the loan of the Bank committed by his involvement capital amount of Bank Rs. 7,10,73,469.74 and interest Rs. 10,89,58,796.20 total principles and interest Rs. 18,00,32,265.94

amount in words (Eighteen Carore, Thirty Two Lacs, Two Hundred Sixty Five and paisa Ninety Four Only) loss to the Bank and act is the offence of corruption and the action against him be taken as per the then Corruption Control Act, 2017 section 8 and 9 currently applicable Corruption Control Act, 2059 section 8 sub section 4 to recover the penalty amount of that Bank is the plaintiffs main claims.

Statement of CIAA is mine; I had opened the LC with name of defendant Nepal Professional Garment Pvt. Ltd. Imadole Lalitpur. Three number of Letter of Credit was opened in the name of that company. During my tenure, LC was opened Rs.26,78,395/20. During the opening of Usance LC, there was not provision in the Banks to obtain collateral; therefore no separate security was obtained. Nepal Professional Garment was good borrower of the Bank, his previous annual loan turnover with the Bank was around 100 Millions. During my tenure he repaid around 50 Millions to the Bank. LC opened during my tenure was not old. My approval limit was Rs.70,00,000/- and I was within my loan limit and all the LC were opened due process. There is a provision regarding the interest calculation that interest calculation started from the date of expense book in the foreign account of the Bank, no relation with late posting of AOC and Banks not suffered any interest loss.

There was no provision to keep on separate register of the borrower regarding loan limit since the beginning of opening of L/C. Therefore, no question arises regarding the loss and damaged of the register, not any negative remarks was seen during the internal supervision of Rastriya Banijya Bank and Nepal Rastra Bank supervision too taken to the Bank. Regarding the violation of the Credit Working Procedure of Rastriya Banijya Bank and recommendation, Circular no 26 of the department dated 2058/1/20 BS (03/05/2001AD), Dispatch No. 373, Circular dated 2053/12/8 BS (21/03/1997AD), and Circular No. 32 dated 2058/3/12 BS (26/06/2001AD), as I was all ready been transferred to Central Office, recovery department on 2053/7/16 BS (01/11/1996AD). Those circular were issued only after my tenure. Therefore the complaint is baseless. As I am obeying all the norms,

rules and regulation, policy, guidelines and circular and limitation of the Bank, I am working with the best interest of the Bank, therefore, allegations against me in the charge sheet are not culpable and not recoverable from me. The foregoing are statements made by Defendant Shree Krishana Shrestha.

From Defendant Shree Krishana Shrestha, as per Section 7(d) of Special Court Act, 2059 seeks Rs. 5,00,000/- as a deposit amount from him, he paid in cash and is in bail.

Statement of CIAA is mine, as started by my previous manager regarding the process of pre export loan and FBN transaction, employee working earlier than me told/acknowledge about me regarding the procedure and process of issuance of those loan, therefore my action was just continuation as per the rules and this was only a previous practice as informed me, transaction history of the party was long and about more than 1 crore annually, party was reliable and trustworthy as per the concerned section, since the industry was run satisfactorily and all the loans were booked to make the Bank in profit and with good intention, it was not our intention to harm the Bank and make benefit to the borrower. As deadline was to recover within 6 months, however, I was transferred within 1.5 months from the date of investment, successor manager and employee was responsible for the recovery. I was not trained regarding the LC, and had not got any chance to be a part of LC and to work with LC, situation was to work with consultation of the then existing employee of the concerned section/department and had not any bad intention regarding the work. Regarding Rs. 5,00,000 of PXL, limitation was Rs. 50,00,000. Kusum Khanna was authorized therefore, transaction were made. It was learnt that PXL No. 33/29 was recovered and settled, regarding the lack of Bill of Lading, terms, Fright Cargo Receipt is allowed, therefore, as per the terms LC was accepted, Regarding the Promissory Note due to the signature of the borrower such loan were secured. I was involved in the benefit of the Bank, as I was been able to obtain additional collateral such as house and factory in the name of the Bank due to

which I have saved loss of the Bank, as earlier land was only registration mortgaged in the Bank name. Therefore, I was not involved in the crime as claimed by the claimant; I should be acquitted of such allegations. The foregoing is the statement made by Birendra Nath Lohani before the Special Court.

Pursuant to Section 7(D) of the Special Court Act, 2059, Rs. 3,00,000/- has been fixed as a security from Defendant Birendra Nath Lohani and in lieu of that he provided assets as deposit and is in bail.

It is said that, in the case of PXL no. 33/16 Rs.5,00,000/- loan was disbursed in the capacity of Acting Manager, however, limit of Nepal Professional Garment was Rs. 50,00,000/- late payment facility limit was Rs. 50,00,000 and total limit was Rs.1,00,00,000/- , security for that was land and building of Imadol valued at Rs. 1,30,21,588/- was mortgaged in favor of the Bank. Therefore due to safe collateral security and transaction based on within the limitation can't be take otherwise and sue against me. Similarly, Rs, 10,00,000 loan for No. 33/16 and 33/29 was recovered from the security provided by the Garment as per the Letter bearing Dispatch No. 2252 of Rastriya Banijya Bank dated 2061/10/20 BS (02/02/2005AD) . There are following reasons for not charging against me regarding the payments of FBN 33/373, where payments should have to be made after deducting all the amount of pre export loan, however, all the amount was deposited to the Borrowers account received from main export letter of credit. At the time of execution of FBN, letter of credit section and managers are solely final authority, and initial signature of mine as an accountant does not make any affect to the policy matters, it was simply a completion of procedure and I may have signed to the documents of voucher and the deed paper after signature and order of the manager. At the time of executing FBN, it is seen that, some amount was owed and with the intention to operate the business too, borrowers had sold the bill and all the amount of Rs.26,50,200/- was not deposited to the borrowers account, only Rs. 12,02,763/- was approved. It cannot be said, all

amount was deposited. It cannot be said that Rastriya Banijya Bank's Business Working Policy and Recommendation, Circular No. 98 of the Department dated 2055/9/16 BS (31/12/1998AD) was not obeyed. Under the circumstances of enclosing of BOL A.B., I had put my initial signature and all the documents related are in the custody of concerned section, therefore, I should not be charged. AOC loan no. 33/233 was opened by me as per rules, and at the time of repayment period of this loan, I have already been transferred. Posting, Checking, Collecting necessary documents and maintenance of register if any, was to the duty of the concerned section, due to my transferred, I can't say why they are unable to produce the register before the inspector. I am innocent; I should be acquitted from the charges mention in the charge sheet is the statement made by Defendant Bharat Bahadur Basnet before the Special Court.

Pursuant to Section 7(D) of the Special Court Act, 2059, Rs. 2,00,000/- has been fixed as a security from Defendant Bharat Bahadur Basnet and in lieu of that he provided cash deposit and is in bail.

Charge sheet against me is false. Banking business are guided by profit and based upon trust therefore, I had provided continuity to the previous business man. Due to the business transaction with the Party the Branch was awarded for generating revenue during half yearly closing at the end of Poush 2053 BS. Neither was there any intention to harm the Bank nor to make any benefit to anyone else. Being a Manager of the bank, I had banking with the party for the betterment of the Bank and during my tenure, all the property of the firm was transferred to bank's ownership. Thus, I have secured the loan of the Bank. Since the party conducted large transactions and was a credible borrower of the Bank making good profit for the Branch, therefore, transaction were made with good intention. I had worked with that Branch since 2053/7/13 BS (29/10/1996AD) to 2054/9/ BS (15/12/1997AD) and in that period million of rupees was deposited at the Bank. There were not any clear instruction and

circular that a single Bank can't be a Local LC Bank and negotiating Bank, and banks are still making such transaction till the date. The foregoing are statements made by Defendant Dilip Kumar Shrestha before the Special Court.

Pursuant to Section 7(D) of the Special Court Act, 2059, Rs.25,00,000/- has been fixed as a security from Defendant Dilip Kumar Shrestha and in lieu of that he provided assets as deposit, and is the bail.

Special Court had ordered to present the Defendants' witness for statements, but Defendants' witness statements are not available in the case file.

It is seen from the case file that Defendant Geeta Parajuli, Mahendra Bhakta Pradhananga, Bal Prasad Neupane and Kewal Brishana Khanna did not appear within the initial time period prescribed in the summon issued by the Special Court.

Defendant Kewal Krishana Khanna was Managing Director of Professional Garment Pvt. Ltd. and borrowed loan from the Bank in various heading, under such circumstances. Defendant could not say anything about his repaying the loan, which is outstanding. Therefore, it is clear that he borrowed the loan from Rastriya Banijya Bank as per the chargem sheet under the various headings, and caused loss of Rs.18,00,32,265.94, including principal and interest to the Rastriya Banijya Bank.

Other Defendant Dilip Kumar Shrestha seemed reluctant to recover the loan issued by him. Bank's overdue amount should have been recovered from the borrower's amount received through the Bank. However, such amount was deposited in borrowers account and LC was opened from the same Bank for beneficiary and applicants.When opening of Back-to-back LC, payments should be released only after receiving the amount in lieu of export of goods, but payments was released before receiving any evidence of such amount. Individual limit authorization register was not found. In such a situation, we could not say that Defendant had a malafide intention

towards Bank at the time of issuing loan. Therefore, we cannot say that Defendant is not guilty of the allegations stated in the charge sheet.

It is seen from the case files that other defendant Shri Krishana Shrestha had issued additional loan before recovering previous loan from the borrower. There was not seen any clear register of limit utilization records of the party. During booking of AOC loan it was booked late than issued and make interest loss the Bank, therefore, we can't say that action taken by the defendant was in good intention. Loan issued during the tenure of the defendant as he claimed was against the Banks Act, Rules, regulation and circular was not fully obeyed, loan was not recovered and bank had suffered huge loss, therefore we can't say that defendant had not committed offences as claimed in the charge sheet.

It is seen that Defendant Birendra Nath Lohani, during transactions with NP Garment, issued PXL againt the collateral obtained for L/C and did not obtain any separate collateral. On the other hand, it is seen that, outstanding amount to Rastriya Banijya Bank was not recovered from the amount received when negotiating FBN and entire amount was released to the customer. Defendant did not show interest in recovering the Bank's outstanding amount. Hence, the malafide interest of Defendant Lohani in the banking transaction with borrower Khanna is clearly seen. When conducting transactions with the customer, Defendant Lohani did not pay attention to securing Rastriya Banijya Bank's outstanding amount and the credit that was granted. Procedures were not completely followed. The full amount received from FBN was deposited in the borrower's account despite previous outstanding credit, hence providing benefit to the borrower and showing no interest in recovering previous loans. When previous credit was outstanding, additional credit was granted to the borrower based on the same collateral. Therefore, the aforementioned proves that Defendant Lohani participated in providing illegal benefit to the borrower and causing illegal loss and damage to Rastriya Banijya Bank.

Documentary evidence shows that when Defendant Bharat Bahadur Basnet issued loans to borrower Defendant Khanna, he issued additional loans despite the outstanding amount from previous loans. Defendant Basnet and others were involved in directly releasing to the borrower the amount received by the borrower through FBN, without deducting Rastriya Banijya Bank's outstanding amount, despite previous PXL outstanding amounts. Defendant Basnet granted loan facilities to the borrower without showing any interest in recovering outstanding amounts, which caused loss and damage to Rastriya Banijya Bank. When opening Back-to-back L/C, payment for L/C should be released only after receiving money for the exported goods; however, the L/C amount was released in the absence of proof of amount received for the exported goods. Suitable collateral was not obtained for Rastriya Banijya Bank's investment in loans, and there was no real interest in recovering the outstanding amount of Rastriya Banijya Bank. Therefore, Defendant Basnet is found to have committed the offences alleged, since Defendant Basnet along with other persons did not fully comply with Rastriya Banijya Bank's policies, rules and circulars, did not consider securing Rastriya Banijya Bank's investment and guaranteeing recovery thereof, and provided benefit to the borrower and caused loss and damage to Rastriya Banijya Bank.

In violation of Act, rules and circulars related to Bank, Defendants Geeta Parajuli, Mahendra Bhakta Pradhananga and Bal Prasad Neupane also provided additional credit facilities to borrower Defendant Khanna against weak collateral, despite the outstanding amount from previous loans. These Defendants were obliged to appear in Court to present evidence to challenge the allegations made against them; however, they did not appear in Court as per the summons issued to them by the Court, and have missed the first appearance. Documentary evidence does not show the full recovery of the credit that was granted with the involvement of the Defendants as well. Investment was made in new loans when previous loans were still outstanding. Investment was made against only one

collateral which was inadequate. These Defendants, who were employees of Rastriya Banijya Bank, had no interest in recovering Rastriya Banijya Bank's outstanding amounts. Despite outstanding amount to Rastriya Banijya Bank, borrower Defendant received money from Rastriya Banijya Bank through FBN. Such amounts were released to borrower Defendant without showing interest in recovering Rastriya Banijya Bank's outstanding amounts. Hence, it cannot be held that these Defendants did not commit the accused offences. It is found that Defendants Shree Krishna Shrestha, Dilip Kumar Shrestha, Birendra Nath Lohani, Bharat Bahadur Basnet, Geeta Parajuli, Mahendra Bhakta a and Bal Krishna Neupane committed the crime of causing illegal loss and damage to Rastriya Banijya Bank, and Defendant Kewal Krishna Khanna colluded with Rastriya Banijya Bank employees, pledged weak collateral, illegally obtained and spent claimed amount from Rastriya Banijya Bank and showed no interest toward the repayment of such amount and caused loss and damage to Rastriya Banijya Bank; therefore, it is proven that these Defendants mutually collided and caused illegal loss and damage to Rastriya Banijya Bank. However, it is not just to recover from the employees the principal and interest amount of Rs.18,00,32,265.51 received under various headings by Defendant Khanna. Defendant Khanna has not been able to say how much money he has paid back on the loan received from Rastriya Banijya Bank, and present evidence thereof. It is seen that Defendant Khanna received the principal amount of the claim. Other Defendants who are Rastriya Banijya Bank employees are not accused of taking or receiving any amount; they are accused of providing benefit to borrower Defendant in violation of Bank's rules, laws and circulars. The principal amount of the claim should be recovered from Defendant Khanna. Therefore, it is held that loss and damage of the principal amount of Rs. 18,00,32,265.51 was caused by commiting the offences claimed in the charge sheet, and that Defendant Khanna committed offences pursuant to Section 8 of the then prevailing Corruption Eradication Act, 2017 and Defendants Shree Krishna Shrestha, Dilip Kumar Shrestha, Birendra Nath

Lohani, Bharat Bahadur Basnet, Geeta Parajuli, Mahendra Bhakta Pradhananga and Bal Krishna Neupane committed offences pursuant to Section 7(2) of the same Act. It is therefore held that the principal amount should be recoverd from Defendant Khanna, who shall be imprisoned for 2 (two) year pursuant to Section 8 of the same Act. Defendants Shree Krishna Shrestha, Dilip Kumar Shrestha, Birendra Nath Lohani, Bharat Bahadur Basnet, Geeta Parajuli, Mahendra Bhakta Pradhananga and Bal Krishna Neupane shall be fined Rs. 5,000 each pursuant to Section 7(2) and 29(2) of the same Act. The above mentioned is the decision rendered by Special Court, Kathmandu on 2064/3/12 BS (June 26, 2007 AD).

I am not satisfied with the decision of Special Court. L/C transactions are not conducted by obtaining collateral. Banks open L/Cs based on the fame, status and credibility of the concerned business person. Thus, Special Court interpreted contrary to the general principles of banking and the basis of Special Court's decision, i.e., issuing loan without obtaining collateral, is erroneous. The letter having Disptach No. 2252 dated 2061/10/20 BS (February 2, 2005 AD) submitted to CIAA states that the collateral pledged by borrower Defendant has been auctioned and the amount already recovered; however, the aforesaid letter has not been admitted into evidence. I issued the loan to borrower Defendant initially. Subsequent loans were not issued by me. Regarding loans issued after I was transferred from Baneshwor Branch Office on 2053/7/16 BS (November 1, 1996 AD), allegations against me were biased in stating that new loans were issued without repayment of previous loans. Branch Managers that succeeded me should show loans issued during my tenure as having been recovered; however, they showed new loans to be recovered, and that is why loans issued during my tenure are seen outstanding. After I was transferred, Dilip Kumar Shrestha worked at Baneshwor Branch Office followed by Birendra Nath Lohani. This fact is not disclosed in the chargesheet, and I am charged in connection to loans issued during other persons' tenures. I am charged for principal amount of Rs. 26,78,395.20, and it is claimed

that Circulars were violated on 2053/12/8 BS (March 21, 1997 AD), 2058/1/20 BS (May 3, 2001 AD) and 2058/3/12 (June 26, 2001 AD). However, I did not issue the above mentioned loans in violation of circulars becuase I was transferred on 2053/7/16 BS (November 1, 1996 AD). I have been charged without any basis, and Special Court rendered a decision to impose upon me a fine of Rs. 5,000 based upon such a charge sheet; hence, the decision is erroneous and should be reversed. Therefore, I request the reversal of the aforementioned decision and acquittal. The foregoing paragraph describes the appeal of Defendant Shree Krishna Shrestha,

I am not satisfied with the decision of Special Court. Special Court fined me for not complying with Bank's policies, rules and circulars, and not for receiving or spending the amount claims in the charges. The aforesaid decision is contrary to Section 25 of Evidence Act, 2031. While a loan limit of Rs. 1,00,00,000, including Rs. 50,00,000 as PXL and Rs. 50,00,000 as loan were issued, Rs. 1,30,00,000 had been obtained as collateral guarantee from the borrower company's building and land at Plot No. 833, 832 and 28 after deducting the margin, and the same had been accepted by Rastriya Banijya Bank; thus, Special Court's decision, based on collateral not having been obtained, is erroneous. The limit for PXL was Rs.50,00,000, and during my tenure as Manager and Assistant I signed documents to issue credit of Rs. 10,00,000; thus, it is errorneous to hold that such credit amount was provided with malafide intention in violation of the limit. The conclusion that the amount received from FBN was not recovered and was returned is also wrong. Also, the letter bearing Dispatch No. 2252 issued by Baneshwor Branch Office on 2061/10/20 BS (February 2, 2005 AD) proves that the Rs. 10,00,000 for Loan No. 33/16 and 33/29 has been repaid. The duty to responsibility to recover PXL amount under FBN was not vested in me. I did not give the tok order for the same. PXL was not issued from the FBN amount of L/C No. 132065. In addition, the full amount of FBN 33/376 has not been released to the borrower's account. Also, I did not give the order for the same. It is not my duty to

attempt to recover FBN 33/373 amount after I was transferred. It will be erroneous to say that the transaction conducted on 2055/1/8 BS (April 21, 1998 AD) does not comply with Circular issued on 2055/6/16 BS (October 2, 1998 AD).

I had already been transferred when the Back-to-back L/C amount was transacted, and it cannot be said that I did not show readiness to recover such amount. The Section has the task of entering L/C amount. The argument that the individual limit utilisation register has been lost is also erroneous. The Assistant Manager assumes responsibility for the register, I don't. The letter bearing Dispatch No. 2222 dated 2060/10/20 BS (February 3, 2004) mentions that Rs. 5,00,00,000 from PXL No. 33/16 issued in my capacity as Manager, Rs. 5,00,00,000 from Loan No. 33/29 issued in my capacity as Assistant, Rs. 26,50,200 from Loan No. 33/373, and Rs. 5,69,683.09 from Loan No. 33/233 have already been recovered and there is zero balance; however, this letter has not been evaluated. Therefore, the decision of Special Court that fines me without proper evaluation of evidence deserves to be reversed, and I request for its reversal and my acquittal from false allegations. The foregoing is the appeal of Defendant Bharat Bahadur Basnet.

I am not satisfied with the decision of Special Court. Although the chargesheet states that loss and damage equal to Rs.41,23,004.84 was caused, it is unable to state how much money ha been taken or spent in what manner. One should not be deemed corrupt because of PXL transactions that were conducted against collateral provided by the borrower company when executing L/C transactions. When issuing PXL, loans are issued by considering the paying ability of the borrower company and its credibility, and this does not amount to malafide intention. The decision was arbitraty, and does not evaluate the fact that the borrower's land and building had been kept as collateral. The borrower company filed an application with the Central Office on 2057/10/3 BS (January 16, 2001 AD) regarding the repayment of loan, and there has been no consideration of this fact. Another basis of decision, namely, Rastriya Banijya Bank did not

recover from the amount received under FBN, is also wrong. Outstanding loan was deducted from Rs.26,50,200 received under FBN 33/373, and only Rs. 12,02,763 was released to the customer. Out of Rs.31,16,635.20 received through FBN 33/377, only Rs. 96,860 is outstanding after repayment. Similarly, out of Rs. 20,67,187.50 of FBN 33/267, most has been repaid and only Rs. 1,38,894 is outstanding; this has not been admitted as evidence. I was employed at Baneshwor Branch Office from 2054/8/20 BS (December 5, 1997 AD) to 2055/2/20 BS (June 3, 1998 AD). The decision is erroneous because it does not consider the fact that, during my tenure, loan investment was made by obtaining collateral, and Rs. 50,00,00,000 was recovered from the concerned borrower company. Rs. 50,00,000 of FBN 33/29 was issued within the limit, and the letter with Dispatch No. 2252 dated 2061/10/20 BS (February 2, 2005 AD) makes it clear that the amount has already been recovered. This fact has not been considered. Out of Rs.31,16,635.20 of FBN 33/377, only Rs. 96,860.34 is outstanding, and such amount is outstanding due to various fees. Transaction of Rs. 26,50,200 through FBN 33/373 was executed on 2055/1/8 BS (April 21, 1998 AD) and it had a repayment period of 6 months; since I was transferred on 2055/2/20 BS (June 3, 1998 AD), I was not supposed to attempt to receover it. Among transactions I conducted, full amounts issued under PXL have been recovered and most amounts issued under FBN have been recovered with very small amount outstanding; hence, I should not be found guilty. Therefore, I request for reversal of the decision of Special Court and acquittal from the charges. The foregoing paragraph is the appeal of Defendant Birendra Nath Lohani.

The order dated 2065/5/20 BS (September 5, 2008 AD) states the following. It is seen that Special Court held Defendant to be guilty as per allegations in the chargesheet which claim that the offence of corruption was committed because of the act of returning the deposit amount by the Defendant. It was not ascertained whether or not appellant received or gave money with malafide intention and

committed corruption, and the same was not proved. Furthermore, it has not been proven that Defendants committed acts of corruption with malafide intention or negligence. In such a situation, the decision of Special Court, Kathmandu to hold guilty pursuant to Corruption Eradication Act, 2017 is not consistent with the principles propounded by precedents of Decision No. 6075, Ne.Ka.Pa. 2052 and Decision No. 6448, Ne.Ka.Pa. 2054. Therefore, notice is to be sent to Attorney General's Office for discussion on this matter, and related (lagaau) Criminal Appeal No. 466 and 289 be presented along with this case.

The present case was submitted after being scheduled in the cause list according to rules. On behalf of Appellant Shree Krishna Shrestha, Advocate Hira Regmi argued that the letter bearing Dispatch No. 2252 that was issued by Rastriya Banijya Bank on 2061/10/20 BS (February 2, 2005 AD) mentions that the principal amount specified in the charge sheet for his client had already been recovered, but this fact had not been considered, and it was held that the credit provided had exceeded the limit. There is no factual evidence to prove that the credit limit had been exceeded. Appellant Shrestha is charged with losing register. Only employees responsible for the register should be so charged. As a Manager, my client did not maintain or lose registers. It is erroneous to file charges and specify principal amounts for loans that were issued to the borrower company after my client had been transferred to another location from Baneshwor Branch Office on 2053/7/16 BS (November 1, 1996 AD). The basis, that loans were provided in violation of issued Circulars after Appellant's transfer, is itself erroneous. The Special Court decision that found Appellant guilty and liable to fines is based on wrong grounds, and is erroneous. Thus, the decision should be reversed and Appellant Shrestha should be acquitted.

On behalf of Appellant Bharat Bahadur Basnet, Advocate Kumar Mani Koirala argued that Special Court decided that Defendant was guilty of violating credit limit, in spite of the fact only Rs. 10,00,000 had been provided by my client's signature where the credit limit was

Rs. 1,00,00,000, comprising Rs. 50,00,000 under Pre-export Loan and Rs. 50,00,000 under TRC. Collateral was obtained for such loan and was also confirmed. The decision of Special Court, which did not consider these facts and convicted and fined Appellant Basnet without basis, is erroneous; therefore, the decision should be reversed and Appellant should be acquitted.

On behalf of Appellant Birendra Nath Lohani, Senior Advocates Sushil Kumar Panta and Narayan Ballav Panta and Advocate Jagadish Chandra Pandey's arguments were as follows. With regard to loans issued during our client's tenure as Branch Manager, the basis of Special Court's decision, that s no interest was shown in recovery of loans, is erroneous because the borrower company itself filed an application with Central Office of Rastriya Banijya Bank on 2057/10/3 BS (January 16, 2001 AD). The letter bearing Dispatch No. 2252 that was issued on 2061/10/20 BS (February 2, 2005 AD) makes it clear that most of amount received through FBN has been recovered and insignificant amount was outstanding; thus, Special Court's ruling is erroneous because it ignores this fact and states that the FBN amount was provided to the borrower company. Since our client had already been transferred from Baneshwor Branch Office on 2055/2/20 BS (June 3, 1998 AD), the circulars cited in the charge sheet do not apply to our client. Therefore, the decision, which imposes fines by subjectively stating that no interest was shown toward recovery of loans despite documents revealing that most of the loan amounts issued during our client's tenure as Branch Manager have already been repaid, should be reversed and Appellant Lohani should be acquitted of the charges.

On behalf of Respondent Government of Nepal, Deputy Attorney General Krishna Prasad Poudel argued as follows. Documentary evidence proves that loss and damage was caused to Rastriya Banijya Bank by endangering the loan investment amounts, because the loan limit was exceeded when issuing loan to the borrower company, and additional loans were issued without recovering the outstanding amounts but no interest was shown toward recovering

loans. Special Court's decision to hold Appellants guilty and impose fines on them is consistent with laws. Therefore, since it is not necessary to change the decision, the decision should be affirmed.

Arguments and claims made by Advocates were heard and all documents were reviewed. Here, it is found that decision has to be rendered regarding whether or not Special Court's decision was correct.

Considering the decision, the charge sheet presented alleges as follows. Appellant Shree Krishna Shrestha, during his tenure as Manager of Baneshwor Branch Office of Rastriya Banijya Bank, caused loss and damage to Rastriya Banijya Bank equal to claim amount of Rs. 82,81,943.40, which consists of principal amount of 26,78,395.20 issued in several transactions and Rs. 55,43,548.20 as interest thereon till end of Ashoj, 2061 BS (October 16, 2004 AD), with the malafide intention to provide illegal benefit to Defendant borrower and cause illegal loss and damage to Rastriya Banijya Bank. Appellant Bharat Bahadur Basnet, during his tenure as Manager and Assistant of the same branch office, caused loss and damage equal to claim amount of Rs. 65,11,120.09, comprising the principal amount of 42,19,883.09 issued in several transactions and Rs. 22,91,237 as interest thereon till end of Ashoj, 2061 BS (October 16, 2004 AD), with the malafide intention to provide illegal benefit to Defendant borrower Khanna and cause illegal loss and damage to Rastriya Banijya Bank. Similarly, Appellant Birendra Nath Lohani, during his tenure as Manager of the same branch office, caused loss and damage equal to claim amount of Rs. 41,23,004.84, which consists of the principal amount of 33,85,954.84 issued in several transactions and Rs. 7,37,050 as interest thereon till end of Ashoj, 2061 BS (October 16, 2004 AD), with the malafide intention to provide illegal benefit to Defendant borrower Khanna and cause illegal loss and damage to Rastriya Banijya Bank. Therefore, punishment pursuant to Sections 7(2), 13 and 29 of the then Corruption Eradication Act 2017, and Sections 8 (1)(f),(g) and (h) as

well as Sections 8(3), 12 and 17 of the present Corruption Eradication Act 2059 is requested.

Similarly, the charge sheet states that Defendant Dilip Kumar Shrestha is liable for claim amount of Rs. 16,48,827.37, Defendant Geeta Parajuli for claim amount of Rs. 1,36,67,255.00, Defendant Mahendra Bhakta Pradhananga for claim amount of Rs. 7,32,55,131.03 and Defendant Bal Krishna Neupane for claim amount of Rs. 8,42,27,103.14 which they invested with the malafide intention to provide illegal benefit to the borrower and cause illegal loss and damage to Rastriya Banijya Bank when issuing loan to borrower Defendant Khanna; therefore, these Defendants committed corruption and they should be punished pursuant to the same laws mentioned in the preceding paragraph.

The charge sheet also requests to punish Defendant Khanna pursuant to Sections 8 and 29 of the then Corruption Eradication Act 2017, and Sections 8 (1)(f),(g) and (h) as well as Sections 8(4) of the present Corruption Eradication Act 2059, because NP Garmennt Pvt. Ltd., whose Managing Director was borrower Defendant Khanna, did not repay the total claim amount of Rs. 18,00,32,265.94 that was borrowed as loans in several transactions from Baneshwor Branch Office of Rastriya Banijya Bank in the period between f/y 2052/2053 BS (1995/96 AD) and 2058 BS during the tenure of Manager Shree Krishna Shrestha, Bharat Bahadur Basnet, Birendra Nath Lohani, Dilip Kumar Shrestha and others, and benefitted illegally and caused illegal loss and damage to Rastriya Banijya Bank.

Defendants Kewal Krishna Khanna, Geeta Parajuli, Mahendra Bhakta Pradhananga and Bal Prasad Neupane did not appear as ordered by the initial summons. The decision rendered by Special Court sentenced Defendant Kewal Krishna Khanna to 2 years of imprisonment and the payment of the claim amount of Rs. 18,00,32,265.94. A fine of Rs. 5,000 each was imposed on Defendants Shree Krishna Shrestha, Bharat Bahadur Basnet, Birendra Nath Lohani, Dilip Kumar Shrestha, Geeta Parajuli,

Mahendra Bhakta Pradhananga and Bal Prasad Neupane. It is seen that Defendants Shree Krishna Shrestha, Bharat Bahadur Basnet and Birendra Nath Lohani filed an appeal challenging the decision of Special Court, which has been presented for decision,. It is seen that this Court needs to primarily consider the appeal.

After reviewing the charge sheets and other documents attached to the file, it is seen that Appellants Shree Krishna Shrestha, Bharat Bahadur Basnet and Birendra Nath Lohani were not charged in connection to the same transaction. Rather, they were charged in connection to separate transactions relating to issuance of loans at different times to NP Garment whose Managing Director was borrower Defendant Khanna, during their tenures as Manager of Baneshwor Branch Office of Rastriya Banijya Bank. First, the charges filed against Appellant Shrestha and the appeal filed by Appellant Shrestha need to be considered. It is seen that during Appellant Shrestha's tenure as Manager, principal amount of Rs. 59,307.24 was released to the foreign bank under the Usance L/C opened on February 12, 1996 AD through L/C No. 31/100 opened in the name of NP Garment through Baneshwor Branch Office of Rastriya Banijya Bank by the signature of Appellant Shrestha, and the principal amount of Rs. 59,307.24 is outstanding. Similarly, Usance L/C for USD 1,18,500 was opened on May 5, 1996 AD through L/C No. 31/675; however, goods worth only USD 5,210.40 were imported, and USD 3,329.60 was misappropriated because goods were not imported for this amount. Rastriya Banijya Bank released USD 39,055.16 to the beneficiary, hence the equivalent of USD 39,055.16. i.e., Rs.22,37,861.24 is outstanding. Usance L/C for USD 57,500 was opened on September 5, 1996 AD through L/C No. 32/116, and Rs.3,81,226.96 is outstanding for the borrower Defendant in this regard. Similarly, it is an undisputed fact that Rs. 26,78,395.20 was invested in borrower Defendant Khanna as AOC credit through the above mentioned L/C No. 31/100, 31/675 and 32/116 opened by the signature of Appellant Shrestha.

It is seen that payment was outstanding for amounts invested through L/Cs opened on different dates in the name of NP Garment, whose Managing Director was borrower Defendant Kewal Krishna Khanna, when credits were provided under the above mentioned L/Cs, and total claim amount of Rs. 26,78,395.20 was granted as additional credit to the same customer through L/C No. 31/100, 31/675 and 32/116 opened by the signature of Appellant Shrestha when amount invested through previous L/Cs was still outstanding. It is seen from documents attached to the file that the credit investment limits of various transactions for credit granted through L/Cs to the borrower company had been specified by Central Office of Rastriya Banijya Bank and the same had been made available to the Branch Office where the Appellant Shrestha was employed. However, when providing credits to the aforementioned borrower company through multiple transactions, Appellant Shrestha did not timely consider the maximum credit limit under various headings, did not maintain any record that shows such limit, and did not ascertain such loan transaction by comparing them against such limits. Furthermore, in the course of AOC transactions with the borrower Defendant, it is seen that Appellant Shrestha did not take any action to recover loans previously issued under various headings through L/Cs opened at different times. Additional L/Cs were opened during Appellant Shrestha's tenure while previous loans were outstanding, and loans were issued several times to the same customer; however, borrower's immovable property was not obtained as separate collateral so as to recover loans issued by Appellant Shrestha and previous outstanding amounts. Credit record should be updated on the same day the credit was provided to borrower Defendant through the aforementioned L/Cs; however, it is seen from the investigation report of Rastriya Banijya Bank and other evidences and documents attached to the file that the transaction was not updated as required but was posted in the concerned register only after the payment date. In such a situation, it is seen that the interest to be received by Rastriya Banijya Bank from the

day of issuance of loan to the borrower Defendant, was adversely affected.

It is seen that Appellant Shrestha knew about outstanding loans for the customer when Appellant Shrestha opened L/C and invested in the same customer during his tenure. It is undisputed that Appellant Shrestha had the obligation to obtain borrower Defendant's immovable property as separate collateral pursuant to prevailing Acts, regulations and baking policies, directives and circulars, in order to safely recover the loan invested by Appellant Shrestha during his tenure. Before granting credit of L/C amounts through AOCs opened during Appellant Shrestha's tenure, Appellant Shrestha was obligated to be aware of whether the same customer had repaid the loans issued previously through Appellant Shrestha's bank and whether or not Rastriya Banijya Bank's property would be securely recovered after conducting additional transaction. Also, all transactions relating to issuance of loans should be transparent, and the accounts should be maintained in an accurate and credible manner. L/Cs should be opened and credit provided to the same customer only if issuing additional credit is appropriate. However, evidence shows that accounts of the concerned book was not updated on the same day that the credit was provided through the disputed L/C; rather, the updating of the account in the book was delayed. Thus, it is found that loan investment was not executed in a responsible manner.

In addition, when Appellant Shrestha granted credit through L/C during his tenure to NP Garment whose Managing Director was Defendant Kewal Krishna Khanna, Appellant Shrestha should have opened the L/C to provide additional credit after obtaining additional collateral if Appellant Shrestha found that limit utilization register was maintained so that the maximum limit was clearly seen, review or investigation revealed that the credit limit had not been exceeded, and previous loan had been recovered or security obtained so that previous loan could be recovered. However, it is seen that Appellant Shrestha issued loans in an unsecured manner by not giving proper

consideration to the limit utilization register and by opening additional L/Cs one after another. Appellant Shrestha knew that loans issued without obtaining separate collateral are always risky. Contrary to the official responsibility of an officer holding the responsible position of a Branch Manager to mandatorily invest securely by obtaining collateral when issuing a loan, Appellant Shrestha repeatedly opened L/Cs and provided additional credit to a customer without obtaining collateral, while previous credit was outstanding from the same customer. The opening of the disputed L/Cs cannot be viewed as having been opened in good faith, and it has to be deemed that such act was carried out by colluding with the borrower Defendant with the malafide intention to cause loss and damage to Rastriya Banijya Bank.

The Advocate representing Appellant Shrestha argued that Appellant Shrestha was employed at the Baneshwor Branch Office until 2053/7/16 BS (November 1, 1996 AD) only, and since the Circular mentioned in the charge sheet was issued after 2053/7/16 BS (November 1, 1996 AD), it cannot be said the Circular was violated. Considering in this regard, Circular No. 31/048/049 issued by Bank Business Department of the Central Office of Rastriya Banijya Bank on 2048/12/30 BS (April 12, 1992 AD) addressed Managers of Branch Offices under it and gave the following directions. After credible customers of the bank who conduct AOC transactions open L/C and the imported goods reach Nepal borders, within a maximum of ninety (90) days the TL equal to the principal and interest, after deducting margin from the L/C amount, shall be provided subsequent to completion of proper documentation and examination of the qualification of customer, and a collateral that is adequate to secure such amount shall be obtained at the time of opening such L/C facility because the facility provided in such manner is completely based on customer’s credibility. Bank deposit receipt, Government of Nepal’s development bond (rinpatra), savings certificate or immovable property acceptable to Rastriya Banijya Bank shall be duly obtained as collateral. It is seen that clear

direction had been provided that if immovable property being pledged as collateral, facility worth up to 50 to 70 percent of the valuation amount may be provided depending on the credibility and transaction of the customer. It is seen that Circular No. 5/050/051 issued by the same Department on 2050/4/21 BS (August 5, 1993 AD) provides direction that if Term Receipt or Usance AOC has to be opened, AOC may be opened within limit only by obtaining full additional collateral for the remaining amount other than minimum cash margin.

It is undisputable that Appellant Shrestha had a duty to follow the above mentioned Circulars. It is seen that the Circular bearing Dispatch No. 26 dated 2053/12/8 BS (March 21, 1997 AD), Circular bearing Dispatch No. 2058/1/20 and Circular bearing Dispatch No. 32 dated 2058/3/12 BS (June 26, 2001 AD) that were issued subsequently, provide additional directions without altering the Circulars issued on 2048/12/30 BS (April 12, 1992 AD) and 2050/4/21 BS (August 5, 1993 AD) discussed earlier. Against this backdrop, the provisions of the Circular dated 2048/12/30 BS (April 12, 1992 AD that is directed toward Branch Managers states that when opening L/C, credit should be granted only after obtainign collateral and establishing the basis of recovery of the loan, and it is seen that such provision has been in force continuously. However, it is seen that when opening the disputed L/Cs, collateral was not provided as required and credit was provided without basis, and the principal and interest of the credit issued in such manner could not be recovered resulting in direct loss and damage to Rastriya Banijya Bank. It is seen that Appellant Shrestha did not carry out the transactions for issuance of loans through AOC No. 31/100, 31/675 and 32/116 with good intention; therefore, it is seen that the claim of Appellant Shrestha’s appeal, for acquittal from the allegations of the charge sheet, cannot be sustained.

Considering the other Appellant Bharat Bahadur Basnet, it is seen that he was employed at the Baneshwor Branch Office as an Account Officer. The charge sheet alleges that Appellant Basnet

committed corruption by providing loan of Rs. 42,19,883.09 to NP Garment whose Managing Director was borrower Defendant Kewal Krishna Khanna, which includes loans equal to Rs. 5,00,000 through PXL and Rs. 5,69,683.09 through AOC that were issued by Appellant Basnet in his capacity as Branch Manager, and loans equal to Rs. 5,00,000 through PXL and Rs. 26,50,200 through FBN issued by Appellant Basnet in his capacity as Assistant. After reviewing documents, it is seen that a total of Rs. 42,19,883.09 was issued to borrower Defendant Khanna, comprising Rs. 5,00,000 through PXL No. 33/16 in Appellant Basnet's capacity as Manager, Rs. 5,00,000 through PXL Loan No. 33/79 and Rs. 26,50,200 through FBN Loan No. 33/273 in Appellant Basnet's capacity as Assistant, and Rs. 6,69,683.09 through AOC No. 33/233 in Appellant Basnet's capacity as Manager. Appellant Basnet has accepted, both during investigation and in court that he carried out the above mentioned transactions. When issuing such loans, provisions of the Circulars require separate collateral to be obtained for PXL; however separate collateral had not been obtained. It is seen that Appellant Basnet issued additional loan by opening L/Cs under PXL, in a situation where amounts from loans issued through previous transactions were still outstanding.

Similarly, additional loans were granted under FBN irrespective of outstanding previous loans. FBN transactions require the mandatory attachment of bill of lading, airways bill and other documents as well as the dispatch within the shipment date to be completed before foreign bills are purchased; however, it is seen that bills were purchased in the absence of such documents and transactions were conducted contrary to banking policies, rules and Circulars. When opening Back-to-back L/C relating to AOC, payment for L/C amount should be released only after receiving payment from the importer for the goods exported by borrower Defendant's firm. However, it is seen that the L/C amount is released prior to payment of the amount by the importer. Therefore, it cannot be said that Defendant was interested in securing the amount owed to the bank.

When providing credits through the above mentioned L/Cs under circumstance where it was clearly seen that the credit amounts provided to Defendant's firm was outstanding and the principal amount and interest thereon had been increasing, Appellant Basnet knew the fact that opening additional L/Cs and issuing additional loans one after another without recovering such outstanding amounts from previous transactions would make the bank's investment unsecured and cause loss and damage. However, it is seen that when Appellant Basnet granted credit by opening L/Cs during his tenure, Appellant Basnet did not consider the maximum limit, condition of loans that were issued, possibility of recovering such loans, and collateral or security to be mandatorily obtained therefor, and he issued those credits by merely stating that the customer was credible. In addition, Appellant ignored general banking rules that require action to be taken for recovery of previous loan when issuing additional loans repeatedly to the same customer or firm, or require the deduction of previous principal and interest before issuing additional loan. It is seen, from the granting of new credits despite old outstanding loans, that Appellant Basnet did not carry out the disputed transactions with bonafide intentions.

Considering the argument put forward by the Advocate representing Appellant Basnet that charges against Appellant Basnet cannot be sustained because loans issued during the tenure of Appellant Basnet had been recovered, it is seen from the letter bearing Disptach No. 2252 issued by Baneshwor Branch Office of Rastriya Banijya Bank on 2061/10/20 BS (February 2, 2005 AD) that, out of the credits provided through different L/Cs to borrower Defendant Khanna, principal and interest of credits issued through the disputed L/C No. 33/16, 33/79 and 33/276 opened during the tenure of Appellant Basnet had not been fully recovered at the time of confirmation by Rastriya Banijya Bank after valuation of borrower Defendant; and it is seen that amounts are still owed to Rastriya Banijya Bank. The aforementioned also shows that credits were issued in a risky manner when the disputed L/Cs were opened,

without conducting genuine evaluation of the borrower's immovable property according to prevailing Acts, Regulations and Circulars. If a collateral that had already been pledged for a previously issued loan is used as the basis for opening subsequent L/Cs and additional L/Cs are opened one after another and credit provided continuously, without obtaining separate collateral that is adequate to cover such credit and interest accrued thereon till the repayment period specified by the bank, then it cannot be deemed that Defendant has bonafide intentions.

Furthermore, whether or not prevailing laws and banking policies, rules and circulars had been followed at the time Defendant issued loans, becomes an important topic. If a loan had been negligently issued at the time of transaction without fulfilling responsibilities required by the official duties and the Bank's amount is still outstanding despite the recovery of some principal and interest amount, it cannot be said that mere recovery of the loan subsequently provides validity to such acts or establishes good intention of the Defendant. Primarily, facts regarding whether or not an officer followed the procedures prescribed by prevailing laws in good faith to secure the investment of the bank, determines whether or not the officer in the business of issuing loans acted with bonafide or malafide intention when issuing the loan. In the present case, compliance with banking policies, rules and circulars is not found in transactions carried out by Appellant Basnet. Therefore, merely based on recovery of a loan subsequently, Defendant cannot escape liability for loan issued in an irregular manner at the time of issuance. Thus, since the disputed loan transactions conducted during the tenure of Appellant Basnet did not comply with Circular No. 31 issued on 2048/12/30 BS (April 12, 1992 AD), it cannot be deemed that transactions by Appellant Basnet had been carried out with malafide intention and Appellant Basnet cannot be fully acquitted of the charges claimed against him.

Considering the case of Appellant Birendra Nath Lohani, the charge sheet states as follows. Appellant Lohani opened different L/Cs

under Pre-export Loan and FBN in the name of NP Garment whose Managing Director was borrower Defendant Kewal Krishna Khanna, and issued loans equal to Rs.33,85,954.84 during his tenure as Manager of Baneshwor Branch Office of Rastriya Banijya Bank. Also, Appellant Lohani issued loans without obtain separate collateral to secure Rastriya Banijya Bank's investment, which resulted in loss and damage to Rastriya Banijya Bank.

After reviewing documents, it is seen that during the tenure of Appellant Lohani transaction of total principal amount of Rs. 33,85,954.84 was conducted, which consisted of Rs. 5,00,000 through PXL No. 33/29 and Rs. 28,85,954.84 through FBN No. 33/373, 33/377 and 33/367. It is seen that, out of the above mentioned transactions, separate collateral was not obtained for PXL transactions. It is undisputable that Appellant Lohani, when releasing payment to borrower Defendant, had an obligation to release only the remainder after deducting Bank's outstanding amount from the amount to be received through FBN, after the goods of the borrower Defendant who receives such PXL Loan had been exported and proof received thereof. However, the full amount of PXL was issued without recovering in such manner the outstanding amount owed to Rastriya Banijya Bank.

Similarly, it is seen that banking policies and circulars provide that when executing FBN transactions, payment should be made for only the amount that is left over after deducting the loan amount received as PXL by borrower Defendant. However, it is seen that no action was taken to deduct PXL loan amounts in such manner in FBN loans and the entire amount received through FBN was deposited in the borrower Defendant's account, which resulted in the Bank's outstanding amount increasing. Amounts should be released to the concerned customer in FBN transactions only after bill of lading and airway bill are mandatorily attached and the shipment date is reviewed; however, it is seen that Appellant Lohani did not pay attention to such procedure and did not release payment of such loans as per procedures. It is seen from the overall situation that

Appellant Lohani, in the banking transaction with borrower Defendant Khanna, did not show interest in recovering the outstanding amount of the bank in which he was employed, issued loans one after another despite previous outstanding amounts, directly participated in the act of increasing the overall outstanding amount of the bank in which he was employed, and directly participated in the act of causing loss and damage to Rastriya Banijya Bank while providing inappropriate benefit to borrower Defendant; thus, Appellant Khanna cannot be fully acquitted of the allegations of the charge sheet.

It is seen from the grounds and evidence deliberated above that transactions for loans issued during the tenures of Appellants Shree Krishna Shrestha, Bharat Bahadur Basnet and Birendra Nath Lohani in the name of Nepal Professional Garment Pvt. Ltd., whose Managing Director was Defendant Kewal Krishna Khanna, did not comply with banking rules and policies as well as Circular No. 31/048/049 dated 2048/12/30 BS (April 12, 1992 AD) and other circulars subsequently issued, and that loans were issued in irregular manner which caused illegal loss and damage to Rastriya Banijya Bank and illegal benefit to borrower Defendant. Therefore, the decision of Special Court which convicted Appellants Shree Krishna Shrestha, Bharat Bahadur Basnet and Birendra Nath Lohani for offence enumerated under Section 7(2) of the then prevailing Corruption Eradication Act 2017 and imposed fines of Rs. 5,000 on each Applicant pursuant to Sections 7(2) and 29(2) of the same Act, is found to be correct and it is affirmed. The appeal of Appellants, requesting for complete acquittal from the allegations of the chargesheet, cannot be sustained. Registration of records shall be cleared and documents submitted as per rules.

I concur with the above decision.

J. Sushila Karki.

Done at this day of 5th Magh, 2068 BS (February 8, 2012)

Translated by Saroj Raj Regmi and Manish Kumar Karki

The principle of Corpus Delicti is recognized also in our legal system which rejects the existence of a crime in the lack of dead body of a person said to have murdered.

Supreme Court, Division Bench

Hon'ble Chief Justice Khil Raj Regmi

Hon'ble Justice Prakash Osti

Cri. Apl. No. 065-CR-0167

Case: Culpable Homicide.

Appellant/Plaintiff: Government of Nepal with the FIR of Dil Bahadur Sunar

Vs

Respondent/Defendant: Man Kumari Nepali, a resident of Rupandehi district, Semlar VDC, Ward No. 4

- **In a most heinous nature of crime like culpable homicide, no one shall be incriminated only on the basis of a verbal statement ignoring the fact proved by the scientific test.**
- **The dead body of the person said to have killed shall stand as the most-vital evidence in a circumstance when a person is said to have killed by another person. In case the corpse is recovered, the wounds and the bruises caused in it as well as the situation present while ante mortem and post-mortem could be examined which may help to unfold the mystery how the death was really occurred. At a circumstance when the corpse**

is not recovered, the plaintiff shall be liable to prove the fact by other independent evidences about how and when the deceased was murdered.

- **If any investigation process is curbed taking someone's immature claim as the only resort, there will always remains a situation of concealing the truth.**
- **If no efforts were made to explore other evidences taking the hearsay evidence which is most fragile in nature as the basis, in this situation there is no meaning of investigation nor could the reality about the crime be explored.**
- **The chain of a number of independent evidences is required to be sewn in one sequence to prove someone a guilty. The other hearsay evidences and the depositions made in court and elsewhere are required to be supported by a series of the evidences knit in one unbroken string to bear the credibility of evidence. The mere confession shall have no weight of evidence. This fact must be perceived by both the investigation and prosecution sides.**
- **In case a person is supposed to have murdered only because he is out of sight for some time, and in case such a person came back alive in society, later the justice may face its peril. A legal system which pursues the notion like not a single innocent person should be subjected to punishment even if nine other criminals may go unpunished, and also that the 'benefit of doubt goes to the accused, now therefore, a sincere attention must be paid before sentencing any person in the charge of culpable homicide in a situation where the dead body is not recovered.**
- **The corpse may not be recovered in an extra ordinary situation such as flood and fire. The accused may have**

used all possible means to make the remnants of the corpse out of scene. The plaintiff, however should be liable to prove that such activities were attempted.

- **It is no doubt that the fact expressed in the confession must be corroborated by the independent evidence. Also, they are required to be seen natural and matching to the human traits and behavior.**

Decision

Prakash Osti, J: The brief account of the fact of this case presented here by way of an appeal registered in pursuant to Section 9(1) (c) of the Judicial Administration Act, 2048 on behalf of the government of Nepal against the decision of Appellate Court, Butwal dated 2065/2/13, and the verdict delivered therein is as follows:

It was 28th Marga, 2062 my brother Chandra Bahadur Sunar was out of home but he did not returned. During search it came to know that Khadga Bahadur Nepali and Mankumari Nepali killed him and buried in a debris (dung site). So I have presented them here requesting necessary legal action to be taken against them. It is the content of the FIR of Dil Bahadur Sunar.

Basanti Nepali, in her statement says it was around the last week of the month of Mangsir, Chandra Sunar had come to my home and was found lying in a bedstead. Khadga Bahadur Nepali and Mankumari Nepali were out of home. During the night Khadga Bahadur Nepali came and began assaulting Chandra Bahadur Sunar blaming him that he is the guy who put him in prison. Mankumari Nepali also involved in beating up and ordered to finish him. They dragged him in the foreyard and thrashed. As I tried to stop them they threatened me of life. They killed him and buried in the dung site.

Sukumaya in her statement said that it was around the last week of the month of Mangsir of the year 2062, Chandra Bahadur Sunar had come to the father-in-law Khadga Bahadur Nepali's home and was

lying there. Basanti Nepali was at home, Khadga Bahadur Nepali and Mankumari were somewhere in the village. They came at night, beaten up Chandra Bahadur Sunar and brought in the foreyard. Khadga Bahadur Nepali was saying that the guy to send him in jail was Chandra Bahadur Sunar and Mankumari began to kick him to death. Khadga Bahadur Nepali has used a staff. As I tried to stop him he threatened me. They pressed in the neck, killed and buried him in the debris. They threatened me they would kill me also if I reported the case to others.

Khadga Bahadur Nepali in his statement says as he was alleged by Chandra Bahadur Sunar of his involvement in the murder of the Om Prasad Bhusal, the vice-chairman of Semlar VDC, in the year 2042 and put in imprisonment since then was finally acquitted in the year 2053. He was in search of an opportunity to find and finish Chandra Bahadur Sunar. In 2062/8/28 Mankumari Nepali and himself were in the field. Retuning at the evening they had bought wine and drank together. He sent the wife earlier to him to prepare meal. Later, as he reached home he saw Chandra Bahadur lying in the bedstead. He dragged him out to the foreyard finding his enemy at his own home today, and beaten up. His sister-in-law was stopping them not to fight. After killing him with staff and stone buried in the dung site. His wife was not involved in assault, she just gave the order. Later, he collected the skeleton, taken to a gorge of the eastern side of his home and buried there.

Mankumari Nepali, in her statement has admitted that on 28th Marga, 2062 she and her husband were as returning from the field she took a pint of wine. His husband also did so. I arrived home ahead of him. In the bedstead of our home I saw Chandra Bahadur Sunar sleeping. As I inquired him of his unexpected presence he got angry and pushed me aside. I fell in the foreyard and sustained a hit in my cheek. At the meantime arrived my husband and assaulted him. I provoked the husband to kill him. He killed him up by beating. My husband known to have buried his corpse in the dung site. I was not involved in the beating but just given the order.

A deed prepared depicting the situation of the dead body existence at crime scene had a mention that the north-faced house of Khadga Bahadur Nepali is located in Rupandehi district, Semlar VDC, Ward No. 4 in Kedali village surrounded in the east by a cultivated paddy field of Khadga Bahadur Nepali, in the west lies the house of Saraswati Bhusal, in the north there is a house of Dal Bahadur Nepali and the south lies the house of Chandra Bahadur Chettri. In northern side of the foreyard there is a spot where Khadga Bahadur Nepali had killed Chandra Bahadur Sunar in 2062/8/28, little beyond in the eastern side of the supporting roof of the house there is a stone used in the killing, 15ft. east of that house there is another hey-roofed house, just below that roof of the house there is a dung site, in the said dung site there is a place where Khadga Bahadur had buried to Chandra Bahadur Nepali. There is a gorge in 150 meter east in the western bank of which were found the skeleton of the deceased in the scattered form among which there is a skull looked like a human head, 3 sets of humerus and a rib were recovered and other remnants were handed over to the relatives of the deceased for completing the final funeral rites.

Sunil Sunar, in his statement has said that on 28th Marga, 2062 my father Chandra Bahadur Sunar had come in the house of defendant Khadga Bahadur Nepali where he was beaten up by the husband and wife and were buried in the dung site.

Khadga Bahadur Nepali, in a dead signed in the acquaintance has stated that the stone which is recovered in the occurrence was used by him to kill Chandra Bahadur Sunar.

Sabitri Pokhrel, in her statement has maintained that in the night of 2062/8/28 Khadga Bahadur and his wife has killed in their own house because of the previous envy and buried in the dung site. It came to know me in the month of Jestha, 2063.

The charge-sheet demands punishment in pursuant to No. 13(3) for a crime under No. 1 and 13(3) of Chapter on Homicide of Country Code (Muluki Ain) since the defendant Khadga Bahadur Nepali

(Sarki) and Mankumari Nepali (Sarki) were murdered Chandra Bahadur Sunar, the brother of the complainant.

The defendant Mankumari Nepali, in her explanation made in the court complains that my husband and I had not killed to Chandra Bahadur Sunar as claimed in the charge-sheet. I do not know the killer. I must not be punished because I have not murdered any person.

The defendant Khadga Bahadur Nepali in his explanation in court claims that he has not killed Chandra Bahadur as complained in the charge sheet. There was litigation about land between my elder brother Dil Bahadur and Chandra Bahadur. I do not know how he got dead. The accusation made in the first information report is untrue. Since I have not murdered anyone as mentioned in the charge-sheet. I must not be subjected for punishment.

As per the order of the court, the informant Dil Bahadur Sunar, Gautam Sapkota who had signed bond in police and the defendant's witness Krishna Bahadur Nepali have taken their explanation and enclosed in the case file.

The district court Rupandehi reached a decision in 2064/2/6 which mentions that though the defendants are found given their statement denying the accusation, however, have confessed the crime while giving explanation in the authorized officer. The informant and the plaintiff's witness Gautam Sapkota, while giving their deposition in court have said that the defendant had accepted the murder at the occurrence and therefore was presented before the police. Hence, the defendant Khadga Bahadur is found to have murdered the deceased by hitting with stone and staff so he is decided to inflict life imprisonment along with the confiscation of his entire property in accordance with No. 13(3) of the Chapter on Homicide. In the case of defendant Mankumari Nepali who was present in the occurrence and given word involving herself in assault even if the death was not occurred due to her blow she is decided to inflict life imprisonment in pursuant to No.13(4) of the Chapter on Homicide of the Country Code (Muluki Ain).

In the present case it is not clearly established about whether Chandra Bahadur who is said to have died is living or dead. It is not substantiated whether the skeleton said to have recovered by the plaintiff is of a human skull or not. At the same time it is not yet established from any side that the recovered skeletons are of the deceased Chandra Bahadur Sunar. Unless and until Basanti and Sukumaya Nepali, the key persons of this case made their deposition appearing before the court to substantiate their deed made at the occurrence, such a document can not be accepted as evidence in accordance with Section 18 of the Evidence Act, 2031. The complainant and Gautam Sapkota while making their deposition in court have given the reference of the same deed signed by Basanti and Sukumaya. So their claim relying upon others have no effect of an evidence against us. The defendant Mankumari Nepali and Khadga Bahadur Nepali in their joint letter of appeal wanted to prove them innocent by referring the decision of district court as erroneous and so reversible.

The Appellate Court Butwal has made an order to summon the opposite party for discussion under No. 202 of the Court's Procedure as it saw the decision of the original court erroneous and partly reversible in proving guilty in a criminal offence merely on the basis of an acquaintance deed prepared under control of the investigation officer without tearing down the doubt. The court argues that the informant in his information report had a wording "depending upon the development of investigation process" which means that the allegation made against the defendants is based only on doubt, the corpse of the deceased has not been recovered neither it has been clearly identified, no examination has been made on whether the skeletons stated in the deed of recognizance of recovery are of a man or other beings as well as it is also not ascertained that the recovered remnants are of the deceased Chandra Bahadur himself, the plaintiff is failed to present Basanti Nepali and Sukumaya Nepali for their deposition even when requested by the court for their

presence following the procedure as mentioned in No. 115 of the Chapter on Court's Procedure.

The first information report is found registered only on the basis of the personal wit, the deposition made by the defendants in the court is fully denied the crime, and the said deed was signed under threat during investigation, the recovered skeletons are not fairly examined about whether they are of the deceased or not, the persons who were present in the occurrence have failed to make their deposition in court in support of their statement made in the spot so they have no weight as evidence, the recovered skeleton are proved by the expert's report as of a person between 16-30 years of age whereas the deceased is a fellow of 46 years old, so the defendants can not be considered as guilty of the alleged crime. In such a case of grievous nature the crime must be substantiated without doubt by the direct and substantial evidence. In reference to this case file, there is the lack of concrete and direct evidence to claim without doubt that the defendants have committed a crime. Now therefore, the personal assumption and wit can not be taken as sufficient ground for proving guilty. The defendants Khadga Bahadur Nepali and Mankumari Nepali are thus proved innocent in the claimed charge. This is the decision of the Appellate Court, Butwal made in 2065/2/13.

An appeal registered in this court on behalf of the plaintiff the government of Nepal had a plea that the defendants have confessed their crime before the authorized officer, the skeleton recovered from the spot was indicated by the defendants themselves and the particulars of the deed signed at the occurrence by Sukumaya Nepali and Basanti Nepali, and the chains of the events has clearly established the fact that the defendants were the killers of Chandra Bahadur Sunar. Hence, the decision of the Appellate Court to declare the defendants innocent is erroneous and subject to reversal. The decision of the original court must be sustained.

This court orders in 2067/7/30 to summon the respondents/ defendants in accordance with No. 202 of the Court's Procedure for

discussion since the decision of the appellate court Butwal is likely to be differed because the defendants have confessed the crime before the authorized officer, and as stated in his deed of confession the stone which was used by the defendants to kill the deceased was pointed out by himself, the defendant is unable to stick on the fact that the dead body was not recovered from his dung site and failed also to make a plea that they are not of the deceased. In such a situation, without properly evaluating the evidence the decision reached merely on the ground of age variance to declare the defendants innocent is erroneous.

This case which is duly submitted before this bench for hearing, the learned deputy Attorney General Mr. Rewati Raj Tripathi during the hearing argued that the decision of appeal court is erroneous because the defendants have not only confessed the crime before the authorized officer but also the skeleton was recovered from the debris. While going through the overall content of the case file it is revealed that Chandra Bahadur Sunar had gone out of home in 2062/8/28 but did not return. During search it came to know that the defendants Khadga Bahadur Nepali and Mankumari Nepali killed him and buried in the dung site. So the information was registered in 2062/2/20 requesting to initiate legal action. In this, the defendants are found made their deposition in court denying the claimed charge. The original court decides Khadga Bahadur to award life imprisonment with confiscation of his entire property under No. 13(3) of the Chapter on Homicide whereas in the case of defendant Mankumari Nepali the court inflicts life imprisonment under No. 13 (4) of the Chapter on Homicide. The Court of Appeal declares the defendants innocent since there is the lack of direct and substantial evidence free of doubt. The government of Nepal is found to have registered an appeal against the said decision. This court has ordered so as to summon the respondents taking the ground that the crime is confessed at the occurrence and the defendant is failed to plea that the skeleton recovered from the dung site is not of the deceased.

While taking into account the fact mentioned above now it has been necessary to reach a decision about whether the conclusion reached by the appellate court Butwal so as to declare the defendants innocent on the ground that the examined human skeletons are not directly proved to be the skeletons of Chandra Bahadur Sunar without any room for doubt.

While considering upon the decision to be reached the situation as such is that the first information report is found registered much belatedly and the skeleton was not recovered from the dung site of the defendant as stated in the order issued to summon the respondents but found recovered from a gorge lying 150 meter east beyond the house of defendant Khadga Bahadur Nepali. Now, it is to be clear whether the skeletons recovered from the gorge were of Chandra Bahadur Sunar or not. While going through the contents of the first information report it was registered by the deceased brother Dil Bahadur who claims that his brother had gone out of home in 2062/8/28 but did not return. In course of search it came to reveal that he was killed by Khadga Bahadur Nepali and Mankumari Nepali and buried in the dung site. Thus, in one hand there is confusion of date when Chandra Bahadur was actually disappeared and on the other hand the first information report has come to register only after 6 months, that is in 2063/2/20, from the date when he was said to have disappeared. The stone which was used to kill Chandra Bahadur Sunar had no sign of staining the blood of the deceased or any other proof related thereto. Any other stones available elsewhere in the village can not be pulled and joined with this incident. On the basis of the statement of defendant Khadga Bahadur who claims that Chandra Bahadur was killed and buried in the dung site and after decaying the corpse the skeletons were thrown in the gorge. While conducting search as said above, there were recovered a skull which looks like the head of a man, 3 set of *humerous* and a rib in a scattered condition along the bank of the gorge which is witnessed by a bond prepared capturing the scene of the situation of the place and dead body. While sending those

human remnants for scientific test, the Kathmandu Autopsy Center/Department of Forensic Medicine has found submitted the test report indicating as under:

- The skeletal remains are of human origin.
- They are more likely from male person.
- Age of the person from skull and the other long bones is in between 16-30yrs.
- Correlation with past history of trauma in deceased left leg is necessary for confirmation of positive identification as there is evidence of healed fracture in left leg below knee joint.

While taking the above opinion as basis they appear nothing but the bones and skeleton of the human organs. But the result of the scientific test shows that they are of a man of 16-30 age group. Whereas the age of deceased Chandra Bahadur is stated 46 year old in the first information report. Though the defendants, in their statement made before the authorized officer had a mention that it was buried in the dung site, however they are found recovered in a gorge 150 meter east beyond the home of the defendants and in a scattered condition. In the charge-sheet, the statement of Basanti Nepali and Sukmaya Nepali signed during investigation and of the defendants made before the authorized officer are put forth as the vital evidence. But Sukumaya and Basanti, the eye witnesses of the event are not presented in the court and reconfirmed the document prepared in course of the investigation. As we bother upon the nature of the location of the place of incident all including the complainant Dil Bahadur, the deceased Chandra Bahadur and the defendants are the residents of the same Semlar VDC Ward No. 4, Kedali. The deed responding the place of the event and the situation of the dead body shows that there is his field in the east of the defendant Khadga Bahadur's house, in the west lies a house of Saraswati Bhusal, north situates Dal Bahadur Nepali's house and to the south there lies the house of Chandra Bahadur Chettri. All these circumstances suggest that the burying of a corpse in the dung site

of a house which is located surrounding by the houses of the various individuals of one locality and after decay it was thrown in a nearby gorge does not seem so reliable and conformity to the situation. It is because when a human corpse is buried in dung sites its decomposing process, the smell which spreads in nearby areas and its impact can not be kept secret for a long time.

Gautam Sapkota, who signs a deed in course of investigation when makes his deposition in court is found, stated that there was a wrangling between Basanti and Sukumaya, the mother-in-law and daughter-in-law. The daughter-in-law brought the matter in public and he got it. This, instead of substantiating the fact, helps further worsening the relation of these two women as a result of this domestic war between these two women and casts a doubt that the daughter-in-law would like to blame the mother-in-law and father-in-law in revenge. Mr. Gautam Sapkota is not the eye-witness of the event, either. The key source of his explanation is Basanti. In the lack of other solid evidences to substantiate his saying, the statement of Basanti Nepali who is not tried from the court can not be taken as vital and declare guilty only on that basis.

Though the defendants have made confession before the authorized officer, however, are found denying before the law court. Let's suppose that the corpse was buried in the dung site as mentioned in the explanation made before the authorized officer by the defendants, no efforts have been found made to search and find the parts of the human corpse and the related materials taking into account the outer phenomenon of the place of burying the corpse and other potentialities. Instead of collecting the evidences to be scientifically verified, the defendants mere confession has been produced as a major clue. This can not establish the fact that the human skeleton found in the scattered condition here and there along the bank of the gorge are the organs of Chandra Bahadur, the deceased. Similarly, the fact that those bones were excavated from the dung site of the defendants and thrown in the gorge also have not corroborated by other independent and undisputed evidences.

No one shall be convicted guilty on the basis of the verbal statement in a grievous nature of criminal charge like culpable homicide neglecting the fact proved by the science.

In this case, the situation is that the dead body of the deceased Chandra Bahadur has not been recovered. The charge is concentrated on some human bones recovered from a gorge near the defendant's house and thought that these are the bones of the Chandra Bahadur's body. Chandra Bahadur's disappearance and the recovery of some bones taken as the evidence of the Chandra Bahadur is dead closed the avenues of exploring further about him. Just disappearance of a person can not be considered that he got dead. It seems that Chandra Bahadur was disappeared in 2062/8/28, but he is not searched for a long period. The overall study of the case made in course of search does not open the mystery of his murder by the defendant.

This case has been originated through an information report given by Dil Bahadur, the brother of Chandra Bahadur after six months of his disappearance. That's also only on the basis of Basanti's saying who claimed Chandra Bahadur was murdered by his father and mother-in-law. No steps are found moved in the search of a person who is said to have disappeared, his corpse is not recovered and only the findings of some bones was taken as recovery of Chandra Bahadur's corpse and unexpectedly narrowed the investigation process. At a circumstance when a person is said to have murdered another person, the dead body of the person so murdered becomes the must vital evidence. In a situation, when the corpse is recovered, the injuries and bruises sustained while ante mortem and post mortem along with the situation of the place of incidence could be tested and examined which may lead to the revelation of exact reason of death. At a circumstance when the corpse is not traced out, the plaintiff must be liable to substantiate the fact that how and when the person convicted of murder killed the deceased. This fact is not established in this case.

If the investigation process is made limited taking an unfaithful statement of any person other than the eye witness as vital evidence, there may be created a situation in which the truth never comes out. The investigation and the prosecution side must be equally stout in a grievous nature of case like culpable homicide since this responsibility is entrusted to the police, the key security organ of the government. If the most feeble evidence like hearsay evidence is accepted as a vital evidence and not investigated other evidences, there will be no meaning of an investigation which can not explore the reality about the crime and the criminal. Mere accusation against any person would not be sufficient, it is equally important also to collect the evidence which corroborates the charge. The charge is made of a culpable homicide but the existence of the corpse cannot be proved nor any other evidences are collected which substantiates that the deceased was killed by the defendant. This has landed the case in a doubtful situation. The culpable homicide is such a nature of case in which nobody could be declare guilty only on the basis of the presumption.

While supposing a disappeared person as dead and made the conviction accordingly, we must be very mindful on the fact that such a person may be traced and come alive, some day. Because there are both the possibilities of his being alive or dead. So before reaching a conclusion that he is dead it is essential to hunt for other undisputed evidences. In this case the bones so far recovered are not corroborating the fact that those bones are of Chandra Bahadur Sunar himself. Whatever statements the plaintiff may have taken as basis to prove defendants the murderers of Chandra Bahadur, those statements if not tested legally lack the weight of evidence. Because of a trend to believe that the investigation process is completed as and when the defendants confessed the crime during prosecution, no reality could come out about the condition of the disappeared Chandra Bahadur and of the human bones so far recovered. As a result, such a genuine subject matter reached to vanish into the womb of mystery. The plaintiff is found reckless on the fact that no

one could be deemed guilty of a crime merely on the basis of his confession. The chains of irrevocable evidences must be inter-woven to each other to establish the crime against any person until and unless the particulars of any verbal evidences are corroborated by the chains of facts of the evidences because the mere confession may not bear any evidential value. This fact must be perceived by the investigation and prosecution side. Now therefore, it is said that first of all it must be proved by an independent evidences that how the crime happened. Before this the prosecution side should not defendant's statement to introduce as evidence. But here, in this case, Chandra Bahadur is disappeared, some human bones are found in the gorge and somebody passes a statement after six months of disappearance of Chandra Bahadur that he was murdered, and all these fact have made the parts of the particular of the defendant's statement and referred it as his confession and charged him without introducing additional evidences except repeating the same verbatim. At a circumstance, when the corpse is not recovered, no conclusion could be reached that Chandra Bahadur was murdered by these defendants only on the basis of the statements of persons other than the eye witness assuming that the bones so far recovered are the bones of Chandra Bahadur himself. Section 18 of the Evidence Act, 2031 clearly provides that in respect to the matters mentioned in the document prepared under prevailing law in course of search or investigation shall take the form of an evidence only if the person who deposited as above are presented in the court and tried as a witness. This shows that the investigation and prosecution side must not take only the confession of the defendants made before the investigation officer as basis but also requires introducing additional material evidences. But in the lack of such evidences no accusation against the defendants could be established only in the basis of hearsay evidences.

The principle of Corpus Delicti is founded also on the notion that no one should be convicted until the dead body is presented. The key notion of this principle is that prior to prove guilty of offense and

award punishment to a person in the charge of culpable homicide, there must be established an event that there has been the death of any person. Where the dead body is recovered and the death is scientifically proved it would help the court to reach a easy conclusion that the death was occurred due to murder. If we reached a conclusion that somebody was murdered because he is disappeared and his status is not known. In such a situation, if such a person appeared in society someday, the whole system of justice may face its peril. A legal system which follows the notion that let nine criminals may go unpunished but not a single innocent person be the subject of injustice. We have accepted also the notion that the benefit of doubt goes to the accused. Against this background, without the introduction of a corpus, a high level of intellectual exercise must be made before sentencing some one in a death charge. The corpus may not be recovered in some unusual events such as flood and out break of fire. The culprit would attempt also to conceal the dead body. However, it is the obligation of the plaintiff to prove the existence of such a situation. In view the fact as observed above, in this case, nothing has been corroborated on the basis of proof and evidences so far produced that Chandra Bahadur was murdered by these defendants though the principle of Corpus Delicti could not be accepted without explanation. In such a circumstances the confession made at the occurrence and the order of this court to summon the respondent have been unable to prove that the stone which the defendant used to kill the deceased was the same stone which was used to kill the deceased and the skeleton recovered from the dung site are the skeletons of the deceased.

Not only this, a number of questions mentioned in the charge-sheet which takes the confession made before the authorized officer as the key basis are not properly answered. The defendant Khadga Bahadur Nepali is found imprisoned from 2042 to 2053 because of the disclosure of a secret by the deceased. Here, the same deceased, the disappeared Chandra Bahadur is found sleeping in a bedstead of the defendant's house on the day of occurrence, this

part of the confession can't be easily believed in view of the human nature. In the close proximity of the place of occurrence there are houses of various individuals. The basis of the commission of the crime are assumed that there have happened the activities like killing a person with frequent beatings, giving order for killing and also the requests made not to thrash in that way. But the people of the given locality are seemed unaware of all these activities. So also, the facts contained in the confession of the defendants are found unable to comprehend the reality. It is necessary that the facts expressed in the confession must be corroborated by the independent evidences. They are equally necessary to be natural and attributive to the human nature and behavior. These things have been unable to come in fore through the overall reflection of this case.

Hence, on the basis of the reasoning made above such as the failure in substantially corroborating the fact that the human bones recovered from the bank of the gorge are the remnants of the dead body of Chandra Bahadur Sunar, failure of the plaintiff to establish the fact that the said bones were excavated from the defendant's dung site where the corpse was said to have buried together with the lack of clinical test of the area, no situation exists so as to convict the defendants as guilty of the crime supposing that they were murdered Chandra Bahadur Sunar who is said to have disappeared from home on 28th Marga 2062 and did not return thereafter and, the decision to declare the defendants innocent of the claimed charge is consistent with law and, therefore, it is sustained. The claim made in appeal by the government of Nepal can not be materialized. Let this case be removed from the regular proceedings and handed over the file of the case as per rule.

I concur with the above decision.

CJ. Khil Raj Regmi

Done on the 5th Poush, 2068 BS (December 20, 2011)
Translated by Bhim Nath Ghimire

The purpose and meaning of the words and phrases used in the statute must be discovered so as to reflect the will of the legislature while interpreting the letters of the law.

Supreme Court, Division Bench

Hon'ble Chief Justice Khil Raj Regmi

Hon'ble Justice Bharat Raj Upreti

Criminal Appeal No. 068-CR-0788

Case: Human Trade and Trafficking.

Appeallant/Plaintiff: Government of Nepal, by the report of Ka Kumari

Vs

Respondent/Defendant: Jyoti Rai, a resident of Rampur Thoksila VDC, Ward No. 6, district Udayapur

- **In a situation where the legislative history itself has clearly expressed the fact that the intention of the legislature is to gradually cut short the Supreme Court's appellate jurisdiction. The provision contained in Section 9 of the Administration of Justice Act, 2048 can not be used so as to demean the said intention of the legislature.**

- **There is no scope to hear appeal by this court against the decision of the appellate court in a situation when the appellate court decides so as to fully or partly revoke the decision of the original court, office or authority which has inflicted punishment for a term less than 3 years under the legal provision of Clause (c) of sub-Section (1) of Section 9 of the Administration of Justice Act, 2048 amended by an Act enacted to amend Some Nepal Acts pertaining to the Administration of Justice Act, 2067.**
- **Since the intention of Section 9 of the Administration of Justice Act, 2048 is to reach a conclusion from appellate court at one time on whether or not there is a scope of appeal in this court for those plaintiffs and the defendants in regard to whom there has been reached a decision at one stroke. Hence, it will be undesirable to reach a conclusion on the basis of an imagination that such and such thing will happen in the future.**

(The actual name of the prosecutrix /victim of this case has been changed in pursuant to the Procedural Directives, 2064 relating to keeping in confidence the privacy during the action proceedings of the special nature of cases of a party to the case. His/her real name and the identity along with the address has been kept in a separate sealed envelop and is enclosed in the file of the case.)

Decision

Khil Raj Regmi, CJ: The summary of the fact of this case and the decision reached thereupon is as follows:

Ka Kumari in her letter of complains writes: I was living in my home and busy in my own usual household chores. The defendant Jyoti Rai was introduced with me during her visit to her maternal uncle's home. In that course, she used to tell me that there is a better

chance of you guys in abroad. We could get good job there. I have a man to arrange all this. I can send you abroad. Saying this she arranged a passport for me in her own expense. She began to allure me showing different things and unseen fortune. She took me to Kakarvitta, Jhapa and then handed over me to strange men and returned. Along the way to Bombay and then to abroad, those strange people sexually abused me in tear and when I asked for money after passing the month the replied me that master had brought me from Nepal paying money. Then I came to know that I was sold. Now I am here to file this letter of complaint after my successful attempt to come out of their net.

As I was passing my days doing my own household works I came to introduce with the defendant Jyoti Rai. During talk with her she told me that she is involved in a business of sending people abroad. She even boasted of that she has sent abroad many people like me and allured also me for that and advised to take passport. I replied her I have no money to get passport, she spent Rs. 5000/- on her own and acquired passport from District Administration Office and took me to Kakarvitta, Jhapa where I was received by Prem Adhikary and then handed me over to two unfamiliar boys in that very night who landed me in Bombay India and stranded there for some days. After then, they told me that they got visa and boarded me in a plane to Kuwait. In Kuwait, I passed many hard days, too. There, the foreign men sexually violated me. They even threatened me of life when I denied. Days were passing in such a way. When asking money with the owner after completing the month he replied me that he was brought me from Nepal paying money. Only then I came to know that I was sold. After my successful attempt to escape from there I have been here in Nepal. Ka Kumari in her statement claims that she was sold and sends abroad by the defendant.

The deed of recognizance of recovery had a mention that Jyoti Rai was arrested when she was walking along the way which belongs within this boundary as: Udayapur district Tri. Na. Pa Ward No. 2, Pipalchowk in the east, in the west there is a house in which Agni

Transport has its counter, in the north lies Tirtha Shrestha's home and Milan hotel to the south. While searching her person two Sim cards bearing No. 899570000006749038 and 189919208101564638, citizenship certificate of Jyoti Rai with No. 52293/4055, a passport with No. 2369463 and a phone diary in which from cover was inscribed letter as alplanma, having full sized 55 pages and half sized 6 pages measuring 7 inches in length and 3 inches and 2 lines in breadth was recovered.

The defendant Jyoti Rai in her statement maintains that while she was going to visit her mother's sister and her husband, there I was introduced with Ka Kumari as that I was returned from abroad. Then she used to meet me time and again, requested every time to send her in foreign country since the economic condition of her home is weak. Then I told her that she needs a passport. As she said that she has no money to take passport I had given her Rs. 5000/- for that propose. I also told her that she will get Rs. 10,000/- monthly in Kuwait. She became ready to go at any cost. She came to my home 2065/12/14. The next day on 2065/12/15 I arranged her to reach through Kakarvitta to Bombay. After 12/13 days stay there she then sent Kuwait by plane. She was arranged to stay in a room in Bombay until she get visa. After visa was received I arranged her plane ticket, she left for Kuwait I returned to Nepal. Later, in the year 2066 Ashar she was returned to Nepal on her own reason. In no way, she was sold by me.

A deed prepared in course of conducting inquiry with the local has recorded the fact that before the complainant left for foreign country they were unknown about her going abroad. They came to know it only after a rumor was spread in the village that she left for abroad and reached Kuwait. Following her return from abroad after 2/3 months as we inquired about her she told that the defendant Jyoti Rai made her passport, allured her to go abroad to earn money and took to Kakarvitta. After Jyoti Rai handed over her to the strangers she was sent to Kuwait via Bombay anyway where I was sexually abused by foreign boys, threatened to death if denied and compelled

to do so. While asked money after completing the month the owner replied that he was brought her by paying money. Only then she came to know that she was sold. She got out of their control any way and arrived in Nepal. We knew all this so seriously aggrieved she would not have opened all these things so as to demise her own image and career. So was we are convinced on the matter that complainant was sold by the defendant and sent abroad.

A deed signed by Deepser Rai and other three people containing the detail about how this incidence took place. According to them they had no knowledge when the complaint left for abroad. They even know not that who the persons to send abroad were. As she returned to home after 2/3 months, it came to know that the defendants allured the complainant to go abroad for money. The defendant Jyoti Rai paid for her passport and took her to Kakarvitta where she met the defendant Prem Adhikary and they handed over other two boys who made her reach Kuwait via India. In Kuwait she suffered much sexual abuses, when asked for money; the owner says he had bought her in money. Then she tried to come out of there any way. She made plans for running away and got success. In this way she is now in Nepal. We came to know all this as she described as above. If the complainant was not compelled to face that type of conditions in a foreign country why she would have expressed all these things which spoils her dignity and honor. We are fully convinced that the defendants had allured the complainant to reach abroad and sale there.

The charge-sheet is found submitted demanding punishment against the defendants Jyoti Rai and Prem Adhikary of Human Trafficking Act, 2064 for committing crime in violation of Section 3 and to pay compensation to aggrieved Ka Kumari under Section 17 of the same Act because the documents enclosed in the case file clearly substantiate the fact that the defendants Jyoti Rai and Prem Adhikary, with their secret design and involvement made the complainant walk from her home to Kakarvitta alluring to send her abroad and then Kuwait via Bombay, India for sale.

The defendant Jyoti Rai in her deposition made in the court in 2067/1/28 has stated the matter that Ka Kumari went to her home and inquired about going abroad. She made request to sent also her if there is anything to be good. As see requested for contact, I made contact in phone with a man in Kuwait name Mohan Dai who was from western Nepal. I do not know the proper name and address of this person. Since I had already been in Kuwait and worked there I was familiar with a lady whom I used to call as sister-in-law and currently in Nepal on home leave made the complainant reach Kakarvitta with her. I have no connection with Prem Adhikary. I am unaware of the fact how the complainant was treated in Kuwait. My going of abroad also relates with similar story. I encountered nothing unexpected during my stay there. My own sister Rama is now in Oman. I have done nothing as to trade and trafficking the defendant. The charged conviction in untrue. I do not know who poped up her to file such a letter of complain. I just helped her for contact as per her request. So I must not undergo any punishment as claimed.

The district court Udayapur in its decision made in 2067/9/12 mentions that no situation as to prove a crime as claimed in the charge-sheet exist since the defendant Jyoti Rai however, had allured the complainant for foreign employment and taken her from her home situated in Chaudandi VDC of Udayapur district to Kakarvitta, Jhapa and handed over to other person to reach Kuwait via India but the clue of taking any advantages from the sale could not be disclosed. The defendant Jyoti Rai is decided to punish a term of 2 years of imprisonment under clause (f) of sub-Section (1) of Section 15 of the Human Trafficking (control) Act, 2064 for committing a crime under Clause (b) of sub-Section (2) of Section 4 of the same Act. In the case of another defendant Prem Adhikary, now absconded is decided to keep his case in pending under No. 190 of the chapter on Court's Management of country code (Muluki Ain).

The defendant Jyoti Rai, in her letter of appeal found claimed the fact that she has done nothing as sale etc to the complainant Ka

Kumari. She was left for employment abroad in Kuwait on her own accord. This fact straightly proved by the documents raised in course of investigation and included in the case file maintained in the court before. Now the situation is such that the complainant Ka Kumari while making her deposition in court in 2067/7/18 has clearly stated the matter that the defendants are innocent, the particulars contained in the letter of complain is not mine and the defendant is a person of sound character. Such unrestrained declaration made before the court should be taken for granted as one of the most reliable evidences here in this case. Likewise, a deed which depicts the version of the people present at the time of collecting the views of the locality about the incidence, the persons like Laxmi Rai, Nadakumari Rai, Sharmila Rai, Surendra Rai and others have univocally confirmed in their deposition in court the matter that the defendants are innocent, they are not involved in human trafficking. They should be renounced from the allegation. Now therefore, the decision made by the district court in 2067/9/12 sentencing a term of 2 years of imprisonment appears against the principles of natural as well as criminal justice therefore should be declared unlawful and erroneous.

Since the decision of original court has not denied the truthfulness of the occurrence of the incidence as well as the defendant's involvement, there is no need of making further assertion of evidences in regard to proving the incidence. The letter of complaint registered by the prosecutrix while at the moment of occurrence of the crime and her deposition approved by the court has cleared the fact in a straight forward manner that after introduction with defendant Jyoti Rai she has admitted that she has a business of sending people abroad and many people like the complainant have already been sent as said and if the complainant also would like to go abroad and do not have money to get passport she would herself provide for the purpose. In this way she allured the complainant giving money also for passport and taken her to Kakarvitta and then Bombay where also she sexually abused and finally reached Kuwait.

In Kuwait she exploited by her master not paying money because she was replied that her master was bought her from Nepal paying money. Only then she came to know that she was sold. After all, she became able to come out of their net and returned to Nepal. Her allegation against the defendant has proved this undoubtly about which the court appears: reluctant and rests only on sexual abuse and awards punishment accordingly. This should not be the case. It is not the matter to be disclosed by the aggrieved that she was sold in this and that amount of money. So it could not be the ground to announce less punishment to the offenders. The defendant in her statement before the authorized officer and in the court has confessed the matter that she is the person to send the complainant abroad, if she had no intention to sale, there is no reason to pay Rs. 5000/- for obtaining passport. Suppose for a while that the complainant was not sold, in such a situation, Section 7(c) of the Evidence Act 2031 offers ground for a reasonable presumption because it is against the common human perception that the complainant would not have to file allegation on human trafficking against the defendant who has made her a means of earning money, if the complainant was not really sold. The district court ignores this fact and would like to mention only the emotional and fabulous things. Therefore the decision reached by the original court is archaic and full of filled with procedural errors evaluating and examining the proofs and evidence. Such a decision should be revoked and the punishment should be awarded based on the charge-sheet. Appeal of the government of Nepal stands as such.

Appellate Court Rajbiraj concludes in 2068/2/11 that Ka Kumari's deposition made in the court in 2067/7/8 has stated the defendant as innocent and should not be punished, the letter of complainant is signed by her but the content is not her. Since the case is initiated by the victim herself and the letter of complain becomes the key instrument to it in such a situation her deposition made in the court should be taken as direct evidence. Moreover, her deposition is supported by the documents enclosed in the case-file and also by

the statement of the defendant. Hence the decision of the original court inflicting the defendant 2 years of imprisonment punishment under Clause (f) of sub-Section (1) of Section 15 of Human Trafficking (control) Act, 2064 unreasonable and so it is revoked. The defendant Jyoti Rai is declared innocent. Appeal of the government of Nepal can not be materialized. In the present case, there exists also a situation of filing a fake letter of complaint by the complainant Ka Kumari hence she is decided to be punished with a fine of Rs 3000/- in accordance with Clause (4) of sub-Section (2) of Section 28 of the State Cases Act, 2049.

Plaintiff Government of Nepal appeals to this court requesting for the reversal of the decision of the appellate court on the ground that it is erroneous because it has declared the defendant innocent only on the basis of complainant's deposition made in the court appears hostile to her own letter of complaint.

The Joint-Registrar issues an order of rejection in 2068/8/28 upon the letter of appeal in pursuant to Rule 27 of the Supreme Court Regulations, 2049 and No. 27 of Chapter on Court's Management stating the reason of lack of scope for registering appeal in a situation where the district court inflicts punishment of 2 years of imprisonment to the defendant and the appellate court revokes that decision under sub-Section (1) of Section 9 of the Administration of Justice Act 2048 as amended by Act enacted for the amendments of some Nepal Act, 2067 pertaining to Administration of Justice.

Plaintiff the Government of Nepal files a petition requesting invalidation of the order made by the Joint-Registrar and then register the letter of appeal.

Section (1)(a) of the Administration of Justice (with amendment) Act, 2048 has made a provision of appeal in Supreme Court in regard to cases in which a term of 3 or more than 3 years of imprisonment punishment is involved. In the briefing part of the decision of the appellate court there is a mention of Section 15(1) (a) of Human

Trafficking (Control) Act, 2064 demanding punishment to both the defendants namely Jyoti Rai and Prem Adhikary.

The said section has a provision of imprisonment of a term not exceeding 20 years. The defendant Prem Adhikary has been absconded and his case is put in suspension. Defendant Jyoti Rai is imprisoned for a term of 2 years of sentence which is revoked by the appellate court and declared innocent. The appeal registered by the Government of Nepal against that decision is found rejected disqualifying for registration taking the basis of punishment awarded by this court. But in Section 9(1) (c) of that Act, the legislator has used the term 'case' not 'decision'. It could not be intention of legislator that the defendant Prem Adhikary could file appeal in this court in case he is punished for more than a term of 3 years of imprisonment and the same magnitude of defendant Jyoti Rai will have only way out for revision.

Chapter on Murder had a provision of punishment ranging minimum from 3 months to maximum for life that is not exceeding 20 years. A single suit may be possible for various degrees of claim and demands of punishment and imprisonment. It would be unreasonable to draw a meaning that the legislator, while effecting fresh amendments in that section in 2067/12/15 was imagined that among equal degrees of offenders some should be given the right of appeal and others only for filing petition of revision. This kind of interpretation may invite further complication in the judicial process. So it will be unwise to calculate the intention of legislator in the light of punishment to be made by the court since the real intention of the legislator was to discourage frequent appeals in the supreme court also in minor cases while observing the overall scenario of the case involving fine of Rs. 25000/- or more, cases in which the claim amount could not be ascertained the decision made by the court, office or authorities with original jurisdiction in these cases if found fully or partly reversed by appellate jurisdiction shall have scope of appeal. So the order of the Registrar is nullified. The single bench of this court orders as such in 2068/9/27.

This appeal is presented today before this bench for decision by way of the above-mentioned order by the single bench of this court.

The learned joint attorney general Mr. Kiran Poudel represented on behalf of the plaintiff the government of Nepal pleaded that the provision contained in Clause (c) of Section 9(1) of the Administration of Justice Act, 2067 opens the door for appeal in the Supreme Court. There may cause hindrance in the judicial process to draw the interpretation of amended provision so as to mean that amongst the same degrees of defendants some may have scope of appeal and others do not and they have to recourse only for revision taking the basis of punishment made by the subordinate court's reasoning that the punishments may be varied among the two or more defendants involved in a single case. The decision reached by the appellate court so as to let loose the defendants from the conviction made in the charge-sheet taking the ground only of the deposition of the complainant made going against the content of her own letter of complain is erroneous. Hence, the said decision should be revoked and punishment to the defendant should be inflicted as per the claim made in the conviction letter.

After hearing the argument put forth above, now it is to finalize on whether or not there is the scope of appeal to this court against the decision of the Appellate court Rajbiraj.

Section 9 of the administration of Justice Act, 2048 has made provisions of appeal to this court against the decision or the final order of the Appellate Court. There are the following provisions in this regard:

Jurisdiction of the Supreme Court to hear appeal:

(1) Appeal against the decision or a final order of the appellate court shall be heard in the supreme court in the following cases:

a) In which the appellate court exercises original jurisdiction and have made final disposal,

b) In which the punishment of a term of 10 or more years of imprisonment is made and

c) Cases involving 3 or more years of jail term, fine of Rs 25000/- or above, the claim amount is Rs. 50,000/- or above, or cases in which the claim amount is not ascertained, and is decided by the original court, office or authority which is while deciding by the appellate court from the appellate level is fully or partly revoked.

(2) Appeal in regard to case received as referral to obtain approval also many be entertained in the Supreme Court.

Since the words and phrases "have made" or "involved" use as above indicate the meaning " have done or made by the court" and in a situation where the Appellate Court inflicts 10 years or more years of punishment of imprisonment in the context of Clause (c) has inflicted punishment of a term of 3 or more years of imprisonment or awarded a fine of Rs. 25000/- or above, or Rs. 50000/- or above or a case in which claim amount is not ascertained and which the Appellate Court has fully or partly revoked, the supreme court may entertain appellate jurisdiction.

Here it has been necessary to reach an appropriate conclusion in light of the history of legislature having had a comparative study of the various legal systems long since practiced in regard to the conditions in which the Supreme Court entertains appeal.

Prevailing legal provision contained in Section 9 (1) (c) of the Administration of Justice Act, 2048 is amended by an Act enacted for the amendment in Some Nepal Acts on Administration of Justice, 2067 (published in Nepal Gazette, Vol. 66, dated 2067/12/15, Supplementary No. 37) and the provision contained in Section 9 (1) (c) of the said Act is replaced by the new provision. In Section 9 (1) (c) of the said Act replaced by the fresh provision was as "in regard to cases decided by court, office or authority with original jurisdiction is fully or partly revoked by Appellate Court while deciding from the appellate level against that decision."

It will be equally important illustrate and consider here also upon some provisions contained in Administration of Justice Reform Act, 2031 related to it prevailed before the enforcement of the Administration of Justice Act, 2048.

The following provisions are found contained in Clause (a) (b) of sub-Section (5) of the said Act in regard to the scope of appeal in the following courts:

Appeal: (1) The zonal court shall entertain appeal in the following cases against the decision or final order of the district court under Section 9.

a) Cases in which the amount involved in the dispute or the claimed amount is not exceeding Rs. 50000/- or cases in which the punishment of imprisonment is not exceeding a term of 5 years or a amount of fine not exceeding Rs. 5000/- or a case punished under Section 11,

b) The Regional Court entertained appeal in cases which involves claimed amount of fine or punishment more than what is mentioned in clause (a), or case related to water channels, public placed, pasture land of common public utility or a partition case in which no inventory has been disclosed or cases related to the settlement of relationship.

The Supreme Court shall entertain appeal only in the following cases in which the Regional Court has made decision or issued final order:

a) Death sentence, life imprisonment along with the confiscation of property or a punishment of life imprisonment.

1. As we observe the above mentioned provisions of the Administration of Justice Reform Act, 2031 they appear different to that of the provisions made in the existing Administration of Justice Act, 2048 in regard to the scope of appeal. In the above mentioned provisions of the said Act, we can find in them the words as "may be" "have been" phrases used frequently. "Have been" means made by the

court and 'may be' means possible under law. We can take for granted the provisions of Section 13 (1) (a) and 13 (5) (a). In Section 13 (1) (a) the phrase is used as: "case in which punishment of imprisonment may be of a term not exceeding 5 years or a fine of not exceeding Rs 5000/-" which is meant that there is a law under which there may be the imprisonment of 5 years and Rs 5000/- as fine. Under this provision there is the scope for the appeal not withstanding the term of imprisonment or amount of fine or imposed by the court. By this we can see substantial difference in regard to appeal provisions between the preceding Act and prevailing Act in regard to the Administration of Justice. Administration of Justice Reform Act, 2031 has fixed the penalty likely to be inflicted under law and liberalize the scope of appeal to the superior Court whereas the prevailing Administration of Justice Act, 2048 does not take the basis of possible punishment but the decision (punishment) of the court and brought about a new provision about the scope of appeal.

2. The provision of the previous Administration of Justice Reform Act, 2031 which liberates for appeal on the ground of punishment "likely to be imposed" is wider in it and has further widened the appellate jurisdiction of the higher court. Opposite to it, the present Administration of Justice Act, 2048 which takes the basis of "the punishment imposed by the lower court" seems to have relatively squeezed or reduced the appellate jurisdiction of the superior court.

The Administration of Justice Reform Act, 2031 was replaced by the Administration of Justice Act, 2048. In another term, the legislature did repeal the former and issued the later. The term' to be' used in Section 13 of its predecessor is discontinued and used only "have made" or "done" in the new one which has clearly been visible that it

has the lesson or lighten appellate jurisdiction of the Appellate Court with the objective of conferring the power of making final decision on minor scales of cases. In like manner, the Clause (b) of Section 9 (1) of the Administration of Justice Act, 2048 according to which there was a provision of appeal in Supreme Court in all cases decided by appellate court imposing 10 or more years of imprisonment and the provision of Clause (c) according to which the cases decided by the court, office or authority with original jurisdiction if fully or partly revoked by appellate court was appellable in the Supreme Court. This provision is amended by an Act enacted for the amendments in Some Nepal Act, 2067 and had a new provision in Section 9(1) (c) of the Administration of Justice Act, 2048 according to which appeal could not be filed in Supreme Court in all those cases which are partly or fully revoked by the appellate jurisdiction. This new provision has lessen the appellate jurisdiction of the Supreme Court and consolidating the jurisdiction of appellate court together with giving the power to appellate court to issue final verdict in many minor cases. It was the real intention of the legislature. In a situation where the history of legislature itself has clearly expressed the fact that the intention of the legislature is gradually cut short the Supreme Court's appellate jurisdiction, the provision contained in Section 9 of the Administration of Justice Act,2048 can not be used so as to demean the said intention of the legislature

3. While observing the fact of this case the defendants Jyoti Rai and Prem Adhikary has committed a crime under Section 4(1) (a) of the Human Trafficking Control Act 2064, so they should be punished under Section 15(1) (a) of the same Act is the content of the charge sheet. The original court, while deciding in 2067/9/12 imposes a punishment of imprisonment for a term of 2 years to defendant Jyoti Rai under 15 (1) (b) of the same, and in the case of another absconded defendant Prem Adhikary, his case is put in suspension in accordance with No 190 of the Court's

Procedure of country Court (Muluki Ain). There has been filed appeals from both the plaintiff and defendant Jyoti Rai. The Appellate Court Rajbiraj decides so as to fully or partly revoke the decision of the district court in 2068/2/11 giving amnesty to the defendant Jyoti Rai. Against that decision of the Appellate Court the plaintiff government of Nepal has registered this appeal in who's Para No. (6) it is stated the matter that the appeal was filed in accordance with Section 9(1) (c) of the Administration of Justice Act, 2048.

In a situation where any court, office or authority with original jurisdiction awards punishment of imprisonment of a term less than 3 years exercising the power conferred by a legal provision of Clause (c) of sub-Section (1) of Section 9 of the Administration of Justice Act, 2048 amended by an Act enacted to amend Some Nepal Acts pertaining to the Administration of Justice Act, 2067 and where the said decision is fully or partly revoked by the appellate court, no further appeal could be entertained in this court.

4. The learned government counsel has lamented that there may create a procedural difficulties in regard to filing appeal later after the suspension is ended in his case in a situation of not filing appeal since the case of one of the defendants was suspended. While considering towards this fact, the provision of Section 9 of the Administration of Justice Act, 2048 which provides for scope of appeal to this court is not a provision to be attracted without discrimination in regard to all the defendants involved in the same cause but not decided in one stroke.

In case of those defendants in regard to whom the decision could not be delivered together with other defendants involved in one and the same case, the matter about whether or not there will be the scope of appeal under this section in such a condition shall be decided as per the situation likely to occur at the time of decision later. However, the intention of Section 9 of the Administration of

Justice Act, 2048 is to reach a conclusion from appellate court at one time on whether or not there is a scope of appeal in this court for those plaintiffs and the defendants in regard to whom there has been reached a decision at one stroke. Hence, it will be undesirable to reach a conclusion on the basis of an imagination that such and such thing will happen in the future.

Hence, it will be unreasonable to reach a conclusion on the basis of an imagination that such and such thing will happen in the future.

Since the conclusion about whether or not there will be the scope of appeal in the case of the defendant put in suspension would have to be resolved at the time of giving final verdict, hence, this bench cannot be agreed with the argument put forth by the learned government counsel that there will be created a procedural difficulty, later.

5. Now therefore, the government of Nepal shall have no scope for appeal to this court as provided in the amended provision contained in Section 9(1) (c) of the Administration of Justice Act, 2048 against the said decision of the appellate court in the case of the defendant Jyoti Rai who is decided innocent by the appellate court revoking the decision of the original court that has imposed the punishment of 2 years of imprisonment. The present appeal is decided to be vacated. The file of the case be handed over according to the rules.

I concur with the above decision.

J. Bharat Raj Upreti.

Done at this day of 13th Bhadra, 2069 (August 29, 2012)
Translated by Bhim Nath Ghimire

The civil service organization is an independent body to function for the government. It has its own rules and regulations. It is not a private establishment incorporated under specific law.

Supreme Court, Division Bench

Hon'ble Chief Justice Khil Raj Regmi

Hon'ble Justice Baidhya Nath Upadhyaya

Writ No. 2066-WO-0858

Subject: Certiorari Plus Mandamus.

Petitioner: The gazetted third class technical officer Bindeshwor Prasad Patel, a resident of district Rautahat, Inarwari VDC Ward No. 4, currently working as an assistant forest officer at the district forest office, Bara

Vs

Respondent: Ministry of Forest and Soil Conservation & others

- **Civil service is an organization having extensive and huge responsibility and accountability of broader spectrum which can not be compared to a business enterprise having limited objective owned by any individual or institution and interpret in a narrow sense.**
- **Civil service organization can not be taken as an establishment defined under Section 2(b) of Labor Act, 2048 and the role of civil servant to that of a laborer or worker of such an establishment.**

- **There is a separate Civil Service Act, 2049 and Civil Service Rules, 2050 in effect to apply only in the case of civil servants, and there is a separate provision pertaining to the trade union of the civil servants in Section 53 of the Civil Service Act, now therefore, no Trade Union Act can be attracted in the case of civil servants.**
- **The interests of all the employees must be preserved through the collective bargaining. It could not be the central objective of the collective bargaining to preserve only the welfare of the union officials and to establish its uncontrolled power in promotion and transfer.**
- **It can not be consistent with the objective of the public administrations and the recognized principles of law and justice to interpret fundamental right to make a claim that frequent administrative actions such as transfer and promotion should be made in the wish of an office bearer of a trade union merely because he is the member of such union.**
- **It would be unreasonable to say that a civil servant who is working in a trade union cannot be effected his transfer without his consent.**
- **Civil Service Organization is the key mechanism of state administration that enforces government policies and plans, delivers goods and service to the people on daily basis, and develops future plans and perspectives of the government. So it is impractical and irrational to place it in the equal footing of an establishment owned by an individual or an institution having fixed and limited objective, and the role of a civil servant as the role of the laborer or worker of such an establishment and to say that the officials of a trade union like the petitioner must enjoy unlimited and uncontrolled power**

over the transfer and promotion so as to kill the essence, spirit and objective of the public administration and management merely because he is an official of a given trade union.

Decision

Baidhya Nath Upadhyaya, J : The synopsis of this case come to register in pursuant to Article 107(2) of the Interim Constitution of Nepal, 2063 and the order issued thereto is as follows:

I, the petitioner, was appointed in non-gazetted first class post in 2044/4/7. Since then, I have been working in different remote areas of the country and now in district forest office, Bara. In like manner, I have been elected in the post of president of Nepal Civil Service Employees Forum, Bara Chapter under District Executive Committee for a period up to Magh, 2067. Section 2(k) of Trade Union (first amendment) Act, 2055 has defined office bearers as the member of executive committee also. This clears that I am the office bearers of the trade union executive committee.

I have been handling both the responsibilities and getting the salary and other benefits by the respondents. But a decision of respondent Department of Forest dated 2066/11/28 transferred me to Department which caused me the injustice, therefore, the said decision should be declared void.

The petitioner further mentions that the Department of Forest, contrary to a legal provision contained in Section 23 a of Trade union (first amendment) Act, 2055 which states that no transfer and promotion shall be effected without the consent and sub-Section 6 of Section 53 of Civil Service Act, 2049 provides that the trade union official shall be transferred to a place favorable to his work place. In like manner, the point No. 12 of the terms and Conditions of Transfer, 2066 of the Ministry of Forest and Soil Conservation dated 2066/11/23 prohibits the transfer of the trade union officials. But against all these parameters, the arbitrary transfer of the respondents has not only hampered the daily activities of the trade

union and the rights provided me by Section 23 a of the Trade Union (first amendment) Act, 2055, sub-Section 6 of Section 53 of the Civil Service Act, 2049 also have been aggravated. Now therefore, the decision of the Department dated 2066/11/28 and a letter of the same dated 2066/12/25 is requested to declare void in pursuant to Articles 32 and 107 (2) of the Interim Constitution of Nepal, 2063 and a writ of mandamus in the name of respondent to reinstate the petitioner in the previous place be issued.

This court issues an order inquiring about what had happened in this case. Why an order as demanded by the petitioner should not be issued? If there exists any ground or reason not to issue such an order, a written reply be submitted within 15 days excluding the time limit to be consumed for journey directing not to implement the letter of transfer of the Department dated 2066/12/5 given to the petitioner, until this petition is finally disposed of.

Rule 122 of Civil Service Rules, 2050 had a mandatory provision that a civil servant shall go to his place of transfer and work there. No one can avoid this duty and responsibility. Employees may be transferred at any time after completing the minimum period of stay at the given place. It must not be the situation that the employees working in a highly accessible district should stay there for a long period only because he is associated with the trade union. The Civil Service Act and Rules thereunder had a provision of periodic transfer. So the writ petition should be cancelled, responds the Department of forest.

It is the duty of every civil servant to present in the office of his transfer. Section 18 of the Civil Service Act, 2043 provides as such. In Rule 122 of Civil Service Rules, 2050 had a mandatory provision that a civil servant shall present in the office of his posting and transfer and the Act does not provide that the reason of his being involved in trade union shall not obstruct to make such transfer. The petitioner has been working from 2062/11/10 to 2066/11/28 continuously in district forest office Bara and the act of transferring him to provide the knowledge of various geographical conditions of the country has not infringed his fundamental as well constitutional

rights. Now therefore, the ministry of forest and soil conservation responds that the order of this court to issue interim order giving no chance of hearing to this Ministry is unlawful. So the writ petition should be quashed.

The written reply of district forest office Bara is not found enclosed in the file of the case.

The present petition which is duly submitted today for hearing, the learned advocates appeared on behalf of the petitioner argued in their advocacy that the Interim Constitution of Nepal, 2063 has provided the rights of opening trade union, the Trade Union (First Amendment) Act, 2053 had a clear legal provision that an employee who is affiliated to any trade union can not be transferred or promoted without his consent and the Civil Service Act, 2043 also had a mandatory legal provision of transfer in a place of his choice. In such a situation, the transfer of the petitioner affected by the respondents is contrary to legal provision and has hampered the legal and constitutional rights of the petitioner. So an order as requested must be issued. The learned joint Attorney General represented on behalf the respondent the government of Nepal pleaded that it is the obligation of the state to provide the civil servants with the knowledge of different geographical regions and to mobilize the man power involved in public administration to deliver essential service to the people. So Section 18 of the Civil Service Act, 2049 provides the power of transfer to the concerned authority. If someone is not satisfied with the transfer affected by such authority, he may complain before the Ministry of General Administration. Here, the situation is that the petitioner did not follow the path of alternative remedy but directly entered into the writ jurisdiction. No legal and constitutional right shall deem to have aggravated while making lawful transfer of any employee from one to another office. So the writ petition should be quashed.

After hearing the arguments of the learned legal counsels and studying the overall case file including the petition, it is found necessary to settle the following questions:

1. Whether or not the Trade Union Act is applicable in the case of civil servants?
2. Whether or not an employee affiliated in trade union could be transferred without his consent?
3. Whether or not an order as demanded by the petitioner should be issued?

In regard to the first question about whether or not the Trade Union Act applies in the case of civil servants, Article 153 of the Interim Constitution of Nepal, 2063 has granted Nepal government the power to form civil service and other necessary government services and the formation of such entity, operation modality and service conditions shall be as provided in law. Under this constitutional provision, the Civil Service Act, 2049 is in force for the formation of civil service, to provide for the service conditions and operation as well as to make the civil service more competent, consolidated, service-oriented and accountable. While observing the above mentioned legal provision, there is no room for dispute that the formation of civil service is made for the operation of the state administration. State administration covers the good governance as well as development administration, the civil service shall have the key role to translate them in behavior and it has direct bearing with the economic, social and political aspects of human life. Since it was formed for the operation of state administration under constitution, now therefore, the civil administration is found established as one of the key mechanism in carrying out the administrative activities to be performed by the government.

The civil administration is responsible also for implementing the action policies, delivering the goods and services to the people and to formulate future plans and strategies. This shows that civil administration has to play a entrepreneur's role for the economic, social, cultural, political and psychological development of the people focusing on justice and equality as per policy and a civil servant from his part shall demonstrate him transparent and accountable in administrative system and distribute goods and services to the people in an equal manner to ensure the good

governance, create an environment so that there is a rule of law, safeguard the national interest, reduce social inequality and build a society based on justice and equality in order for accomplishing the national goal. In addition to this, the civil administration is liable also to perform the important activities to assist the government by ensuring balanced development, high economic growth, creation of equal opportunity, proportionate and economic as well as effective service delivery, poverty reduction and conservation of environment and the like.

Here, in this case, the petitioner's main claim is that he is a trade union official. So his transfer is contrary to Section 23 a of Trade Union (first amendment) Act, 2055, and Section 53 (6) of Civil Service Act, 2049, and therefore, quash able. While looking into the constitutional provision pertaining to trade union the Article 30 (2) of the Interim Constitution of Nepal, 2063 provides that every worker and employee shall have right to open trade union, create organization and ensure the right of collective bargaining. As we looked into the Trade Union Act, it is found promulgated with the objective of registration and operation of trade union and to manage other related activities in order for the preservation and promotion of professional welfare and interest of the workers and self-employed individuals working in various industry, trade and business with and without the establishment. Section 23 a of the same Act provides that the office bearers of the establishment level trade union executive committee may not be transferred or promoted without their consent except in special circumstances whereas the establishment means any factory, company, organization, institution, firm or their group where 10 or more people are involved and established under existing law with the objective of operation of industry, business or service, as well as tea garden established under law with business motive and an establishment incorporated under law which employ 10 or more people within the industrial district. In accordance with the above definition, the establishment shall comprise any factory, company, organization, institution, firm as well as the tea garden established under law with the objective of

operating any industry, business or service where 10 or more workers or employees are involved.

As per this definition, the civil service is not an establishment registered under law with any business purpose but it appears as an organization established as a key mechanism formed under Civil Service Act to operate the administration of the country as per constitution having broad and specific scope for developing policy and plan necessary for the operation of the country's administration and implement and monitor those plans and policies as well as ensure the delivery of necessary services on behalf of the government. Having such an extensive and huge responsibility and accountability, the civil service organization can not be compared to a business entity having limited objective owned by any individual or institution and interpret in a narrow sense.

Civil Service was constituted for the purpose of operating state administration under Article 152 of the Constitution, and there is a separate Civil Service Act and Rules in force for the civil servants and the said Act and Rules have made over all provision in respect to the operation of the civil service. In this way, where there has been an arrangement of special Act and Rules with a provision of transfer, promotion, retirement, departmental actions as well as code of conduct and discipline for civil servants, the civil service seems to be operated in accordance with the said Act and Rules. In order to enforce the rights guaranteed by Article 30 of the Interim Constitution of Nepal, 2063 for opening trade union, to make organization and enjoy rights related to labor as well as of collective bargaining there has been made a separate arrangement in Civil Service Act pertaining to trade union for the civil servants.

Hence, the civil service organization can not be taken as an establishment as defined in Section 2 (b) of Labor Act, 2048 and to the role of civil servants to that of a laborer or worker of such establishment. Similarly, where there is a separate Civil Service Act, 2049 and the Rules, 2050 in effect to apply only in the case of civil servants and in a situation where there is a separate arrangement of

trade union in Section 53 of Civil Service Act, now therefore no Trade Union Act can be attracted in the case of civil servants.

While considering upon the second question about whether or not a civil servant working in trade union can be transferred without his consent, it demands a overview of the theoretical aspect of the transfer. The transfer is a natural and a regular administrative decision to be taken in regard to the posting of an individual from one place to another of the same grade. If the responsibility entrusted to the employees could not be performed as it was hoped, there may arise a situation of transfer for the purpose of entrusting that responsibility to any other appropriate person transferring the former in any other place. The transfer becomes necessary also to make an employee who contribute in the objective of the organization more efficient, to receive higher service from him, to fulfill his request to facilitate him, to punish him, to give him justice, to conduct his comparative assessment, to utilize the employee in poll as well as to provide the knowledge and experience of geographical location.

Having taken into account this theoretical aspect, the transfer of a Civil Servant has to be made to provide him with the knowledge of various geographical regions and Section 18 of the Civil Service Act, 2049 has granted the power of such transfer. For this purpose the geographical regions shall be categorized into A to D group and he has to work there for a fixed period of time and the said section provides for such a period in the letter of transfer. If the transfer is found made against the said legal provision, the authorized officer may take departmental action against the office bearer who effected the transfer and such a transfer may be invalidated by the Ministry of General Administration, and Section 18 (12) provides that if such transfer was made by the Ministry, the Council of Ministers may invalidate such transfer.

While observing the said legal structure, the process of transfer appears to be purely an administrative and regular process and power of transfer of a civil servant is entrusted to an authorized officer. While effecting transfer by such an authority, he shall do so

to provide the experience of geographical region and to work for a fixed period in the fixed category of geographical region. If any errors came to pass in such transfer or found done it neglectfully the authority affecting it also shall be the subject of departmental action. The Ministry of General Administrative may invalidate the transfer if it was affected by any other authority, and Council of Ministers, if it was done by the Ministry. In this way, the intention of the legislature is that this common phenomenon of transfer should be corrected through the administrative process itself taking it out of the scope of judicial review.

As we bother upon the claim of the petitioner that he is a trade union official and his transfer made against his will is contrary to Section 23 a of the Trade Union Act and Section 53(6) of the Civil Service Act, we found it unnecessary to brainstorm here since we have already made an elaborative discussion on the fact that the Trade Union Act can not be attracted in the case of civil servants. As we consider upon the legal provision made in Section 53(6) of the Civil Service Act, 2049 it is found mentioned that the authorized officer should make arrangement of transfer in a favorable place if the officials of national level trade unions and the official trade unions requested their transfer in a place of their choice. By this, it does not mean that a civil servant working in an authentic trade union can not be transferred or should be transferred only at his will.

The main plea of the petitioner is that because of the transfer affected by the respondents he is deprived from enjoying his labor related rights such as opening of trade union, to get assembled and of group bargaining guaranteed by Article 30 of the Interim Constitution of Nepal, 2063. There is no dispute on the fact that the constitution has provided the workers and employees right of collective bargaining. Since the employee's union working in the organization is taken as an independent body it does not concern only with the interest of union officials it represents also the employees as a whole. The organization while exercising this right not only keeps the union security clause but also the management rights clause and reach an agreement taking into account the

welfare of the both sides. Under collective bargaining both the management and employee's organization must understand the respective responsibilities. What will be the option and the possible consequences likely to be created in case no agreement could be reached? What impact will it made to any of the parties? All these facts shall be realized by both the sides and must be abided by the concerned laws and rules paying due attention to the respective limitation. "The interests of all the employees must be preserved through the exercise of the collective bargaining. It can not be the central objective of the collective bargaining only to preserve the interest of the union officials and to establish their uncontrolled power in the transfer and promotion."

There is no legal hurdles to devise necessary policy on what condition and by which process to effect transfer, what parameter to be used in the transfer of one service to another, from one office to another or duration of time period of internal transfer, how to remain alert not to effect hasty transfer or stop mass transfer at one time, upon what condition it is to effect temporary or permanent transfer, internal and external transfer, individual or group transfer? All these aspects must be taken into account along with grievance handling process while making provision of transfer in the case of union officials, develop policy through collective bargaining in such matters and act accordingly, and then the authority who has power of transfer shall consult with the concerned employee while deciding on transfer and shall obtain opinion of the supervisor and trade union according to need. The petitioner is not found appeared for judicial review with a claim that such a policy has been developed and nothing has happened according to that policy and not secured justice even while pursuing the path of alternative remedy under Section 18 (12) of the Civil Service Act, 2049.

The fundamental right pertaining to trade union granted to civil servant is not a right without expectation; it is intermingled with the duty. The first and foremost obligation of a civil servant is to fulfill the duties and responsibility of operating the public administration of the country. It can not be consistent with the objective of the public

administration and the recognized principles of law and justice to interpret fundamental right to make a claim that the frequent administrative actions like transfer and promotion should be made in the wish of an office bearer of a trade union merely on being an union official. Hence, it will be unreasonable to say that the transfer of a civil servant who is working in a trade union can not be affected without his consent.

Now therefore, on the basis of the grounds and reasons discussed above, the Civil Service Organization is the key mechanism of state administration that enforces government policies and plans, delivers goods and service to the people on daily basis, and develops future plans and perspectives of the government. So it is impractical and irrational to place it in the equal footing of an establishment owned by an individual or an institution having fixed and limited objective, and the role of a civil servant as the role of the laborer or worker of such an establishment and to say that the officials of a trade union like the petitioner must enjoy unlimited and uncontrolled power over the transfer and promotion so as to kill the essence, spirit and objective of the public administration and management merely because he is an official of a given trade union. On the other hand, since the petitioner, without pursuing the path of alternative remedy available under Section 18 (12) of the Civil Service Act, 2049 is found entered into the extra ordinary jurisdiction of this court in the premature state, there exist no ground for issuing an order as demanded by the petitioner. The writ petition is hereby judged to be vacated. Since the writ petition is so vacated, the interim order issued by this court becomes ipso facto inoperative. Let the respondents be given the information of this order and duly handed over the case file.
I concur with the above decision.

CJ Khil Raj Regmi
Done on the 6th Marga 2068 BS (November 22, 2011)
Translated by Bhim Nath Ghimire

It is a duty of the state to preserve the intellectual property right of a person as his rights over other property.

Supreme Court, Division Bench

Hon'ble Justice Balram KC

Hon'ble Justice Awadhesh Kumar Yadav

Civil Appeal No: 1074 of 2064 BS

Case: Registration of Trade Mark.

Appellate/Defendent: Karma Ghale, authorized on behalf of Sumy Distillery and its Board of Directors, based at Beldia, Mukundapur VDC-9, Nawal Parasi District.

Vs.

Respondent/ Plaintiff: Mrs. Anju Upreti Dhakal, a resident of Lalitpur Metropolitan City-13, Lalitpur district authorized on behalf of Netherlands based Guiness United Distillers Vintners Amsterdam BV (currently named as Diageo Bronds SBV)

- **Patent, design and trademarks are significant in the industrial sector. Regardless of however liberal the economy may be and though the role of government may have been limited to grant license in licensing regime, only the industry enjoys absolute monopoly over industrial property such as patent, design and trademark.**
- **In laissez faire economies, the government itself encourages competition so that no industry can exercise monopoly over any product. The laws are also**

framed accordingly. However, even in such circumstances, it is considered as the public duty of the State to protect the patent, design and trademark used in any product or service for the preservation of interests of any entrepreneur, merchant or the end user of such products or services. It shall be the prime liability of the State to protect these intellectual properties like any other property earned by an individual.

- **Upon considering the legal provision of Patent, Design and Trademark Act, 1966, it has been laid down that in order to enjoy protection of trademark it shall have to be registered in Nepal at the Department of Industries. Protection post registration as well as its revocation is also provided for. Pursuant to s. 18(3) of the Act, the Department may revoke the registration of a trademark in case it is found to be encroaching on the reputation of trademark of any other party.**

Decision

The brief facts and order of the current case submitted as an appeal against the verdict of Appellate Court, Patan before this Court as per Section 9(1) of the Adminiatration of Justice Act, 1991 are as follows:

Balram KC, J: The Lawyers and Lawyers Pvt. Ltd. had applied before the Department of Industries on 29th December, 2003 stating that it has gained power of attorney along with the necessary documents from the Netherlands based Guiness United Distillers Vintners Amsterdam BV to register the trademark here in Nepal by the name of GORDON'S which it applies in its products under the international category No. 33. The Department of Industries informed the applicant that the trademark GORDON's has already been registered in the name of Sumy Distillery. The Nepal based agent of

applicant was changed to Pioneer Law Associates and it reapplied before the Department of Industries on 24th November, 2004 along with detailed documents seeking to register the GORDON'S trademark in Nepal.

Pursuant to Section 21(b) of the Patent, Design and Trademark Act, 1966, a trademark registered abroad cannot entertain the rights in Nepal unless the concerned person registers it in Nepal also. In this scenario, prior to the filing of applicant's petition, the Nepali industry, viz. Sumy Distillery Pvt. Ltd. had already registered the trademark GORDON's in its name. Hence, in case the trademark GORDON'S is registered in the same category as per the applicant's demand, it may confuse the general consumers and since it also looks identical to the trademark already registered, the claim of the applicant to have it registered in its name shall be contravened and inconsistent to the Patent, Design and Trademark Act, 1966. The Department of Industries decided to this effect on 8th December, 2004.

The decision of Department of Industries seems to be contradictory to Section. 16, 18 and 1(c) of the Patent, Design and Trademark Act, 1966 as well as Section 9 of the Treaty Act, 1991, Articles 2 and 6 of the Paris Convention and the protocol of international trade ratified by Nepal. Hence, as the decision of Department of Industries dated 8th December, 2004 seems to be flawed, we pray for the annulment of that decision and obtain justice as per the appellant's stand. The appeal filed by the plaintiff read as such.

It was decided on 5th April, 2005 to defer the complaint made on 22nd March, 2005 to be decided only after the case filed by the appellants seeking the dismissal of trademark registered by Sumi Distillery Pvt. Ltd. reaches to a conclusion. In fact the complaint and the present case need to be studied and decided in tandem. In case the trademark is revoked as per the complaint, then only it can be registered as per the demand of appellants.

Moreover, upon studying the decision of Department of Industries dated 8th December, 2004, it has been found that the decision maker himself has not judicially analyzed and reached to a conclusion, rather it was decided not to register the trademark as per the opinion of legal officer. On the above two grounds, since the decision of Department of Industries dated 8th December, 2004, is found not to be appropriate from the legal perspective, that decision is hereby quashed. Now, it is required that the Department of Industries should put both the parties of dispute in one place and has to study the complaint made by the appellant and the application seeking the registration of trademark in unison and has to reach a lawful decision. The case file is hereby sent back to the Department of Industries from where the case originated. The verdict of Appellate Court, Patan reads as such.

The Sumi Distillery Pvt. Ltd. has been selling its products after duly registering the trademark by the name of GORDON according to the procedures determined by the Patent, Design and Trademark Act, 1966. In this scenario, the former agents of respondent, viz. Lawyers and Lawyers Pvt. Ltd. applied to register their own trademark to which the Department of Industries decided not to register their trademark by the name of GORDON'S. Then the respondent changed their agents in Nepal to Pioneer Law Associates and reapplied to register the trademark GORDON'S in their name. To this the Department of Industries decided that, since that trademark resembles an already registered trademark and it may create confusion among the masses as per the principles of trademark and practices, the trademark sought by the applicants could not be registered. Dissenting over that decision, the respondents filed an appeal as well as an application seeking annulment of the trademark GORDON which is registered in our name. As such, the application was put on hold only to be decided after the Appellate Court, Patan gives a verdict over the appeal.

On observing like that it cannot be said that an application was filed before the other application was decided upon. After the time limit for appealing against the decision reached over an application has exhausted, the respondent had changed its agent and reapplied for the registration of trademark and another decision was made not to register trademark as requested. Then against that decision, an appeal was filed by the respondent as well as it has applied in the Department of Industries to annul trademark registered in our name. A quasi-judicial body's taking the legal opinion as a ground to reach decision cannot be termed as otherwise. Since the trademark demanded by the respondent is identical to the trademark already registered in our name, as per the statute, principle and norms of trademark regime, the Department of Industries had decided not to register the trademark contrary to the demand made by respondent. Hence, the verdict of Appellate Court, Patan to return the case file to Department of Industries requiring it to study both the applications in unison seems to ignore the above grounds and clauses as well as contradictory to the statute, principle and norms of trademark regime as well as the precedents promulgated by the Supreme Court whereas the Appellate Court could have examined the evidence and have decided on it. Therefore, since that verdict of Appellate Court, Patan is contrary to law, we pray for its revocation and the sustainment of decision of Department of Industries. The appeal made by the respondent before this Court read as such.

Here, the Department of Industries had decided on 9th August, 2004 not to register the trademark GORDON'S and any appeal wasn't filed against it. Meanwhile another legal counsel as the representative of respondent filed another application and it was again decided on 8th December, 2004 not to register the trademark GORDON'S once again. Challenging that decision, an appeal was made on 4th February, 2005 and an application seeking the revocation of trademark GORDON was filed on 22nd

March, 2005. On this ground, the verdict of Appellate Court, Patan seeking decision on both the applications together seems to be legally flawed and as the verdict may not sustain, this case shall have to be submitted before this Court after summoning the disputant parties or upon expiry of time limit. The order of Division Bench of this Court read as such.

In the present case which is duly submitted before this Bench as per the cause list, learned advocates duo Mr. Anil Kumar Sinha and Hira Regmi representing the appellant argued that after the initial action as regards the registration of trademark through another firm failed, the respondent agreed over the decision and did not resort to any legal course. However, later, it changed its representative firm and applied again without stating the earlier course of action which was again turned down. This led to an appeal by the respondents before the Appellate Court, Patan to which the Court returned the case file citing decision to be taken in tandem with the application filed. As per the Administration of Justice Act, 1991, the Court is competent enough to decide by itself after examining any worthy particulars. Hence, the decision of the Court to return the case back from where it originated is flawed legally.

On the other hand, learned advocates trio Mr. Tilak Bikram Pandey, Shiba Prasad Rijal and Anju Uprety Dhakal representing the respondent side argued that the appeal filed after expiring time limit in a case under the summary Procedures Act deserves to be quashed. Pursuant to Section 18 of the Patent, Design and Trademark Act, 1966, application seeking the revocation of registration of trademark may be filed at any time. This trademark has been registered since much before and is prevalent even in Nepal since much long as an acclaimed trademark. Nepal, being a party to the Paris Convention, is bound to protect the well known trademark as per the provisions of Treaty Act. Hence, the verdict of Appellate Court, Patan shall have to be upheld.

Upon considering towards the decision after examining the documents enclosed in case file along with the letter of appeal and hearing the arguments postulated by the learned advocates, it seems that the crux of verdict shall be to decide whether the verdict of Appellate Court, Patan revoking the decision of Department of Industries dated 8th December, 2004 and returning the case to be decided once again is appropriate or not or if the stand of appellant suffices or not.

Here, the Pioneer Law Associates filed an application before the Department of Industries on 24th November, 2004 requested the registration of trademark GORDON'S on behalf of the Netherlands based Guinness United Distillers Vintners Amsterdam BV to register the trademark here in Nepal by the name of GORDON'S which it applies in its products under the international category No. 33. To this, the Department of Industries decided on 8th December, 2004 that: *Pursuant to Section 21(b) of the Patent, Design and Trademark Act, 1966, a trademark registered abroad cannot entertain the rights in Nepal unless the concerned person registers it in Nepal also. In this scenario, prior to the filing of applicant's petition, the Nepali industry, viz. Sumy Distillery Pvt. Ltd. had already registered the trademark GORDON in its name. Hence, in case the trademark GORDON'S is registered in the same category as per the applicant's demand, it may confuse the general consumers and since it also looks identical to the trademark already registered, the claim of the applicant to have it registered in its name shall be contravened and inconsistent to the Patent, Design and Trademark Act, 1966.*

An appeal was filed on Appellate Court, Patan against this decision citing that the decision was made on the basis of approval of an opinion of the legal officer was inconsistent. To this, the Appellate Court, Patan on 29th August, 2006 pronounced verdict that: *Upon studying the decision of Department of Industries dated 8th December, 2004, it has been found that the decision maker himself has not judicially analyzed and reached to a conclusion, rather it was decided not to register the trademark being based on the opinion of*

legal officer. On the above two grounds, since the decision of Department of Industries dated 8th December, 2004, is found not to be appropriate from the legal perspective, that decision is hereby quashed. Now, it is required that the Department of Industries should put both the parties of dispute in one place and has to study the complaint made by the appellant and the application seeking the registration of trademark in unison and has to reach a lawful decision. The case file is hereby sent back to the Department of Industries from where the case originated. The Sumy Distillery Pvt. Ltd. filed an appeal before this Court challenging the very same verdict.

Even prior to this development, the Lawyers and Lawyers Pvt. Ltd. submitted an application on 29th December, 2003 seeking registration of the trademark GORDON'S to which the Department of Industries decided on 29th December, 2003 that since an identical trademark of Sumy Distillery in the name of GORDON has already been registered the later trademark could not be entertained. No appeal was made challenging this decision. Second time, on behalf of the Company, Pioneer Law Associates filed an application before the Department of Industries on 24th November, 2004 requested the registration of trademark GORDON'S. The Appellate Court, Patan, while pronouncing its verdict, had stood mainly on the ground that an application seeking the revocation of trademark registered by Sumy Distillery and decided by the Department of Industries on 5th April, 2005 to put on hold and the case related to registration of trademark shall have to be studied and decided concurrently.

Intellectual Property is a catchy word. Though it originated from the internal laws of the respective countries, now it has assumed an international stature. The rationale behind granting intellectual property rights an international recognition is to protect the rights of creator and to allow sanction against any breach, if so be. The term intellectual property primarily incorporates the following phenomena:

- ☐ Patent ☐ Trade Mark
- ☐ Industrial Design ☐ Copy Right ☐ Trade Secret

Due to the campaign launched by the countries in 19th century to enforce a multinational treaty of international dimension to be applicable for all, Paris Convention for the Protection of Industrial Property came into effect in 1883. Likewise, Berne Convention for the Protection of Literary and Artistic Works was promulgated in 1886. The IPRs are the encapsulation of all the international conventions and treaties. Other conventions relating to it are as follows:

- Rome Convention, 1961
- Paris Convention, 1967
- Berne Convention, 1971
- Treaty on Intellectual Property in Respect of Integrated Circuits, 1981

Sometimes, liberal economy and public concern may not go hand in hand. Economic liberalization is a prime characteristic of several WTO treaties, especially the TRIPS Agreement. Irrespective of whatever measures undertaken for economic development considering public good, those should not be inconsistent with the WTO Treaty regimes.

Nepal is already a member of WTO and has ratified the Paris Convention also. The Patent, Design and Trademark Act, 1966 has made the needful legal provisions concerning the trademark regime in Nepal. Nepal is also a contracting party to the Paris Convention. Hence, being a WTO member, Nepal is also bound to observe the full compliance of TRIPS Treaty too. As Nepal already is a state party to several IPR protecting international conventions such as the Berne Convention, Paris Convention and TRIPS under the WTO arrangement, it becomes an obligation for Nepal to honor the provisions of those treaties and conventions pursuant to the Treaties

Act, 1991. According to the Nepal Treaties Act, 1991, in the event of any inconsistency between the provisions of international treaties to which Nepal is a party, and the Nepali laws arises, then the provisions of treaties shall prevail. After Nepal became a member of WTO, the Patent, Design and Trademark Act, 1966 was amended via the Act Amending some Acts Relating to Import, Export and Intellectual Property which came into effect on 24th November, 2006 and consequently Nepal has expressed its commitment to provide international protection to the industrial property. In this light, the legal provisions of Nepal as regards the trademark shall have to be compatible and made compatible with the international treaties and conventions.

Patent, design and trademarks are significant in the industrial sector. Regardless of however liberal the economy may be and though the role of government may have been limited to grant license in licensing regime, only the industry enjoys absolute monopoly over industrial property such as patent, design and trademark. There may be competition among various industries over any product. However, it is a recognized principle, usage and practice of the industrial regime to grant monopoly for trademark, etc which distinguishes its products and designs from those of its rivals. There shall be no place for monopoly and cartel in a laissez faire economy. Owing to monopoly and cartel, the consumers shall be at the receiving end since a limited number of industries exercise their monopoly in the market. Monopoly and cartel also negatively impact on the national industrial development. If there is a close competition among the industries over a sector then high end products at reasonable price may be possible due to impetus on research and as such the consumers of market shall be advantaged. In laissez faire economies, the government itself encourages competition so that no industry can exercise monopoly over any product. The laws are also framed accordingly.

However, even in such circumstances, it is considered as the public duty of the State to protect the patent, design and trademark used in any product or service for the preservation of interests of any

entrepreneur, merchant or the end user of such products or services. It shall be the prime liability of the State to conserve these intellectual properties like any other property earned by an individual. Monopoly has been granted to the creators of these intellectual properties with a view to protect these assets. One of its objectives is to ensure that one may not take undue advantage of the goodwill earned through an invention of the other. Hence, in the same line, the Nepali laws also have provided to grant and protect monopoly in patent, design and trademark of any industry whatsoever.

The provisions of Section 3, 12 and 16 of Patent, Design and Trademark Act, 1966 also shall have to be interpreted in the same vein. As regards the effectiveness of the international treaties, instruments and declarations to which Nepal is a party, Nepal as a sovereign nation shall have to deliver its commitment made before the international community. No nation may derogate from the binding legal provisions once a representative of the country signs on any convention and is ratified by the respective country's legislature.

In the case of Salmon Vs. Commissioner of Custom of Excise (1996) (3 All ER 871) Lord Diplock has observed that: *There is a prima facie presumption that parliament does not intend to act in breach of international law including specific treaty obligations.* Moreover, in the case of Brind Vs. Secretary of State for the Home Department (1991) (All ER 220) it was held that: It was well settled that construing any provision in domestic legislation which is ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the international convention the courts would presume that parliament intended to legislate in conformity with the convention and not in conflict with it.

In today's era of protection and promotion of foreign investment, the effective protection and promotion of intellectual property is a prerequisite in itself. In the Liabilities, Guiding Principles and Policies enshrined in the Interim Constitution of Nepal, 2007, it is evidently provided that Nepal shall adopt liberal and mixed economy and shall encourage foreign capital and investment. If the patent, design and

trademark of the entrepreneur are not to be protected, then the foreign investors shall also be discouraged in investing in Nepal. Moreover, entrepreneurship shall also wither away if the State is not to provide protection to the entrepreneurship of the national entrepreneurs. Nobody shall discord on this matter.

Upon considering the legal provision of Patent, Design and Trademark Act, 1966, it has been laid down that in order to enjoy protection of trademark it shall have to be registered in Nepal with the Department of Industries. Protection, post registration as well as its revocation is also provided for. Pursuant to section 18(3) of the Act, the Department may revoke the registration of a trademark in case it is found to be encroaching on the reputation of already registered trademark of any other party. Hence, the verdict of Appellate Court, Patan to return the case for another decision to be made by the Department of Industries after studying and deciding on the application of company seeking revocation of registered trademark and the application seeking registration of its own trademark in unison is found not to be otherwise but appropriate in itself.

Therefore, the verdict of Appellate Court, Patan dated 29th August, 2006 to quash the decision of Department of Industries dated 8th December, 2004 and to return the case for another decision to be made by the Department of Industries stands to be upheld as it seems to be reasonable. The concerned agency shall have to decide again after collecting and examining evidences in a judicious spirit. The stand of the respondent fails to suffice. This case shall be duly written off the registry and the case file be handed over as per the rules.

I concur with the above decision.

Justice Awadhesh Kumar Yadav

Done at this day of Phagun 2, Monday 2067 BS (14th February 2011)

Translated by Bishnu Prasad Upadhyaya & Narayan Sharma

Where there is no food there is no hope of life. Therefore it is the first and foremost duty of the state to free the people from hunger because all other rights and freedoms are impossible unless and until the right to food is established.

Supreme Court, Division Bench

Hon'ble Justice Bala Ram K.C.

Hon'ble Justice Bharat Raj Upreti

Writ No. 0149 of the year 2065

Subject : Mandamus.

Petitioner : Advocate Prakashmani Sharma, a resident of Kathmandu district, KMC Ward No. 14 Kuleshwor on behalf of pro-public (Janahit Samrakshan Forum) and on his own

Vs

Respondent : Office of the Prime Minister and the Council of Ministers.

- **The right of freedom cannot be realized unless the right to food is achieved and in the lack of food a man loses his dignity and honor. Hence, the right of freedom and the right to food are mutually inclusive. For a man, a dignified life, that means the right to live a prestigious life is a life based on human value, norms and honor. To realize the right to live a dignified life of a citizen the state dedicated to make it a welfare state shall be required to maintain peace and security, protect the life and property of people, and for such respectful and prestigious life the basic needs. Such as food, water, home health, freedom, privacy, education, clothes etc should have been made available and affordable to all.**

At least, the right to food, one of the basic needs, should have come within the reach of all citizens for the realization of the right to live a dignified life.

- **As the citizens are provided with their right of employment, a fundamental right, there shall created a corresponding duty on the part of state and it is therefore shall have to work towards preparing favourable environment through enactments of necessary legislations, fiscal policies and programs even by imparting vocational and training and education needed for the purpose.**
- **A healthy body, physical fitness and the workable age are the preconditions for an employment. Minors must not be employed in work. Elderly people of the old age lack the capacity to work. The state employment policy however had a provision of employment opportunity to all the qualified citizens but they too must take retirement after attaining. certain level of age. The state cannot offer lifelong employment guaranty.**
- **It is a duty of the state to ensure access to food and its availability. In the want of food the right to food had no meaning. And, as the right to food turned meaningless, the citizens cannot realize their right to live a dignified life under Article 11 (1) (of the constitution).**
- **Not only for the security and protection of life and property of the people, the duty of the state is also to avoid starvation (hunger) in order for the enjoyment of right to food. The state must take each and every possible step as much as the resources allow it. Except in a situation of beyond control, the state should be responsible to the loss of life of its citizens incurred due to the lack of food and its negligence and complacency in taking timely decision.**

- **Man may die of hunger and a baby inside the stomach of a pregnant mother may suffer malnutrition whereas the children, old people, unhealthy men, helpless and disabled may incur death. Now therefore, the government must not be fail from its constitutional liability of supplying adequate quantity of food stuffs on time within the kingdom of Nepal to prevent infringement of right to food of the citizens decision.**

Decision

Bala Ram K.C. J, The summary of the fact of the writ petition registered in this court in pursuant to Articles 32 and 107 (2) of the Interim Constitution of Nepal, 2063 and the order thereupon is as follows:

We the petitioners would like to mention in the following paragraphs that the food, shelter, clothes, education, health and employment are the basic needs for the life of a man. Among many other human rights, the right to consume sufficient food is an inborn right of each human being. Reflecting on it, Article 18 (3) of the Interim Constitution of Nepal, 2063 has placed the right of food as a fundamental right declaring that every citizen shall have the right of food regime as provided in law. Article 12 has provided right to live a dignified life whereas Article 13 has guaranteed the right of equality. Likewise, the Universal Declaration of Human Rights, 1948 and Conventions on Economic, Social as well as Cultural Rights, 1966 has provided the food and nutrition rights as an important human right inherent to life. But in Nepal, there is rampant food scarcity in 32 districts out of total 75 districts of the country. Further, 16 districts are extremely aggravated because of the lack of food. We the legal practitioners involved in this writ petition have made our presence before this reverend court along with a petition asserting that we have locus standi to file a Public Interest Litigation (PIL) of this kind in pursuant to Article 107 (2) of the Interim Constitution of Nepal, 2063.

1. Whether or not the right to consume sufficient food and the right against hunger should be ensured under right to live a dignified life of a citizen guaranteed by Article 12 of the Interim Constitution of Nepal, 2063 ?
2. Whether or not an order of mandamus or any other appropriate order should be issued in the name of the concerned agency in order to guaranty or to have guaranteed access of people on food under right of food sovereignty guaranteed by Article 18 (3) of the same.
3. Whether or not a just compensation should be paid to the family of the deceased died of hunger every year due to the gross negligence of duty by the concerned agency ? and,
4. Whether or not an interim order should be issued in the name of the concerned respondents to make the food available, right at the moment ? All these constitutional and legal issues are raised in the writ petition, we request for the issuance of an order of writ of mandamus or any other order as may deem appropriate in the name of the concerned respondents directing them to adopt appropriate as well as necessary measures to ensure access of people to food and guaranty the right against hunger. Also, since it is an issue involving public interest, we make a humble request to proceed it giving priority in hearing. This is the content of writ petition filed in 2065/5/30.

The Office of the Prime Minister and the Council of Ministers in their written reply submitted in 2065/6/10 state that the government of Nepal, paying due regard to the right to feed and right against hunger of the people, has made special arrangement to devise and implement programs so as to ensure the right of food regime of every individual citizen by enabling the overall aspects of food and

nutrition security coordinatively in thee year interim plan. This plan contains the program of sale and distribution of food in remote districts through Food Corporation. The government of Nepal has announced the program in the budget speech for the year 2065/2066 in order to make the supply regular effectively as charted out in delivery routine with the expansion of storage capacity of food corporation in those remote districts where the local produce falls short to feed all the people throughout the year. For this, it has proposed to bring necessary reforms in the management side of the food corporation. Taking into account these emergency period food security provisions, the present location and conditions of food godowns shall be examined and prepared the action plans and design accordingly to construct the new modern godowns and has adopted the policy of constructing new and scientific food godowns in a phasewise manner. Arrangements have been made also to remove any types of obstructions likely to cause in the regular delivery of most essential goods including food stuffs along the high ways and link roads and economies the transport cost. The government of Nepal has paid sincere attention to the issues raised by the petitioners and has already been initiated necessary actions for the protection of food regime guaranteed in the constitution to the people. Hence, there is no possibility of issuing order of writ on such matters. The writ petitions should be vacated.

The Ministry of Supply and Commerce, in its written reply submitted in 2065/7/21, had a mention that an additional purse of Rs. 16 crore have been made available for the transport of food stuffs in districts with extreme food crisis in the later half of the current fiscal year 2065/2066. There have been prepared a food supply special package program-2065/2066.

This ministry has been conducting supervision, monitoring and evaluation of the programs carried out by the Food Corporation. In the budget speech of current fiscal year 2065/2066, the amount of grant assistance has been increased to ensure effective supply as per the schedule of delivery by strengthening food storage capacity

of food corporation including the programs related with innovations of the management side. In the three year interim plan (2064/065-2066/067), arrangements have been made to keep minimum surplus in security safety storage for the emergency provision likely to be caused by natural disaster and maintain the surplus of minimum 15000MT of sugar through Salt Trading Corporation Ltd. Natioanl Trading Ltd., and Nepal Food Corporation and a policy has been adopted also to continue the current practice of keeping surplus of salt at least for a period of 6 months by ensuring effectiveness of the concerned mechanism. It is not true as claimed in the petition that the government has not developed any short-term, medium term and long term plans on the supply and distribution of foods in district with food crisis. Hence, the writ petition should be vacated.

The Ministry of Agriculture and Cooperatives has mentioned in its written reply submitted in 2065/7/17 that Nepal is an agricultural country but because of its topographical conditions the production of food in most of the mountainous and hilly regions is recorded less than what is generally expected. The most crucial factors such as lack of irrigation, flood, landslide, traditional practice of farming falls short etc. The demands with the food crops produced in the respective districts, locally. Reality is this that the grain produced in the Terai has been fulfilling the food demands of all the Nepalese people. One of the key objectives of the Ministry of Agriculture and Cooperatives is to increase production and productivity and provide food security to the people. This ministry has been conducting various agricultural programs every year, the main purpose of which is to feel self reliance in food and promote its coverage. Other activities include the launching of special programs in remote hilly districts. The maximum utilization of fertile land and increase in the production and productivity to reduce shortage of food are being launched in these districts. Among these programs the agricultural expansion programs, cooperative farmings, small irrigation projects and delivery of fertilizer and seed, long term agricultural perspective programs, live stock service expansion program, Karnali zone

specific agro-project and community live stock service expansion programs, and community livestock development program are the other activities so far been carried out. The government of Nepal is ever committed to fulfil food demands of all Nepali people including those living in the remote parts of the country to enable the people for the enjoyment of their fundamental rights. In that course of action, the government of Nepal has established a food store in national level and food security bank in SAARC region level giving full attention to basic food coverage for people and is committed to continue the same also in the future. Hence, the writ petition is requested to vacate in view the above mentioned grounds and reasons.

A written reply is found submitted in unision by Nepal Food Corporation, its Board of Directors and General Manager in 2065/7/6. The content of the written reply is this that Nepal food Corporation has been working actively in the full swing depending on the available means and resources for the accomplishment of its objective giving sincere vigil to the prevailing constitution, laws and the policies of government of Nepal. The corporation develops plans in yearly basis and has made the provision of safe storage of food grain. In hilly districts the corporation has been doing sale and distribution of rice of its purchase as well as the rice received from donor agencies through its depots and the concerned VDCs on the recommendation of the District Food Management Committee, and in urban areas, through its offices or dealers, as per need. In remote hilly districts it is working for ensuring simple and easy access of ordinary people to food conducting sale and distribution in subsidized rate fixing quota on the basis of transport subidy granted by the government of Nepal. The corporation has made the supply easy delivering food grain as per need using own truck as well as the helicopter or sky truck provided by Nepali Army. The present food crisis in the country is not because of the corporation's own reason but because of the drought and irregular rain cycle. The food crisis prevalent in various VDCs of 28 districts of the country have

been identified. Taking into account this fact, about 37172.47 quintal food grain have been sold and distributed within the first three month's period of the current F.Y. 2065/066. The supply as well as sale and distributions of food grain of prescribed quota have been taking place for the concerned districts annually. So is the case, however, the corporation has estimated that those districts needs other 9200 quintal food grains now therefore, it is going to implement a special package programm of delivery, sale and distribution provision of food in order to make arrangements for additional food grains. As the corporation has fully honored the right of food regime expressed in Article 18 (3) of the Interium Constitution of Nepal, 2063 on the basis of food supply plan, policy and the running programs of food supply stated above. Hence, the writ petition should be quashed.

In this case which is presented before this bench after duly entering into the daily cause list, the learned advocate prakashmani Sharma appeared on behalf of the petitioner argued that the right to food is the fundamental right of a person. Article 18 (3) of the present constitution has internalized this fact. The government of Nepal is responsible in not providing sufficient food to the people suffered from hunger. A writ of mendamus is requested to be issued in the name of the respondents. The learned deputy Attoney General Dharma Raj Poudel representing on behalf of the respondent maintained that the government of Nepal has fully honored the fundamental right provided by the constitution and conducting various programs by making policy based institutional arrangements in order to translate the food regime in practice. Stress has been given to make the supply of food even better in future. So the writ petition should be dismissed. Similarly, the learned advocate Vinitkumar appeared on behalf of another respondent Nepal food corporation pleaded that the storage, delivery, supply and distribution of food have been made as per corporation's regulations, 2064 and have been conducting special program 2065/066 in order

for making the food supply easy. So the writ petition should be vacated.

The arguments put forth by the learned counsels is heard and the case file also studied. The following questions are required to be answered here in this concern:

a) Is right to food and right against hunger a fundamental right or not ?
b) Shall the people have access to food as per right of food regime under Article 18 (3) of the Interim Constitution of Nepal, 2063 or not ?
c) Is the government obliged to pay compensation or not in case a man dies of hunger ?
d) What will be the role of government where there is a food crisis in different parts of the country due to geographical make up and natural disaster, every year ?

First of all, as we ponder over the first question it appears to be the right related with the right to food. To comprehend this fact, we will have to go through the various fundamental rights provided in part - III, state liability, guiding principles and policies provided in part - IV, the executive power provided in part IV, the executive power provided in Article - 37 of the Interim of constitution of Nepal, 2063 as well as the conventions on human rights and the various declarations relating to the right to food. Though the constitution expressly does not provide right to food and freedom from hunger as fundamental right in any Article, however, Article 12 (1) provides citizens with the right to live a dignified life as fundamental right, it declares that the right to food is the every citizen's right. Article 12 (1) offers every citizen with a right to live a dignified life which is referred as right of freedom. No person shall be deprived of his personal liberty except what is provided in law is available also as a fundamental right. The right to live a dignified life remains incomplete

and meaningless in the absence of personal liberty and right over food.

For the full realization of personal liberty and right to live a dignified life, some of the basic needs are required to be made available and enjoyed. Personal liberty does not mean that a person when released from detention shall have his freedom. **Ipso facto** enjoyed. The right to live a dignified life and personal liberty are required to be seen as mutually inclusive. The right to live a dignified life shall mean a life passed with the fulfillment of his enevitable requirements such as freedom, privacy, food, water, health, home and clothes are easily available and being enjoyed. To make the right to live a dignified life meaningful, the constitution of Nepal has provided to all citizens with right of occupation, right to employment, right of social security and rights related to food regime as fundamental rights. In order to materialize those rights, the state as its guiding principles and policies will have to feel obligation of launching land reforms program, establish right over food, ensure social and economic justice, provide a welfare state, encourage the farmers to industrialize the farming increasing productivity, to mainstream the labour class in development process for their development, increase the income generating opportunity of labourer ensuring their right of employment and occupation by raising investment in industries and adopt a policy of developing the economy of the country through the collaborative approach with private, public and cooperative sectors etc. The state liability, guiding principles and policies provided in part - IV are the matters of progressive realization to be implemented by the state in due course of time.

Part-III of the Interim Constitution of Nepal, 2063 does not provide right to food as such as a fundamental right, however, the Article 12 (1) provides right to a dignified life as fundamental right. So the right to food could be enjoyed without Hassels. The rights of freedom cannot be realized unless the right to food is achieved, and in the lack of food a man loses his dignity and prestige. Hence, the right of freedom and the right to food are mutually inclusive. For a man, a

prestigious life is a life based on human value, norms and etiquette. To realize the right to live a dignified life of a citizen, the state dedicated to make it a welfare state is liable be required to maintain peace and security, protect the life and property, and for such a respectful and prestigious life, the basic needs such as food, water, home, health, freedom, privacy, education, clothes etc. should have been made available and affordable to all. At least, the right to food, one of the basic needs should be within the reach of all citizens for the realization of right to live a dignified life.

The right to food could be realized only through the right of employment and social security mentioned in Articles 12 (3) (f) and 18. Article 12(3) (f) provides citizens with freedom of occupation. With the exercise of this freedom, a man becomes able to use his efficiency and skill to generate income and finds access to basic needs including food for the realization of right to live a dignified life with self-reliance. Article 18 (1) provides every citizen with the right to employment. Employment provides a dignified life. This makes a dignified life possible and meaningful. Article 18 (1) does not draw any demarcation lines between men and women on the ground of gender or physical make up for employment. It guaranties right to employment only for Nepali citizen. Except minors all the qualified and competent persons are free to choose employment. As the citizens are provided with their right of employment, a fundamental right, there shall created a corresponding duty on the part of state and it is therefore shall have to work towards preparing a favorable environment through the enactments of necessary legislations, fiscal policies and programs by imparting education and training required for the purpose.

The employment under Article 18(1) could be available in two different conditions. One under Article 153 through jobs to be created in government service for the pupose of state administration and the other to be created in private sector through policy, plan and the law in course of implementing state liability, the directive principles and policies provided under part IV of the constitution. The

policy, liability and directive principles of part IV could not be enforced at a time. These could be activated in due course of time. A new law borns as per need while enforcing those policies and directives. Article 6 of International Covenant on Economic, Social and Cultural Rights 1966 to which Nepal is a party has given stress also on employment rights. It reads: "The state parties to the present covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. These rights could be achieved in due course of time. Though these rights are said to be realized in progressive manner however, it does not mean that they are for belated enforcement.

It is not to assume that first achieve the development then distribute the proceeds to the citizen. The fact is that the economic progress be achieved as soon as possible and uplift the life of the citizen to make them economically stout. For the right of employment which makes the right to live a dignified life and the right illustrated in ICESCR meaningful the Article 6 (2) of ICESCR has declared the corresponding duty of the state as follows: "The steps to be taken by a state party to the present covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

For a dignified and prestigious life, the employment becomes not only necessary but also inevitable. No country can feed its citizen for 3 times a day notwithstanding any system of governance is in office. It is the state to create opportunities for jobs and favourable environment to generate income therefrom. After the employment opportunity is received there may have access to food and materialize the sense of right to food. So Article 12(3) provides right to occupation and Article 18 (1) provides right of employment to all the citizens. A healthy body, physical fitness and the workable age

are the preconditions for employment. Minors must not be employed in work. Elederly people of the old age are unable to work. The state employment policy however had a provision of employment opportunity to all the qualified citizens but they too must take compulsory retirement after attaining certain age level. The state cannot offer lifelong employment guaranty.

The elderly people minors as well as physically impaired ones are not competent for work but they also should have right to food. These people must not be employed in jobs because they are incapable for doing work. They too have right to live a dignified and prestigious life as others do. The social security right is available to these groups of people and thus the right to food is secured to them as fundamental right. The right mentioned in sub Article (2) of Article 18 purported to make the right to food secured and meaningful is a kind of social security right to ensure access to food. Article 9 of the ICESCR speaking on social security right mentioned in Article 18 (2) of the constitution declared, "The state parties to present covenant recognize the right of everyone to social security, including social insurance". The Committee on Economic, Social and Cultural Right under ICESCR has recommended for an undelayed step to take in this regard so that the right to live a dignified life of the old and the disabled people is not encroached in countries where there is no social security and social insurance provisions.

Article 18(3) of the constitution has provided every person with the right of food regime. The realization of right to food is not limited only on the availability of food it is equally important to have access to it. If the food is not available the right to food and right to live a dignified life could not be enjoyed even if the old age allowance, free medical service and the old age pension and all the facilities related to social security are provided. Now therefore, the right to food regime as mentioned in sub-Article (3) is aimed at realizing the right to food in exercise of the right mentioned in sub Article (1) and (2). It is the duty of the state to make the food available and accessible. In the lack of food, there is no meaning of right to food, and no right to live

a dignified life under Article 12 (1) could be enjoyed as the right to food becomes worthless.

The right to live a dignified life contained in Article 12 (1) and 18 has direct relation with right of employment under Article 33 (h) and 35 (2) (6) and (12). Articles 12 (1) and 18 are the fundamental rights of citizen whereas the provision of Articles 33 (h) and 35 (2), (6) and (12) concern with the liability of the state. Rights under Article 12 (1) and 18 are the fundamental rights and could be enforced by this court, however, the rights under Article 33 (h) and 35 (2), (6) and (12) are though not the rights directly enforiable, the state is liable to create the employment opportunity through the development of agriculture as an industry fulfilling the liability of Article 33 (h) and 35 (2) (6) and (12) to realize the right to live a dignified life under Article 12 (1). Interpretation of Articles 33 (h) and 35 (2), (6) and (12) should be made in harmony with the provision of Article 12 (1) and 18 because the right to food is the fundamental right of the citizens.

Part-III of the Interim Constitution of Nepal, 2063 provides for the fundamental right. Those rights are inevitable minimum human rights to live a life of a human being. Right to food is the basic human rights in lack of which right to food could not be materialized. To give meaning to the fundamental rights and to enjoy them, every citizen shall be required to be provided with the right to food.

There is no room for dispute that every citizen has the right to food along with the right to live a dignified life. Right to food however does not mean that the state is liable to feed morning and evening meal just like a regular alms which is impossible. Right to food is not the right to be fed. In a country like ours which has mixed and liberal economy imagined by the constitutional system and the constitution, the state can not feed both meals free of cost and we do not rely also on such constitutional system. What is enshrined in Article 35 (2) and 35 (12) as state liability, policy and guiding principles indicates that ours is a mixed and liberal economy. The state feels no liability to feed the citizen under such economy. The state plays

the role of just a facilitator and regulator to have an access to food. Every one should be capable to stand on its own as per his needs and aspirations. For this, every one is required to become capable on his own. For this the person, either through the enjoyment of freedom of occupation or producing food himself through the exercise of freedom under Article 12 (3) (f) or especially through the exercise of right under Article 18(1) or (2) in employment opportunity made available because of the right economic policy formulated by the state as a facilitator or regulator should initiate action for access to food himself. It is the duty of the state to provide for seed, fertilizer, irrigation, market, pricing etc for the right under Article 18 (3) thereby making the food available and ensuring food security.

ICESCR, stating in relation to the right to food has expressed the fact that the right to adequate food could be realized when every man, woman and child individually or in company with others had physical and economic access to adequate food or means of the procurement of the same at all times.

Article 25 of Universal Declaration of Human Rights 1948 has said: Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social securities and the right to security in the event of unemployment, sickness, disability, widowhood, old-age or other lack of livelihood in circumstances beyond his control.

The said declaration has recognized as healthy, prosperous as well as adequate standard of life and environment as human rights. Likewise, Article 11(1) of ICESCR to which Nepal is a party has said "The states parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including enough food, clothing and housing and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation

based on free consent. Article 11(1) of ICESCR, 1966 has recognized the right to food as one of the most essential human right at least for minimum condition and living standard.

Article 11(2) of ICESCR says; The states parties to the present covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individual and through international cooperation, the measures, including specific programmes which are needed.

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

(b) Taking into account the problems of both food - importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relations to need.

Article 11 of the ICESCR has given special emphasis on livelihood and living conditions of the citizens of signatory states. The emphasis is focused on the availability of food grain, clothes and shelter. Article 11 (1) has given special significance on food and continuous improvement of living conditions and importance of international cooperation. The countries after signing covenant shall make efforts to improve its economic conditions. If it is unable to do so alone, it may ask for international cooperation to provide citizens with adequate food, clothes and residence and improve the living standard.

Not only UDHR or ICESCR but also the conventions like CEDAW, CRC have recognized the right to food as a human right.

Article 12 (2) of CEDAW, in regard to pregnant women has declared: "**Nofurith** standing the provision of paragraph 1 of this articles, states parties shall ensure to women appropriate services in connection with the pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during and lactation." Thus has secured the right to food under nutrition provision.

Convention on the Right of the Child 1989 in its Article 27(3) has mentioned that "States parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and other responsible for the child to implement the right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Right to food shall be materialized when every one in a given society shall have easy access to food state, as a regulator and custodian of the citizens, shall create and prepare an environment that may provide the citizens with easy access to food through the policies, liabilities and directive principles under Article 35 (2) (6) and (12) in order to make competent to enjoy the right mentioned in Article 12 (3) (f), 18(1) or (2) of the constitution. A part from the right to live a dignified life, the following rights also is comprised in the fundamental rights:

1. Right to food,
2. Right to clothes,
3. Right to medical treatment,
4. Right of housing,
5. Right to water,
6. Right of education,
7. Right to social security.

Hence, the right to food and rights to clothes, treatment, housing, water, education and social security are the basic human rights. The state in both the cases as constitutional rights and human rights shall take the policy of progressive realization.

In reference to the right to food, the Supreme Court of India, in the case of Chamell v. State of U.P., interpretating the right to live under Article 21 of the constitution of India has made the following interpretation that without right to food no right to live a dignified life could be materialized: "If any organised society, right to live as a human being is not ensured by meeting only the animal needs of men. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this subject. Right to live guarantee in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the Universal Declaration on Human Rights and Convention or under the Constitution of India cannot be exercised without these basic human right." **............** "The right to get water is part of the right to life guaranteed by Article 21 of the Constitution of India, but a large section of citizens of Allahabad are being deprived of this right. Without water the citizens of Allahabad are going through terrible agony and distressed particularly in this hot season when the temperature goes up to 46, 47 degree celsious. Without water the people are bound to die in large numbers due to dehydration and heat stroke and in fact many have died already".

The other Regional Human Rights Instruments such as Additional Protocal to the American Convention on Human Right in the Area of Economic, Social and Cultural Rights which is known as the protocol of San Salvador (1988), and also by the African Charter on Human and Peoples Rights 1981 has recognized the right to food in view of

the other rights of the citizens. These conventions have enumerated right to food to every citizen and the right to live a dignified life which comprise right to food, life, treatment are associated with the right to economic social and cultural development.

As we ponder upon the second question, we have already mentioned in the foregoing paragraphs that the right to food is a right but the right to be fed is not a right. The right illustrated in Article 11 of the ICESCR is the right related with the progressive realization.

Article 18 (3) has been defined in reference to a writ No. 0338 of the year 2064 in a writ petition involving petitioner Bazuddin Miya verses government of Nepal. In this case, this court has interpretated right to food that the people themself should grow food. The state is liabe only to provide necessary seeds and fertilizer. The state is liable also to save the people from hunger and for that purpose it will have adequate quantity of food grain stored. It is the essence of right of food regime envisaged under Article 18 (3) of the constitution. So, no further elaboration shall be necessary in this connection.

Committe on Economic, Social and Cultural Right in its comment No. 12 has cleared about right to food as under: "Availability requires on the one hand that food should be available from natural resources either through the production of food, by cultivating land or animal husbandry, through other ways of obtaining food, such as fishing, hunting or gathering on the other hand, it means that food should be available for sale in markets and shops." Accessibility......... "Accessibility requires economic and physical access to food to be guaranteed. Economic accessibility means that food must be affordable. Individuals should be able to afford food for an adequate diet without compromising on any other basic needs, such as school fees, medicine or rent. Adequacy......... "Adequacy means that the food must satisfy dietary needs, taking into account the individual's age, living conditions, health, occupation, sex, etc." It stresses on the fact that the state not only makes the food available but shall

create such an environment that the citizens are economically capable to have their easy access to food.

The third question is the vital one but it has raised only on the theoretical aspect of the fact. Article 34 (1) of the Interim Constitution of Nepal, 2063 had a provision that the state shall have liability to maintain a just society through the instincts of a welfare state by safeguarding life and limb of the people and maintaining equality among them. These guiding principles are taken as the philosophy of state administration. The security of life and property of the people does not mean only to save someone from physical injury or attack, it includes also the notion of handling all and every possible measures that protect the people from hunger or from the havoc of natural calamities. Nepal is a mountainous country. Monsoon is the only option for farming here. No road networks have been fully developed. All the districts of the country are not equally accessible. An Untimely monsoon or an unwanted heavy rain causes flood and sweeps away houses, fields and crops resulting in food crisis and starvation. The court is at liberty to take it in judicial notice. This petition requests an order to be issued for an undelayed supply of food grain to save the local people from starvation caused due to the lack of food resulting from the natural disaster stated above.

The duty of state is not only to protect the life and property of the people but also to save them from hunger and enjoy their right to food. The state should mobilize all the possible measures within its reach. Except in a situation of beyond control, the state must be responsible in the loss of life of people due to its negligence or delay in taking timely decisions. The state administration is the custodian of the rights and freedom of the people. That's why the constitution has entrusted the Council of Ministers the executive power. Article 37 (1) provides the executive power to the Council of Ministers. Sub-Article (2) entrusts the Council of Ministers for direction control and administration of the state. So it is the constitutional responsibility of the state to adopt all possible measures to save the country people from hunger resulting from flood, drought or any other natural

disasters. People from any part of the country should not die of hunger due to lack of food. If the people should loss their life because of not providing food in time, the state is liable for that. In the present case, the petitioners have been unable to submit the actual figure of death toll. So, no order shall be needed to be issued as requested in this connection.

Now, before pondering upon the fourth question it will be wise to observe the order made by this court in 2065/6/9. It reads: "In this, a study report released in food security bulletin 2008 produced by the government of Nepal Agriculture Ministry and WFO has revealed the fact that the districts namely Kalikot, Humla, Mugu, Dolpa, Bazura, Achham, Dailekh, Darchula, Baitadi, Dadeldhura, Rukum and Jajarkot are suffered from food scarcity due to drought. More than 3,00,000 population are recorded in dire need of food. A letter sent by food corporation a addressing to No. 11 military office also revealed the fact that the people from above area have been severely affected by food scarcity, one of the rights preserved by Article 18 (3) of the Interim Constitution of Nepal. The right to life is a fundamental right inherent to every citizen. The learned counsels appeared from both the sides were found confessed on the fact that there is a stock of food but due to the lack of transportation there is food scarcity. No man can survive in the lack of food. In case the present food crisis is not addressed in time, there is likely to cause an irreparable human loss. If no interim order as demanded is issued, nothing as giving priority in hearing etc. could be instrumental as doctor after death. Now therefore, taking into account the possible death of people due to transport hassles and in view the nearing of Dashain festival, this interlocutory order is issued in the names of the respondents directing them to make undealyed supply of food stuffs in those districts." Hence, this interlocutory order is believed to be the instant remedy for now.

The government should be responsible not to create any sorts of food crisis in any parts of the country may it be of natural disaster or any other reasons. Nepal is a member signatory of ICESCR and the

declarations and conventions like UDHR Article 25 including CEDAW, CRC etc and our own constitutions provides right to live a dignified life and right to food regime to every individual as fundamental right. So, no one should suffered from hunger. The lack of food not only hinders the people's right to food and right to live a dignified life but also ends the retionale of other rights provided by the constitution. The human rights are mutually inclusive to each others and interdepdents. Man may die in the lack of food whereas a baby in the womb of mother may suffer from malnutrition. The children, elderly people, sick, helpless and the physically impaired ones may face death. Now therefore, the government can not escape from its constitutional liability of supplying adequate quantity of food across the country so as not to hinder the right to food of the people.

It is appropriate here to quote the first sentence of the Articles 1 and 2 of Universal Declaration on the Eradication of Hunger and Malnutrition endorsed by UN General Assembly in 17th December 1947 and adopted by world Food conference. The Article 1 states: "Every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties".

Article 2 sates- "It is a fundamental responsibility of government to work together for higher food production and a more equitable and efficient distribution of food between countries and within countries. Since Nepal is a member of United Nations, it is her duty to comply with the said declaration."

Article 10(b) and Article 18(c) of Declaration on Social Progress and Development passed by the UN General meeting by way of proposal No. 2542 in 11 December, 1969 whose Article 10(b): The elimination of hunger and malnutrition and the guarantee of the right to proper nutrition.

Article 18(c): The adoption of measures to boost and diversify agricultural production through, inter alia, the implementation of democratic agrarian reforms, to ensure an adequate and well-balanced supply of food, its equitable distribution among the whole population and the improvement of nutritional standards." Article 1 of universal declaration on the Eradication of Hunger and Malnutrition which is endorsed by UN General meeting and adopted by World Food Conference: every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop fully and maintain their physical and mental faculties. Society today already possesses sufficient resources, organizational ability and technology and hence the competence to achieve this objective. Accordingly, the eradication of hunger is a common objective of all the countries of the international community, especially of the developed countries and others in a position to help.",

Article 3: Food problems must be tackled during the preparation and implementation of national plans and programs for economic and social development, with emphasis on their humanitarian aspects. The said declaration emphasizes on the higher production and access to all in food through proportional distribution and easy availability of food.

While going through the written reply of the respondent government of Nepal, it came to be seen by a study report prepared by the Ministry of Agriculture and World Food Program and published in Food Security Bulletin, 2008 in regard to hunger in Nepal that the districts such as Kalikot, Humla, Mugu, Dolpa, Bazura, Achham, Dailekh, Darchula, Baitadi, Dadeldhura, Rukum and Jajarkot are affected by starvation due to crops damaged by drought. The report shows that 3,00,000 people are aggravated by food crisis. Article 18 (3) of the constitution provided food regime to the people. The government of Nepal is found conducted various activities with policy

based and institutional arrangments to make the food supply regular. The reason behind food crisis was the loss of crops due to drought. It will be unjust to claim that the government made no efforts to ease the situation where there is lack of food. Citing a case run between Madhav Kumar Basnet and P.M. Girija Pd. Koirala (Some important precedents on constitution law enumerated by the Supreme Court, part 10, volume (B), writ. No. 3341, page (11)) the written reply would like to demonstrate that the government of Nepal and the agencies thereunder were anixious of controling hunger and epdemic as well as deliver relief materials in districts like Humla and others where it is said that one of the key responsibility of an accountable government is to work for the safeguard of the life and property of the people.

There is no dispute that the said districts are facing acute food crisis. It is found that there is rampant food crisis in districts such as Kalikot, Humla, Mugu, Dolpa, Bazura, Achham, Dailekh, Darchula, Baitadi, Dadaldhura, Rukum and Jajarkot. An interlocutory order was issued in 2065/6/9 by this court for immediate supply of food and this court believes that the government has implemented that order in a critical situation of hunger. So far as concerned with the events already passed no order of writ shall be expedient to be issued to that extent. But the situation is that all the districts have no access of road transport nor timely rainfalls as well as excessive rain all have made cumulative impact to cause hunger every year during rainy seasons. As a result, the right to food of citizens may be encroached. Since the right to food is the right of citizen, the following directive order is hereby issued in order to protect the people from hunger:

It is the constitutional duty of the government to create an environment in which the people suffered from hunger may get food in an affordable price without hassels as soon as possible even by importing from the foreign countries in areas where the hunger is rampant. No part of the country shall feel the lack of food by reason of any natural disaster or drought or excessive rain or by any

humanitarian cause. It is the constitutional duty of the government to avoid starvation or hunger even if it needs to import from the foreign countries in case no crops is produced within the country or no food is available in the country. There may come a situation of distributing free of cost food by the state for emergency period. In such a critical condition the government must not remain shy to adopt all possible measures if needed be. Because of the country's geographical difficulties there may cause food crisis. In such a situation, it can utilize land or air transport and deliver food in crisis areas as soon as possible without further delay. The government should feel its responsibility to avoid a situation of food crisis also in future and adopt appropriate measures therefor. In case a situation arises for the use of air or land routes it can be used both the routes to make the food available on time and to protect the citizens from hunger. This directive order is issued in the name of the respondents so as to do as above. Let the file of the case be handed over as per rules.

I concur with the above decision.

J. Bharat Raj Upreti

Done on the 5th Jestha, 2067 BS (May 19, 2010)

Translated by Bhim Nath Ghimire

There is no chance of making a plea for an individual redress in the event of group arrest especially in a case which involves the illegal trafficking of the Narcotic Drugs.

Supreme Court, Division Bench

Hon'ble Justice Damodar Prasad Sharma

Hon'ble Justice Dr. Bharat Bahadur Karki

Criminal Appeal No. 066-CR-0205, 0262, 0301

Case: Narcotic Drugs (*brown sugar*)

Apellate/ Defendant: Sher Bahadur Thapa, a resident of Jhapa district, Lakhanpur VDC Ward No. 3, currently residing in KMC Ward No. 5 and now imprisoned in central jail, Dillibazar, KTM.

Vs.

Respondent/Plaintiff: Government of Nepal, by virtue of a report submitted by a Police Inspector, Kiranjung Thapa

- **An imperfect claim made with the motive of avoiding the larger punishment can not be the grounds for altering the volume of crime and punishment.**
- **The testimony of those witnesses who are living in different locations and are not present also at the moment of occurrence their personal hypothesis can not be justified as reasonable.**
- **In the presence of vital and irrefutable evidence corroborating the claimed charge, a mere denial made**

only at the time of recording the statement cannot be accepted as the basis of someone's being innocent.

- **No substantial difference may be made only because the narcotic drugs was not confiscated from any particular person but from another person of the same group travelling together conducting the business of the narcotic drug.**
- **Since the crime pertaining to the narcotic drugs falls under the vicarious liability, there is no need of brainstorming about whether or not any one of the defendants had the motive of conducting the business of narcotic drugs unless and until it is clearly established by evidence that he was not accompanied with the person from whom the drugs was confiscated or had no alliance to such group.**
- **In a circumstance when a person walks along with another person knowing that the later has possessed the narcotic drugs, or joins in the group of such a person who conducts the business of narcotic drugs, no reprieve from the created liability could be claimed nor any variation in such liability could be made merely on the grounds that the narcotic drugs was not confiscated from his person.**
- **If any person conducts business of any other thing making it to believe that it is nothing but the narcotic drugs even if nothing as such is traced, in such a situation Section 17 a of Narcotic Drugs Act, 1976 has made a provision of the half punishment as if it was held on narcotic drugs. Hence, there will have no substantial difference merely because it was not quoted 'brown' before the word 'heroin' where there has been clearly established that it is the narcotic drugs- heroin.**

Decision

Damodar Prasad Sharma, J: The summary of the fact of this letter of appeal filed in this court, in pursuant to Section 9(1) (c) of the Administration Justice Act, 2048 challenging the decision of the appellate court and the decision thereof is as under:

Police Inspector Mr.Kiran Jung Thapa has supplied an information that the defendant Mr.Sher Bahadur Thapa is reported to have involved in the illegal act of trafficking brown sugar. In course of investigation Mr. Sher Bahadur Thapa, Milan Gurung, Ram Bahadur Lama Ghale are arrested along with 37 gm brown sugar and a scale. So a deed of recognizance of recovery prepared in that connection along with the aspect and contraband goods so recovered are presented here with.

The deed of seizure had a mention that though nothing as illegal was recovered from the person of Ram Bahadur Ghale and Sher Bahadur Thapa. Milan Gurung, who was accompanied with them was found holding in his right hand a black plastic bag inside which was a small scale wrapped in a white paper and some white powder in a white plastic with red border near its neck, and when taking weight along with plastic it was 37 gm and when the plastic was removed it was only 34 gram 300 ml.

The statement of Milan Gurung recorded on the spot states that two years back from now I was here in Kathmandu with rupees one lakh for going in foreign employment where I introduced with Sher Bahadur Thapa. It came to know that he sends men to German for job. For that purpose, he demanded rupees one lakh and I gave him. As he could not send me abroad I asked him to back the money. He returned only 50 thousand and fled. On August, 2005, as I met him and asked the money he said he has brown sugar valued Rs. 7/8 hundred per gram. So he proposed me to make money from its sale. Then he said to meet near Balaju bridge. Next day as we met in the said area he gave me 40 grams saying it costs Rs. 28000. Then I asked to Ram Bahadur Ghale for its sale. He said, it couldn't be

done at one time. Only one gram is possible at one time. It is saleable only in Rs. 600 per gram. With this understanding I handed over it to Ram Bahadur Ghale. After 2/3 days he gave me Rs. 600 saying just one gram is sold. Deepak Malla from Thamel had taken one gram for sample who may come later. One night as Mr. Sher Bahadur, Ram Bahadur and I were talking about its sale; suddenly a police van came along with some police of patrolling division along with Mr. Deepak Malla, who had taken as sample, and confiscated 37 gram heroin and the scale.

It was sent for test in police scientific laboratory which reported it is heroin.

Mr. Sher Bahadur Thapa, in his statement recorded in the spot has mentioned that he has taken Rs one lakh from Milan Gurung. Now he has to return some 17 thousand rupees. He did not do the business of heroin. He was forcibly made to sign in a document prepared by police themselves, in threat. It is not true that he had sold in Rs. 40 thousand to Milan. Milan may have blamed him of the sale of brown sugar because he would not pay back the money.

The statement of defendant Ram Bahadur Ghale recorded during investigation has mentioned that ten days before the arrest Milan proposed him to sale the brown sugar giving assurance of a attractive return. Being allured with his words he contacted Deepak Malla and sold him one gram in Rs 632 out of which he gave 600 to Milan and Rs 32 on his own pocket. Milan Gurung was arrested on August, 2005 along with brown sugar and scale.

Gopal Bista and Lokanth Khatiwada in their separate statement recorded on the spot has mentioned that as they were walking along the ring road for something special to them, they saw some police in civil dress recovering 37 gram brown sugar and a scale from Milan Gurung. There were other men known as Sher Bahadur Thapa and Ram Ram Bahadur Ghale. The police were preparing a deed of recognizance of recovery and arrest.

On the basis of the deed of recognizance of recovery, the statements of the defendants recorded on the spot at the time of arrest, laboratory test report and the statement of the eye witness Gopal Bista and others made on the spot including all other relevant documents enclosed in the case file, a charge-sheet has been prepared demanding punishment under Section 14(1) (g) (2) of Narcotic Drugs Act, 1976 against the defendants Milan Gurung, Kale alias Sher Bahadur Thapa and Ram Bahadur Ghale Lama since they were found while waiting for the costumer and were arrested along with the goods and evidences which, as defined in Section 3 becomes a crime and is prohibited under Section 4 (d) (f) of the same.

I used to consume drugs for the last 6/7 months. In that course, I was arrested near the house of Ram Bahadur Lama. I was arrested while I was talking about the price of the drugs brought from Sher Bahadur. I had just 15 grams but without the scale. Mr. Sher Bahadur was absent while I was arrested. I have not done the business of narcotic drugs. I should be subjected for punishment only for the consumption of it. Defendant Milan Gurung states in his statement recorded in the court.

Defendant Mr. Sher Bahdur Thapa, in his statement made before the court had a mention that as he was sleeping at his home police entered into and took him out saying you are Kale Thapa indeed with whom they had something to ask. Then they took with them and beaten me up there. It was the custody where I first met the other defendants. I have no knowledge all it about. I had taken Rs one lakh from Milan Gurung and returned Rs 83 thousand. I could not return his money so he pulled me in the case. Nothing as narcotic drugs has been confiscated from me. I must not be subjected to the claimed charge because I was brought while I was sleeping in my home and entangled in the dispute.

Mr. Ram Bahadur Ghale in his statement made in court had a mention that as he was walking along with his young son police took him saying they have something to do with him. I have no

involvement in the said incident. I was forcibly made to sign in a document prepared by police themselves. I have no fault and must not be subjected to the claimed charge and punishment.

The witness from both the plaintiff and defendants have recorded their respective statemnts and enclosed in the file of the case.

The Kathmandu district court has reached a decision that since a scale and 37 grams brown sugar is confiscated only from Milan Gurung not from other defendants walking along with him, so Mr. Gurung is found committed a crime as defined in section 4 (d) and (f) of Narcotic drugs Act, 1976 and therefore liable for a punishment not exceeding 10 years of imprisonment along with Rs.100,000 as fine. Defendant Mr. Ghale who has induced the principal offender and Mr.Sher Bahadur who has worked as an accomplice have committed a crime under Section 17 of the same Act, and are subjected to a punishment of not exceeding 5 years imprisonment and Rs. 50,000 as fine, each.

Defendant Milan Gurung filed appeal challenging the decision of the district court Kathmandu alleging that the arbitrary seizure- deed alone could not be the ground for deciding him guilty of offense.

Government of Nepal also filed an appeal to the appellate court complaining that the decision of district court so as to alter the claim as demanded in charge-sheet in the case of Sher Bahadur and Ram Bahadur and punish only under Section 17 is erroneous and void able.

The defendant Sher Bahadur Thapa also files an appeal to the appellate court stating that the decision of the district court Kathmandu to declare an innocent person as criminal should be revoked.

Mr. Ram Bahadur Ghale files an appeal in the appellate court complaining that the decision of Kathmandu district court as to inflict 5 years jail term is wrongful so is revocable because it was made without proper evaluation of the proofs and evidences.

Appellate court Patan, giving reference to the cases with cri-app. No 133, 1993 and 172 connected with this file has made an order to summon the defendant Ram Bahadur Ghale upon appeal of government, now therefore, the office the Attorney General, Patan be notified to present on the appointed date of hearing for discussion.

The statement made by all the defendants has verified the one and only fact that the drugs was seized in their presence. Since the confiscation made in their presence and the confession of Milan Gurung and Ram Bahadur substantiates the fact that they are equally liable in committing the crime and therefore the decision of the original court to inflict the lesser punishment is unjustifiable and is revocable to that extent. Defendants Sher Bahadur and Ram Bahadur should be punished at par with Milan Gurung. In the case of Milan Gurung, the decision of the original court is confirmed. The calim of Milan to declare him innocent cannot be materialized. The court of Appeal, Patan has reached this conclusion.

Defendant Mr. Sher Bahadur Thapa, in his appeal received to this court through the central jail Kathmandu had a mention that he should not be subjected for punishment only because he could not return Rs. 17,000 out of 1,00,000 taken from Milan Gurung to send him abroad. The acceptance of loan is not the acceptance of crime. No evidence has been furnished to prove me guilty. The allegation made by the co-offender should not be the basis to convict me. Milan Gurung, the other defendants and me were not arrested in one place. The seizure deed had no mention that the brown sugar-heroin was confiscated from me. I had not made available the brown sugar to Milan Gurung, the co-offender to pay for money. This fact is substantiated by the deposition of Milan Gurung and Ram Bahadur Ghale recorded before the police. An innocent fellow, like him who finds no place to show him innocent, ignored the documentary evidences furnished by him in support of his plea for revocation of the decision of the lower court. But the court declared guilty and labeled additional punishment and fine only on the basis of

allegation made by the co-offender is therefore unlawful and voidable.

Defendant Ram Bahdur Ghale, in his appeal filed in this court had a mention that he had no involvement in the so-called crime. The particular mentioned in a document prepared on the spot is false. The statement recorded before the authorized officer concerned also is untrue. He has not done the transaction of narcotic drugs. He does not know how he was convicted. The accusation made against him is founded on doubt. The said deed of seizure is not prepared fulfilling the legal process provided in No. 72 of the Chapter on Court's Procedure of Country Code, Section 8 of the state cases Act, 1976. So no conclusion had to be reached so as to punish him only on the basis of such an arbitrary document. No drugs is confiscated from him. The statement which is said to have recorded by him before the authorized officer is fabricated by the opposite party. The statement of Milan Gurung recorded in the district court, Kathmandu also is untrue. Since the scale was recovered from Milan Gurung, there is no room for doubt that the transaction was done by him. He has confessed that he used to consume the narcotic drugs. No punishment should be inflicted only on the basis of allegation made by a co-offender. He was not present in the occurrence and was arrested without reason using force and entangled in a false conviction.

It is not proper to pull someone in a dispute without sufficient reason and ground. The original and appellate jurisdiction has decided unlawfully. I request for justice.

Mahila alias Milan Gurung, in his appeal filed before this court has challenged the decision made by the district and appellate court. He says no drugs and scale as described in the seizure document was recovered firm him. The seizure deed is full of fabricated things. The plaintiff is unable to clearly state the place where the drugs were confiscated with other defendants including him. The 15 grams of narcotic drugs which is said to have recovered from him buying with other defendant Sher Bahadur and was confiscated while it was

being taken to Ram Bahadur Ghale for weight. His statement made in the court is not taken as evidence. He had not purchased such drugs for sale and transaction. He was to be punished according to the crime committed by him The crime should be fixed depending upon the evidences furnished in the court. The quantity of the narcotic drugs should not be the criteria for fixing the punishment. The 15 grams of drugs which he had bought for his own use should be accounted for punishment. The legal clauses stated in the decisions of those courts could not be applied. He must be declaring innocent invalidating those decisions.

This court has issued an order so as to notify the office of the Attorney General for discussion because the decisions of the appellate court in punishing Sher Bahadur Thapa looks somewhat archaic since it is found reached only on the basis of accusation made by the Milan Gurung for the nonpayment of debt. Mr. Sher Bahdur in his both statements made in the investigation authority and in the court has refused the claimed charge. No contraband goods is recovered from him. Defendant Milan Gurung says in the court that Sher Bahdur was not present at the time of confiscation. The file of the case suggests there was money transaction between Milan and Sher Bahadur.

The pleadings of the legal counsels represented from both the sides heard.

The court paid (salaried) lawyer appeared from the defendant Ram Bahadur argued that Ram Bahadur was allured for a little thing. He had no criminal record nor was the drug confiscated from him. His statement in police suggests he was allured for money and helped to sale only one gram. In this situation, he had to be punished only for that count. To that extent the decision is arbitrary. The learned advocates represented from Sher Bahadur said his party was pulled only through the allegation of Milan Gurung. The statement of the co-offender could not be taken as evidence. The allegation is controversial in itself. The claim is of 37 gram however, no narcotic drugs as such are confiscated from the defendant. The deed of

recognizance of recovery is not prepared by confirming the legal formality. The substance which is said to have confiscated is a brown thing, howver, Milan Gurung in his statement has said Mr. Sher Bahadur was not present while confiscation took place. The scale was not recovered from Sher Bahadur. That's what he was not traveling for the trafficking of the narcotic drugs. So the punishment awarded by the court does not sound rational.

Likewise, the learned advocate represented from Milan Gurung claimed that no legal recourse has been adopted at the time of seizure of the narcotic drugs. No scale has been seized from the defendant. If the scale was confiscated, there would not have been arrived a situation to go for weight, the next day. The quantity so seized was of 15 gram and that was for self-consumption. So the punishment had to be made focusing only upon such fact. The punishment for sale and purchase is not justifiable.

The learned government advocate represented from the government opined, since the crime pertaining to narcotic drugs should be established through the mode of its seizure however, the concerned police officers as well as the defendants have made their presence only at the time of seizure of the substance. There is no rationality in making his presence who has not witnessed the seizure. The state had no ulterior motive to pull these defendants into dispute. Had the defendants were not arrested at the moment of seizure it was their liability to prove where was they at the time of occurrence? Why did the defendants Mr. Sher Bahadur come in the occurrence had he not involved in the trafficking of the narcotic drugs? Now therefore, all the defendants were equally involved in the crime as claimed in the charge and the punishment awarded by the appellate court is correct.

After hearing the oral and written brief presented from both the parties and observeing the case file scheduled for hearing today to give verdict, now therefore, the questions rests on whether or not the decision made by the appellate court as to punish all the defendants as demanded in the charge-sheet is correct?

Here, in this case, as the appellants/defendants namely Milan Gurung, Kale alias Sher Bahadur Ghale were hunting to sale the narcotic substances the brown heroin possessed with them confiscated the narcotic drugs along with a scale from their persons, they have thus committed an act defined in Section 3 and prohibited by Section 4 (d) and (f) of the Narcotic Drugs (control) Act, 1976 and found instituted a charge-sheet against all the three defendants demanding punishment under Section 14 (1) (g) (2) and to the defendants Ram Bahadur Ghale and Sher Bahadur Thapa 5 years imprisonment and Rs 50,000 as fine each under Section 17 of the same Act. The court in the case of Milan Gurung and in the case of other two defendants found partly revoked the decision of the original court and decided to inflict the same punishment and fine as to that of Milan Gurung. There were appeals filed in this court by all the defendants separately which is now before this bench for decision.

While going through the file, all the defendants were arrested from the west bank of the ring road, KMC ward No. 16 beside a vendor along the footpath and as examined and searched their body, Milan Gurung found holding a black plastic bag inside which a scale with broken chain wrapped into the white paper and a powder looked-like a brown sugar which was 37 gram while taking the weight, is the content of the deed of recognizance of recovery dated September, 2005. The substance was taken for sample test and the Central Police Scientific Laboratory after examination, reported to be the heroin. The expert police Inspector Prabhat Dhungana was summoned to the court to name the substance; he gave his opinion that it is nothing but the narcotic drugs heroin. Thus the examination report found substantiated also by the opinion of the expert deposited in the court.

While considering upon the appellants/defendants, defendant Milan Gurung, in his deposition made before the authorized officer has confessed the fact that the 37 grams of brown sugar and a scale as stated in deed of recognizance of recovery was recovered from him

as he, Sher Bahadur Thapa and Ram Bahadur Ghale were talking about the sale of the brown sugar standing in footpath near a vendor located in KMC ward No. 16, around eight o'clock in the morning, a red colored vehicle came near them in which a police team of patrolling division and Mr. Deepak Malla, who was supposed to buy the brown heroin later known to be a police intelligent, recovered the 37 gram of brown sugar packed in the said plastic packet along with a scale. His statement made in the court has stated that he had brought 15 grams of narcotic drugs for his own consumption and as it was carrying with him to measure it going to Ram Bahadur. In that course of time Sher Bahadur was accompanied with him until reaching to Balaju.

The deed of recognizance of recovery had a mention that 37 grams narcotic drugs and a scale was recovered from the persons of these defendants and the deposition of the police personnel namely; Police Inspector Kiran Jung Thapa, Police sub-inspector Ram Bahadur Karki and constable Raju Thapa who had seized the same quantity of the narcotic drugs and a scale further clears the fact. Though the deposition made in the court has stated the fact that 15 grams was carried for his own consumption, however, there is the lack of evidence to support his saying. An imperfect claim made with the motive of avoiding the larger punishment cannot be the ground for altering the volume of crime and punishment. The defendant has confessed that the narcotic drugs, brown heroin were recovered from him. The deposition of the reporter (informant), the recover of the substance as mentioned in the deed of recognizance of recovery has not been proved otherwise.

While observing the statement of Ram Bahadur Ghale recorded at the time of the seizure, it states that the police had recovered from Milan Gurung 37 grams of narcotic drugs and a scale and arrested Milan Gurung, himself and Sher Bahadur Thapa on the spot. The said substance – the brown heroin was held by Milan Gurung was confiscated by our would be costumer Deepak Malla and arrested me at the same time. Because of the pecuniary allurement they were

carrying the brown heroin and a scale to sale the substances contacting a person in Thamel area who had earlier taken one gram in Rs. 632 as sample and has said to come again at the appointed time. As they were walking along holding brown heroin and a scale for weight they were arrested. At the time of arrest it was held by Milan Gurung. His deposition in court complains that the statement of the crime – scene was not his own and he had no involvement in such activities. But the defendant has failed to furnish evidence in support of such denial that his statement made in the crime – scene was made against his will. Milan Gurung in his statement recorded in the court states that the seized drug was taken from the defendant himself. This proves that the defendant had involvement in the trafficking of the narcotic substances. On the other hand, it has come to clear from the deposition of the reporters that the defendant was arrested as he was busy talking about the sale of narcotic drugs while Milan Gurung was arrested along with the narcotic drugs and a scale.

The appellate/defendant Mr. Sher Bahadur Thapa seems to have given statement in court and in crime – scene denying the charge. He has mentioned that he had taken Rs 1,00,000 to send Milan Gurung to Germany in failure of which he has still to return Rs 16,000 and imposed him for that reason. Defendant Milan Gurung, in his explanation made in the court claims that he is still to get Rs 50,000 from Sher Bahadur and has taken the narcotic drugs, and in that course, Mr. Sher Bahadur followed him until they reach Balaju. The deposition made by the reporters in the court has stated clearly the fact that all the defendants including Sher Bahadur were arrested in group and the narcotic drugs and a scale was recovered from Milan Gurung. While watching the witnesses presented by the defendant in support of his denial, one of the witnesses Mr. Devi Adhikari is found staying in ward No. 34 KMC and the other Mr. Kedar Acharya hails from Jorpati VDC ward No. 2. Both of them describe that the defendant was a person of sound character in their

best of knowledge and was not involved in the trafficking of the narcotic drugs.

Defendant Sher Bahadur in his deposition in court has stated that he was arrested while he was sleeping at his home is not found supported by the explanation of his witness. As per his saying he used to live in Koteshwor, KMC-35. The testimony of those witnesses who are living in different locations and are not present also at the moment of occurrence, their personal hypothesis can not be justified as reasonable. Although his depositions made in the crime-scene as well as in court disagrees the crime however, the evidence in support of his being innocent is lacking. Where the relevant case file compiles evidences in support of the charged claim and where there is no room for doubt to refer them otherwise in such a situation only an obscure and imperfect claim can not be taken as an instrument to get rid him of the crime.

The reporters in their report had a claim that all the three defendants were arrested in group and they have made their deposition supporting the same report. No part of this deposition has yet been declared otherwise, substantially. Similarly, in the presence of vital and irrefutable evidence corroborating the claimed charge, a mere denial made only at the time of recording the statement can not be the basis of someone's being innocent. The narcotic drugs and a scale were recovered from only one person among the three defendants and the other two were arrested together at the time. No substantial difference will be made only because the narcotic drugs was not confiscated from any particular person but from anyone among the company walking together in order to conduct the business of the narcotic drugs. Except when the law allows keeping or posses the narcotic drugs, in all other cases it will be a crime under Section 12 of the Narcotic Drugs Act, 1976. Since the crime pertaining to the narcotic drugs falls under the vicarious liability there is no need of contemplation about whether any one of the defendants has had the motive of conducting the business of narcotic drugs or unless and until it is clearly established by

evidence that he was not accompanied with the person from whom the said drug was confiscated or he has no alliance to the group of such person. In a circumstance, when a person walks along with the company of another person knowing this that the later has carried the narcotic drugs, or joins in his group to carry the business of the said drugs, no reprieve from the created liability could be claimed nor any modification in such a liability could be made merely on the ground that the narcotic drugs was not confiscated from his person. Since no existing law of the land had a provision that the only person from whom the narcotic drugs is confiscated shall be liable. Now therefore, all other persons who are involved in that business shall also remain equally liable.

Since the learned legal practitioners represented from the appellants/defendants in their pleading as well as in the written note of their plea have expressed their discontent over the fact that the deed of recognizance of recovery is not prepared in conformity with the rules and the case also is not initiated in view the quality of the substances seized but relevant only on brown sugar and punishment inflicted accordingly, hence, this bench would like to deal also with these questions.

While studying the deed of recognizance of recovery, the present case is found instituted under the Narcotic Drugs (Control) Act, 1976. As per No. 2 of the Preliminary Chapter of the Country Code (Muluki Ain) it is clearly stated that the actions in respect to the matter about which there is a specific law shall be moved in accordance with the concerned law and where there is no such law, the Country Code will prevail. Thus, the provisions contained in Country Code will be applicable only when there is no provision in regard to the capture or confiscation of the narcotic drugs. Section 8 (1) of the Act provides if any act which, under this law becomes a crime is happening and there is a possibility of running away of the criminal or suppressing the evidence of crime, the drug control authority or a police personnel of at least the rank of sub-Inspector of police may, by preparing a memo, capture the narcotic drugs

connected with crime and other things as well as the documents useful to evidence, cause to stop any suspicious person, carry search and then arrest him if he so deems necessary. While conducting search as provided in sub- Section (2) of the Act and if the time permits, there shall be presented a member of the concerned municipality or VDC or a gentleman of the area or an employee from any local government office as a witness. The law has made liberal provision while adopting this process and says it may be complied only when there is enough time to do so. It is not a mandatory provision. If there is no possibility of presenting the witness as mentioned in the restrictive clause above and this is evidenced by fact, the deed of recognizance of recovery may be prepared in the presence of at least two drug investigation officers or two police personnel of the rank of sub-Inspector of police. This provision of law recognizes the deed of recognizance of recovery prepared by the police personnel of the prescribed number and rank in the absence of local gentleman or the employees of local government offices. While studying the deed of recognizance of recovery enclosed with the file of the case, it is found prepared in the presence of police inspector Kiran Jung Thapa, police sub-Inspector Dukhan Yadav and Umakanta Aryal as well as police constable Raju Thapa and 5 other onlookers witnessed in the crime-scene. Since the deed of recognizance of recovery is prepared as provided in the Narcotic Drug (Control) Act, now therefore, it will be unreasonable to refer it as unlawful.

The learned counsel from the appellant has made a plea that the captured substances were first declared as heroin. But the case is not instituted as such and moved on brown heroin. Therefore, the punishment made on brown heroin is repugnant to its own record. The laboratory test report suggests that the seized substances consist of the content of heroin and this fact is further clarified by the opinion of the expert. The Narcotic Drugs (Control) Act,1976 had no provision for separate punishment by classifying heroin and brown heroin in different category. If any person conducts business of any

other object making it to believe that it is nothing but the narcotic drugs even if nothing as such is traced. In such a situation Section 17 a of Narcotic Drugs Act, 1976 has made a provision of half punishment as if it was held on narcotic drugs. Hence, there will be no substantial difference only because it is not quoted 'brown' before the word 'heroin' at a situation where there has been clearly established that it is the narcotic drugs- heroin.

Now therefore, as described above, since the defendants Mahila alias Milan Gurung, Ram Bahadur Lama Ghale and Sher Bahadur Thapa have their equal participation in the business of the narcotic drugs as complained of in the charge, the decision reached in 2068/2/4 by the appellate court Patan sustaining the judgment of original court in the case of defendant Milan Gurung awarding a punishment of 10 years of imprisonment and Rs 1,00,000 as fine under 14 (1) (g) (2) of the Narcotic Drugs Act, 1976 in the charge of a crime under 4 (d) and (f) of the same Act partly reversing the decision of the original court in the case of Ram Bahadur Lama Ghale and Sher Bahadur Thapa so as to award half punishment under Section 17 of the Act and fine and punishment equal to that of Milan Gurung is correct and therefore confirmed because all the three defendants have been proved to have their equal bearings in the trade of narcotic drugs. The claim made in appeal by all the three defendants can not be materialized. The case be removed from regular action proceedings and the defendants be notified of this decision then handed over the case-file in accordance with the rules.

I concur with the avove decision.

J. Dr. Bharat Bahadur Karki

Done on this date of 28th Ashadh, 2068 BS (July 12, ,2011)
Translated by Bhim Nath Ghimire

No person shall be arrested and kept in unlawful detention so as to infringe his/her rights of freedom and human rights guaranteed by the constitution and international instruments.

Supreme Court, Division Bench

Hon'ble Justice Ram Kumar Prasad Shah

Hon'ble Justice Dr. Bharat Bahadur Karki

Writ No: 067-WH-0089

Subject; Habeas Corpus.

Petitioner: Advocate Laxmi Prasad Pokhrel, a resident of Bhaktapur district Madhyapur Thimi municipality Ward No.5 on behalf Abdul Khalik, a resident of Pakistan, Baluchistan, 55 chiltan market, Queta kent currently kept in custody in a ground floor room of the office of Immigration Department, Kalikasthan Kathmandu

Vs

Respondents: GON, Office of the Prime Minister & Council of Ministers

- **Unless the law of the Nepal is violated, or any act which amounts to be a crime is committed, it is unlawful to arrest any person and keep him in custody or a detention room.**
- **A legal provision which requires someone to live in a prescribed place if interpreted wrongly and kept in a detention room it shall be malicious interpretation.**
- **The high profile government officials holding in public office are required to respect the freedom of an individual and his constitutional and legal right. If he did**

not do so and malafidely enforces law, it must be taken as the violation of person's right of freedom and human rights guaranteed by the constitution and international instruments.

- **Personal freedom is the most invaluable right of human life. Being a man, such right is inherent to him and no one can infringe this right except as provided in law or without confirming the due process of law.**

Decision

Ram Kumar Prasad Shah, J: The brief account of this writ petition presented here after filing in this court in pursuant to Article 32 and 107(2) of the Interim Constitution of Nepal, 2063 and the judgment delivered on it is as follows:

Since the detainee Abdul Khalik was denied to meet and get him signed in the petition, I have been appeared before this court with the petition on behalf him.

In a Narcotic Drugs case (state run criminal case No. 746) of the year 2054/055 whose plaintiff, by virtue of a police report was the Government of Nepal and the petitioner Abdul Khalik myself was a defendant. As I released after clearing the fine and punishment under Rule 29(2) of Prison Rules, 2020 imposed by the decision of the original Kathmandu District Court in 2053/3/31 and when I was in immigration office for the purpose of acquiring travel documents and visa, the police arrested and pushed me in their van and ordered to detain me in a ground floor room without giving warrant and arrest letters and also without obtaining the approval of the authority to hear the case. It was the legal duty of the Ministry of Home to issue travel Visa to me after the fine and punishment was duly cleared by me as per the decree of the court. Now I am unlawfully detained by the order of the Ministry of Home.

As mentioned above, I was free to leave for my country after clearing the fine and punishment imposed by court but the respondents,

without any reasonable ground arrested me without serving a letter for arrest and detention. From 2068/3/20 onward I have been detained in a ground floor room. The respondents have arbitrarily infringed my fundamental rights provided by the Interim Constitution of Nepal, 2063. So I request to remove that imposition by issuing an order of habeas corpus under Articles 32 and 107(2) of the constitution including other necessary orders as may deem appropriate for my acquittal from the unlawful detention and protect my fundamental right provided by those Articles.

This court has issued an order in 2068/3/31 inquiring about what were the basic contents of the case? Why an order as demanded by the petitioner should not be issued? The respondents be delivered a notice accompanying a copy of the writ petition requiring them to present a written reply through the office of Attorney General along with the file of the case together with the captive, if any, within 3 days from the date of receiving this order excluding the time limit to be consumed for journey and a notice thereof be sent to the Office of the Attorney General for its knowledge. Then table the case after receiving written reply or the expiry of the time limit.

Mr. Abdul Khalik, a Pakistani national, was presented in this Department in course of his travel documents and visa to deport him as he got released from the prison section Jagannath Deval having served the sentence pronounced by the court of appeal, Patan sustaining the decision of the Kathmandu district court made in 2055/3/31 awarding punishment of 15 years jail term and Rs 5,00,000/- as fine in a Narcotic Drug case. Section 9(1) of Immigration Act, 2049 states- "Any foreigner who has served sentence for committing crime violating the Rules made under this Act or any other current Nepal law, the Director General, obtaining approval of the GON, may order for his deportation by fixing or not fixing the time period prohibiting him to come to Nepal, again". To obtain such an approval from the GON the concerned file was forwarded to the Home Ministry and the file has been received bearing today's date along with the approval for deportation. Under

the heading-'Regulation of Visa' in rule 22 of the Immigration Rule, 2051- it is stated- " if any foreigner is detained or received an official information of his detention in course of the action proceedings under current law or has initiated any legal action against him and his presence is essential in Nepal until finality of a legal action initiated against him, the Department, explaining the reason thereof, shall regulate his visa as provided in law. Normally, within 7 days from the date of his release from confinement or the finality of the legal action, such a foreigner may be ousted or deported from Nepal". That's why this Department had forwarded the action of his deportation and the reason of delay by some days was because it was needed to have approved by the government. For a period until when the file returns with approval from the Home Ministry, such a deportable foreigner is required to live at a place prescribed by the Director General under Rule 44 of Immigration Rules, 2051. He shall be liable to borne out the entire expenses payable while deporting from Nepal. Under this provision of law Pakistani national Mr. Abdul Khalik was kept in a safe detention room of this Department.

Every action proceedings carried out by this Department are lawful. Nothing has been done to infringe or violate the fundamental right of none. This Department has done nothing in violation of any constitutional provisions as complained by the petitioner. Some more days were consumed because of managing the internal process. Nothing as to violate the personal right provided in 12(2), right of freedom under Article 13(1) nor deprived any right of equal protection of law. Similarly, this Department has done nothing as to deprive the defendant's right of information under Article 24(1), right to appear within 24 hours before the authority to hear the case, right to get information of action proceeding under Article 24(8) and right to get opportunity of hearing under Article 24(9) and such other liabilities and implementation process pertaining to these category of foreigners to which this Department should liable have not been violated. Now therefore, the claim made in the petition by the

petitioner should be quashed. This is the content of the written reply submitted by the Department of Immigration.

The written reply submitted on behalf of the GON, the office of the Prime Minister and the Council of Ministers had a mention that the petition is silent about the relevancy of this office in regard to what the petition has claimed nor any reason has stated why this office was made respondent. Similarly, no explicit reason has been explained in the order why this office was asked to submit its written reply. This office has no concern with the subject in question as well as the reason about what liability this office had to be responded as per the constitution and prevalent laws. Nothing as substantial reasons has been established behind making an unconcerned agency like this as respondent.

So far as concerned with Mr. Abdul Khalik's detention, this office would like to request to this reverend court that the government of Nepal is committed towards offering due respect to the constitutional and legal rights of a person and enhance the rule of law. Since, the claim made in the petition has no connection with this office there is no need to describe in detail in its written reply. It will be more clear by the written reply to be submitted by the concerned agency. Hence, the order of habeas corpus in the name of this office who has no concern with the claim made in the petition can be issued. The writ petition should be quashed to the extent of making this office a respondent.

After studying the petition along with the file of the case duly submitted before this bench for decision and hearing the argument of the learned advocate appeared on behalf of the petitioner according to whom his party has been keeping in detention by the Department of Immigration even after his release from prison clearing all the fine and punishment inflicted by decision of the court in the case of Narcotic Drugs. So an order be issued so as to present him before this bench releasing from an unlawful detention of the respondents. The learned deputy attorney general Hari

Prasad Regmi, represented on behalf of the government of Nepal said that petitioner has already been deported from Nepal. So the claim of unlawful detention has no meaning. The writ petition should be quashed. Now it is to decide on whether or not a writ should be issued?

The petitioner in his petition has made a claim that in a Narcotic Drugs case run between Government of Nepal and Mr. Abdul Khalik, the petitioner after releasing from jail clearing all the dues as decreed by the court, arrested again by the Department of Immigration without giving letter of conviction pretending that he was called in course of regulating the visa documents etc and has been keeping in detention till to date from 2068/3/20. So it is requested to release him from unlawful detention. And, the respondent Department of Immigration in its written reply had a mention that a Pakistani national Abdul Khalik, after clearing all fine and punishment was corresponded by the prison section to this office for the regulation of his visa document and the action in that relation has been forwarded and would take some time to receive approval. He was kept in detention room until the approval receives from the Ministry of Home. He is not kept in unlawful detention.

While considering upon the decision to be delivered, Mr. Abdul Khalik, who was slapped a term of 15 years of imprisonment and Rs 5,00,000/- fine by the verdict of district and appellate court. A letter enclosed in the file of the case has substantiated the fact that Mr. Abdul has cleared the said fine and punishment. The written reply submitted by the Department of Immigration has confessed the fact that Mr. Abdul has been kept in detention under Section 9(1) (a) and Rule 22 of the Immigration Rules 2049. While studying Section 9(1a) of Immigration Act, 2049 it reads- 'foreign national who has committed any act in violation of this Act or the Rules framed under this Act or the prevailing laws and has cleared all the fine and punishment imposed upon him and he is required to obtain visa, the Director General, obtaining approval of the government of Nepal may issue an order of his ouster from Nepal by fixing or not fixing the

time period. Likewise, Rule 22 of the Immigration Rules, 2051reads-' In case any foreigner has been detained or received an official information of his detention in course of a action proceeding initiated under current law or in a situation where his presence in Nepal is essential until a legal action initiated against him is finally disposed of , the Department, explaining the matter thereof, shall regulate his visa as provided in law. Generally, after seven days of his release from prison or the finalization of the legal proceedings, such a foreigner may be ousted or have him deported from Nepal". While observing the above legal provision, any foreign national who has cleared the punishment awarded by the court in a criminal charge, there is no law authorizing the detention of such a foreigner again. Instead, in Rule 44 (1) of the same Rules, it has been stated- "any foreigner who has to be deported or ousted under this Act or the Rules thereunder, is required to stay at a place prescribed or at a place made available by the Department until his departure from Nepal. He is liable to manage his expense himself. This means – "such a foreign national, prior to leaving for his country or elsewhere, is bound to stay at a place prescribed by the Department if such a place is so prescribed.' By this it does not sound reasonable to derive a sense that he is required to live in detention. To keep in detention and to put in a place are not the phrases to be used for the same meaning and purpose. The provision of compulsory stay at a place prescribed by the Department of Immigration has been wrongly defined and used. Now therefore the respondent Director General has no right to keep the petitioner in a detention room or in custody. In the absence of a clear legal provision, the act of keeping in custody is straightly a malicious act which is also against the law.

The written reply submitted by the Director General of Department of Immigration has not clearly spoken of the matter that the petitioner, after releasing from the imprisonment, had committed a wrongful act so he has been kept in detention under law in course of a legal proceedings or investigation. Unless any law of Nepal is violated or any act which amounts to be a crime is committed, it is unlawful to

arrest any person, keep him in custody or put in a detention room. Except what is provided in current law, it is unlawful to keep any person in a detention room by snatching his freedom. Even if he has committed a crime it is unlawful to keep him in detention more than 24 hours except when the authority hearing the case orders otherwise. Such acts contradict with the Article 24 (3) of the Interim Constitution of Nepal, 2063, Section 15 (2) of Nepal civil Rights Act, 2012 and Section 15(1) of State Cases Act, 2049. It is malevolent to mean that Mr. Abdul Khalik is required to keep in detention room by wrongly interpreting a legal provision that he is required to stay at a place prescribed by the Department. This means that Mr. Khalik was released from imprisonment in 2068/3/20. The Department has submitted its written reply in 2068/4/3 during which the defendant who was innocent was kept in detention without obtaining the approval of the authority hearing the case. The respondent was ordered by this court to appear today along with the captive but the captive did not presented, however, the respondents is found to have furnished some documents along with a letter of Director General in which it is claimed that he has deported the captive in 2068/4/13 that means on 29th July, 2011. In this manner Mr. Abdul Khalik is found kept in detention by the Department from 068/3/20 to 068/4/13, that is 25 days in total.

The high profile government officials holding in public offices were to pay due respect to the freedom of an individual and his constitutional and legal rights. If he did not do so and malafidely enforced the law, it must be taken as the violation of right of freedom and encroachment of the human right of a person provided by the constitution and international protocols. Personal freedom is the most valuable right of human life. The man naturally acquires this right being a man and no one can infringe such right except what is provided in law or without following the due process of law. Personal freedom has been honored also by the various conventions relating to human rights. Article 3 of the Universal Declaration of Human Rights, 1948: " Every man shall have the right of life freedom and

personal security." Similarly, the International Covenant on Civil and Political Rights, 1966, Article 9 (1) says- every person has the freedom and rights of security of personal life. No one shall be arrested unlawfully and made the subject of detention. No one shall be deprived of his freedom other than in manner and process what law provides for. Nepal also has been the member signatories of those international conventions of personal freedom. Article 12 (1) of the Interim Constitution of Nepal, 2063- " Every one shall have the right to live a respectful life." Whereas in Article 12(2)- " No one shall be deprived of his personal freedom. If those provisions were breached it is clear that such act goes against the interim constitution as well as the international conventions and protocols on human rights to which Nepal is a party. As we study the given petition, the petitioner Abdul Khalik is found to have unlawfully arrested and kept in detention abusing the authority by the Director General of Immigration Department in the name of keeping in the prescribed place.

Hence, it is concluded to issue an order of habeas corpus in the name of Director General of the respondent Department to release Abdul Khalik from unlawful detention without further delay since he was found kept in a detention room for a period ranging from 2068/3/20 and the date of filing this petition that is 2068/3/30 and also thereafter in the name of regulating visa by the Department of Immigration which deprives the constitutional and legal rights without the authority of law.

So is the case but a letter of the Attorney General dated 2068/4/16 with dispatch No. 624 and another letter of TIA immigration office dated 2068/4/16 dispatch No. 53, enclosed in the file of the case have suggested that the said defendant has already been sent to Pakistan in accordance with an order having approved the deportation issued in 2068/4/2 by the Ministry of Home, therefore, no order so as to free him in the presence of court is hence forth required.

As the petition of habeas corpus is filed in this court and the respondent served a notice for presence along with the captive and submitted written reply and the case is now in sub-judice, the letters submitted in the bench by the respondents have witnessed the fact that the respondent the Department of Immigration, without notifying the court has transferred the captive in another place. Since it was the duty of the Director General to present the detainee as per the order of the court, however he did not do so but, without the knowledge and permission of the court transferred and deported him. Such act of the respondent has overruled the Rule 37 and 39 of the Supreme Court Rules, 2049. In like manner, Mr. Janmajaya Regmi, the Director General of Department of Immigration who has breached the law and violated human rights, who even after receiving approval of deportation from the Ministry of Home to a foreign national who had cleared the fine and punishment decreed by the court, found kept in his detention room unlawfully from 2068/3/20 to 2068/4/13 with malafide intention and found acted against the duty and accountability of the post by deporting the captive to Pakistan after transfer without notifying the court while the writ of habeas corpus to issue a directive order in the name of respondent was in sub-judice, now it is decided the respondent Ministry of Home, within 3 months from the date of receiving this order, to initiate Departmental action against Mr. Janmajaya Regmi, the Director General for deliberate disobedience of law and for non-compliance of his duty and responsibility giving him a warning for not repeating such unlawful act again and the result thereof and action initiated in that relation be sent to the Decision Implementation Directorate of this Court. The file of the case be handed over as per rule after removing from the regular proceedings.
I concur with the above decision.
J. Dr. Bharat Bahadur Karki
Done on this day of 16th Shrawan, 2068 BS (August 01, 2011)
Translated by Bhim Nath Ghimire

The heinousimmoral and hateful crime of unnatural sexual intercourse against the orphan and children must be discoursed through the application of strict rule of interpretation of statute.

Supreme Court, Division Bench
Hon'ble Justice Kalyan Shrestha
Hon'ble Justice Gyanendra Bahadur Karki
Criminal Appeal No. 1287 of the year 2067

Case: Rape.

Appellant/ Defendant: Molhuysen Hendrik Otto a, permanent resident of Netherland, working location at Galkopakha 'Our Life Protection Child Home' Kathmandu District, Kathmandu Municipality Ward No. 29, Samakhusi, presently imprisoned in Centre Jail, Kathmandu

Vs.

Respondent /Plaintiff: Government of Nepal by the FIR of A and B (name changed)

- **Any act or omission is not against the law in force it cannot be held as crime by giving a liberal interpretation to it.**
- **If a section of law has relatively indicates the provision of other section the provisions of both of the sections**

must not be interpreted separating absolutely from each other. Both of them should be taken as complimentary to each other.

- **If there is condition of ambiguity of whether the charged offense has been committed or not, the charge cannot be sustained. Therefore, the act which is not mentioned in the criminal law or which is not specified as crime cannot be held as a crime as per the law.**
- **Criminal law is not a flexible but a law of strict nature and the legislature has privilege of criminalizing an act and keeps some act out from the crime according to time, therefore, the interpretation of this law is made according to the provision of prevailing law.**
- **The principle of interpretation of looking into the previous law or provision of law repealed or amended law before its repeal or amendment is not applicable in the interpretation of criminal law to determine whether an act is crime or not.**
- **While explaining the meaning of the unnatural intercourse in the context of that plea, it means the sexual intercourse committed unnaturally or abnormally, the types of unnatural sexual intercourse and its act and medium may be of different types.**
- **In the condition that provisions relating to the modus operendi of unnatural intercourse are made in different laws, if the provision made in some law has not associated the provisions of other laws, the provisions made in different laws cannot be taken in the same sense.**
- **The legislature can mention clearly the conditions that constituted the offense of unnatural sexual intercourse and provided different punishment based on difference in activities, medium and the gravity of the subject matter and prescribe different procedure to be followed in different cases. In this viewpoint, it cannot be maintained that the provision of No 4 of the Chapter on Bestiality be attracted in the condition of unnatural sexual intercourse under No. 9 Ka of the Chapter on Rape.**

- **The legislature has included the unnatural sexual intercourse committed against a minor within the definition of rape, it cannot be regarded as child abuse through interpretation.**
- **Interpol is the international organization of Police and Nepal being a member of that organization, therefore, it cannot be said that Nepal police cannot take the help from that organization in the context of crime investigation.**

(The names of the victims have been changed in this case according to 'Procedural Directives, 2064 relating to the Special Nature of Cases in Proceeding for maintaining privacy of the parties, to the case.)

Decision

Kalyan Shrestha, J: The facts of the present case wherein special leave for revision has been granted against the decision of Appellate Court Patan dated 2067/6/12 on the ground mentioned in Section 12 (1) (a) of the Administration of Justice Act, 1991. The summary of the facts of the case are as follows:

The First Information Report made jointly by victims requesting for initiation of legal proceeding to the culprit mentioned that 'we the informants have been resided at 'Our Life Protection Child Care Home' located at Galkopakha. The defendant Molhuysen Hendrik Otto called on us one at a time in his room and he ordered us to

sleep down with him by removing out all of our clothes. He also took out himself his all clothes for being naked. He told us to play and shake his urinating organ (penis) with our hand and mouth; he also had administered different types of medicinal pest in his urinating organ (penis) to commit rape for penetrating into our anus. He has committed such act against us times and again and until February 06, 2007'.

The deed of search and seizure dated Magh 24, 2063 (7th February 2007) mentions the followings: The home located at Kathmandu District, Kathmandu Municipality Ward No. 29, Galkopakha where victims have been raped in the room of south eastern side of the third floor of the five story building of Madhsatto Manandhar. In the room the defendant Molhuysen Hendrik Otto and victim Shiva Neupane were laying down in naked position. Their wearing clothes, I.D. Cards, computer along with tore packet of condoms were seized from the room.

The statement of the witnesses inquired during the investigation including Anil Ghimire, Nim Chhiring Sherpa, Parsuram Panta and Puskar Adhikari stated: The defendant Molhuysen Hendrik Otto forced to sleep down us with him, he had slept down naked himself and ordered us to become naked too, he played and sucked our urinating organ (penis) and ordered us to make same his urinating organ (penis). We had told to Reshamraj Shinkhada about such behavior and activities. We are confident that the defendant had committed rape and unnatural sexual activities against the victims, too.

Prakash Khatri stated that he had told Resham Shinkhada about the defendant Molhuysen Hendrik Otto has been doing child abuse and unnatural sexual activities to the children at the 'Our Life Protection Child Care Home'. I am confident that the defendant had committed rape and unnatural sexual activities against the victims too.

Resham Shinkhada in his statement stated that he had heard about the event only after Prakash Khatri had told about it and that he

also had made inquiry with the children too, but they may have not told it to me because of being a principal of the Home. He added that he had no any assistance and involvement in the event of sexual abuse and unnatural sexual activities committed against the children by Molhuysen Hendrik Otto.

The witnesses including Aashish Adhikari, Anil Sapkota, Govinda Magaju, Shiva Neupane and Sanu Kanchha Lama in their statement have stated that they have confidence that the defendant Molhuysen Hendrik Otto had rape and unnatural sexual activities against the informant since he had committed the same type of behavior against them too.

The statement of Elisabeth Wilhelmus and Eveline Clara Smit at the investigating officer in the course of investigation of the case, as following: Defendant Reshamraj Shinkhada remained quite silent without disclosing no word having been well informed about the commission of Molhuysen Hendrik Otto due to the becoming a friend of defendant Molhuysen Hendrik Otto, so we believe that Mr. Molhuysen Hendrik Otto had committed rape to the children resided at of 'Our Life Protection Child Care Home'.

The defendant Mr. Molhuysen Hendrik Otto in his statement recorded during the course of investigation stated that he is the Director of 'Our Life Protection Child Care Home' located at Kathmandu District, Kathmandu Municipality Ward No. 29, Galkopakha and that he had never made such type of unnatural sexual activities and commission of rape to the children resided at Care Centre. The statement of the First Information Report and other statements are false. .

In the statement of Krishnakumar Thapa made during investigation, it is stated he had recorded the talking and discussion with Elisabeth Wilhelmus and Eveline Clara Smit who are social worker of the Care Home and Prakash K.C. who was former worker of that Care Home in the CD, after having doubt of occurrence of the event and findings some evidences in the course of inspection of the

house such as no person stays at night, child toys being found in the room of the defendant, the defendant did not like to show all the rooms. He also added that he has belief that Mr. Molhuysen Hendrik Otto had committed rape against the children resided at 'Our Life Protection Child Care Home'. The other defendant Reshamraj Shinkhada remained silent being well known about the commission of such act and therefore, he has belief that he also played the role as an accomplice.

In the statement of Bala Giri it is stated that Molhuysen Hendrik Otto had made slept down the person with him alternatively one after another. She also had doubt about it. Defendant had taken Suman Gurung and B (converted real name of victim) with him to make tour in Pokhara. Otto had made slept down them 1/2 night with him after returning from Pokhara. He caused other child to sleep with him after some days of returning from Pokhara and there was quarrel occurred between Otto, Suman and B thereafter. After that event Otto ordered to expel them and give them old clothes them after quarrel. Otto was not ready to give them new clothes because he had given them newly bought clothes at the time of visit to Pokhara where he had given them in lieu of causing them suck his penis and commission of rape. Therefore, it is sure that Mr. Molhuysen Hendrik Otto had committed rape.

The deed of description of the crime scene report reads as: there is bed in the room of eastern side, facing to north of the third floor five story building of Madhsatto Manandhar in which bed the defendant caused the children to sleep down and committed rape and unnatural sexual activities.

The charge sheet registered on 2063/11/17 states that : The defendant Molhuysen Hendrik Otto committed the unnatural sexual activities against the children times and again by different types of allurements to the children resided at the 'Our Life Protection Child Home' which was run by Reshamraj Shinkhada, hereby the defendant Molhuysen Hendrik Otto is charged for committing the offence pursuant to No 3 (2) and 9a of the Chapter on Rape urging

for imposing the punishment pursuant to No 3(2) and also the additional punishment pursuant to the Section 9(A) of the same Chapter and the defendant Reshamraj Shinkhada who acted as an accomplice to Molhuysen Hendrik Otto by indulging himself in the act and therefore, defendant Reshamraj Shinkhada has been hereby charged for committing offence pursuant to No 4 of the same Chapter and thus urging for imposing punishment pursuant to the same Section.

The defendant Reshamraj Shinkhada in his statement before the court has stated that all the cost of the Institution chaired by him has been borne by defendant Mr. Molhuysen Hendrik Otto. Informants have been taking shelter in the institution. The statement of the first information report is fictitious. The statement was not made as per the will of the children. Police has coerced them to sign in it. Prakash Thapa, who is the operator of the 'Voice Children' Child Home, Lalitpur, Patan, has enmity with the Mr. Molhuysen Hendrik Otto because the children taking shelter in his children home had moved to their institution and therefore, with the intention of creating trouble of operating the children home have caused to file this information. The children living in their Care Home live separately. It is impossible to find two persons together in naked position. The chocolate and condom had not been seized from their institution. They had seized computer, camera, printer, and speaker also, which are not mentioned there. The statement of deed of search and seizure report is false. He also added that he had been working with defendant Mr. Otto for last three years and that he knew behavior. No immoral act has been committed by Otto. The so called statement made by Anil Ghimire was prepared by police themselves and caused to sign in it. The children have not made such type of statement. The false statement was prepared according to the saying of Prakash thapa. Prakash Khatri worked at their Care Home before quarreling with Mr. Otto and after quarrel with Otto he left the Care Home. Because of that enmity, he made such statement. Nim Chhiring Sherpa, Anil Sapkota, Parshuram with Puskar Adhikari are

the children residing in their institution. They have also been forced to sign in the statement containing false statement. The statement made by him during the investigation was correct. Anil Sapkota and others had told that there was no injustice committed against them. Bala Giri had not told such statement; the statement which was not made by them had been written and coerced them to sign. He also stated that he did not know Eveline Clara Smit and that he did not know why they had written such a statement. The person giving statement had not stated such a statement. He added that he has known any idea how they had taken statement from Elisabeth who is unable to speak English language. He further added that he had no any idea about the statement made by Molhuysen Hendrik Otto before Police officer. Pornographic photographs have been downloaded from the internet. He said that the charge-sheet is false and therefore he should be acquitted.

The defendant Molhuysen Hendrik Otto's statement in the Court stated that had operated the child care centre with the objective of providing education to the children and makes them good citizens. The informant children and the children giving statement before investigation were the children taking shelter in his children home. The operator of the children's home named 'Voice of Children' had enmity with him (Otto) because of the children of his children home moved to his (defendant's) children home therefore, he caused to file such a FIR and incited to give such statement in cooperation with police. A child named Hemanta Shrestha was residing in his children's home while his younger brother Bipin was residing in Voice of Children and later moved to his children home. On that matter the persons of that children home came to quarrel to him and they took Bipin with them. The condom and kerchiefs were not seized from his room. He added that he has the habit of sleeping naked and he sleeps naked. He was alone in his room and Shiva was also in his own room. The police came at 10 PM. They had not mentioned two digital cameras and they had not returned them to him too. Many false things have been mentioned. The FIR was not

written as said by the children. It would be clear if the children are inquired. The statements made by Prakash, Anil. Bala Giri and Shiva Nyaupane are totally false. Elisabeth Wilhelmus and Eveline Clara Smit used to ask more money with him however, he spent most of the money for children and therefore, they in cooperation with the Voice of Children made such false statement to entangle him in trouble. He further stated that Krishna Kumar has major role in creating fabricated case. He did not know how he has made such a CD. In the Question No 15 and 16 the police had made false statement which was not stated by him. He added that he did not know from where had the obscene pictures been brought since he never watch such pictures. He pleaded that he had not committed the offense and he should not be punished. It is stated in statement made by Molhuysen Hendrik Otto before the court.

The testimonies given by the informant Ka, Kha, defendant Resham Simkhada, the witnesses of the case Rajendra Adhikari, witnesses of Hendrik Otto's Nirmala Paudel, persons giving statement before the police Shiva Nyaupane, Raja Ram Panta, Anil Sapkota, Parsuram Panta, Anil Ghimire, Puskar Adhikari, Rajeev Bhandari, Bala Giri, Nim Tsring Sherpa, Sanu Kanchha Lama, Ashis Adhikari, Govinda Makaju, Krishna Kumar Thapa, Dr. Harihar Wosti who examined the age and specialist Mohan Singh Dhami, who examined the semen have also been enclosed in the case file.

The informant Ka and Kha taking shelter in the Child Care Centre have made definite First Information Report alleging the defendant stating that the defendant had committed unnatural sexual intercourse with them in the anus. There is no reason and enmity of filing such an Information Report and the defendant has not been able to refute the allegation. Apart from this, different types of pests have been seized from the room where the defendant lives. On that allegation, the matters stated during the time of investigation have been corroborated from the testimony given in the court pursuant to Section 10 (a)(b) of the Evidence Act, 2031 (1975). In the Laptop computer used by the defendant Molhuysen Hendrik uses, there is

history of the presence of obscene picture in the folder 'women' and the report printed along with the wave site is enclosed with the case file. On that picture there are the scenes of unnatural sexual intercourse between men. Thus, in the above mentioned context, on the basis of the obscene pictures seized from the defendant and the testimony of the victim children, the defendant Molhuysen Hendrik has been hereby punished with imprisonment for 8 years pursuant to No 3(2) of the Chapter on Rape and additional punishment of imprisonment for one year pursuant to No. 9 Ka of the same chapter. Rs.25,000/ shall be provided to the victim informants as compensation from the defendant. In regard to the defendant Resham Raj Simkhada has denied the charge and the charge has not been corroborated from other evidences. Therefore, the defendant Resham Raj Simkhada gets acquittal. It is stated in the decision of the Kathmandu District Court on 2065/12/25.

Defendant Molhuysen Hendrik Otto filed an appeal in the Appellate Court of Patan against the judgment of the District Court stating that the informants have not been able to specify the date when they had been raped and have not stated that rape had been committed against them for the last time on 2063/10/13. The statement of the First Information Report has not been corroborated from the testimony of the informants made in the court. The police has made to separate deeds of seizure on 2063/9/14 and 25 and has not kept me in presence. There is no relavancey of making two separate deeds of seizure of the same house which is against the provision of the Section 8 of the State Cases Act, 1992. In those deeds of seizure only the clothes of my daily use have been sized which do not play any role to establish the offense against me. The testimonies given by the witnesses Anil Ghimire, Nim Tsring Sherpa, Puskar Adhikari, Parasu Ram Panta are contradictory to the statements they made before the investigating officer. They are not eye witnesses and they only have stated that they have belief that the offense has been committed. Therefore, the judgment is erroneous. Apart from this, it is also stated that obscene pictures have been printed out from the internet, such types of pictures are

easily available in the computers with internet connection and therefore, they are not admissible as evidence against me. The persons making statement before the police have not been able to state that they have seen the acts with their own eye and the other persons making statement before police have not come to the court to give testimony and therefore, their statement is not admissible as evidence as per the Section 18 of the Evidence Act, 1976. In the medical report prepared on 2063/12/25 it is stated that there is no sign of sperm seen. Semen and blood had not been found in the clothes seized from my room when being examined from the Central Police Forensic Laboratory. In this context, the charge made against me by the Government of Nepal has not been proved pursuant to Section 25 of the Evidence Act, 1976 and therefore the judgment of the District Court that decided to punish me as per the charge is erroneous and should be quashed.

In the appeal filed on behalf of the Government of Nepal, dated 2066/11/19, against the decision to the extent of acquitting of the defendant Resham Raj Simkhada it is stated that the Defendant Resham Raj Simkhada had knowledge that Molhuysen Hendrik has committed unnatural sexual intercourse amounting to rape against the children taking shelter in the child care house operated by the him (defendant Resham Raj Simkhada). However, he helped the act by not informing about it. He did care even after he was informed about it and therefore, he played a role of accomplice in committing the crime of unnatural sexual intercourse. The decision that acquitted him only on the ground that he denied the offense stating that he did not know about the occurrence violated the provision of Section 10 of the Evidence Act, 1976. Therefore, the decision should be reversed to the extent of acquitting the defendant Resham Raj Simkhada and the Defendant should be convicted for the offense under No 4 of the Chapter on Rape.

From the evidences discussed above, the decision of the District Court dated 2065/12/25 that convicted the defendant Molhuysen Hendrik Otto for committing the offense under the No. 9 Ka of the Chapter on Rape of Muluki Ain punishing him with imprisonment for

8 years pursuant to No 3(2) of the Chapter on Rape and additional punishment of imprisonment for one year pursuant to No. 9 Ka of the same chapter and providing Rs. 25000/ as compensation to each of the informant and acquitted the defendant Resham Raj Simkhada is just and hereby sustained. It is stated in the decision of the Court of Appeal Patan dated 2067/6/12.

The defendant Molhuysen Hendrik Otto filed a special leave petition in the Supreme Court for the revision of the case stating that there is no consistency between the First Information Report and the testimony of the informants. The statement of the defendant Resham Raj Simkhada cannot be admissible as evidence against him. The photographs downloaded from the internet are not admissible as evidence against him. From the report fo the physician the age of Ka is between 13 to 15 years and the age Kha is 12 to 14 and therefore, the punishment imposed upon him pursuant to No 3(2) is fit. The judgement is silent about the fact that the defendant has been entangled in the conspiracy of Prakash Thapa and the police. The authenticity of the so called letter received from the INTERPOL has not been proved. He stated in the petition that he had denied the charge during the investigation as well as before the court. The plaintiff has not proved that he had committed the offense and the decision fo the Court of Appeal sustaining the decision of the District Court made without proof should be reversed to provide him acquittal.

In the order of the Supreme Court dated 2068/3/5, providing the special leave for the revision of the case pursuant to Section 12(1)(a) of the Administration of Justice Act, 1992, it is stated that there is an error in the interpretation of No 3 and 9 Ka of the Chapter on Rape of Muluki Ain in the context of the principle assumed by the Article 11 of Universal Declaration of Human Rights, 1948, Article 15 of the International Covenant on Civil Rights, 1966 and Article 24 (4) of the Interim Constitution of Nepal, 2007.

In the present case presented before the bench scheduled in the cause list as per the rule, the documents enclosed in the case file along with the plea of the appellant has been reviewed and the

argument of the learned advocates Dr. Rajit Bhakta Pradhanang and Mohan Bahadur Banjara on behalf of the defendant and learned Deputy Government Attorney Ganga Prasad Paudel on behalf of the Government of Nepal has been pursued.

Learned Advocates on behalf of the defendant have argued that the defendant has denied the offense during the investigation as well in the court. The statement of the victim is contradictory to each other. No examination has been made of the so called victims. The principle of analogy is not applicable in the criminal case like that of civil case, but the principle of strict construction is attracted. The victim must be a woman for punishing under the No. 1 of the Chapter on Rape. Since there is no condition under No. 1 of the Chapter on Rape there is any condition of imposing punishment under No 3 for the offense under 9 Ka of the Chapter on Rape. The court cannot criminalize an act through interpretation which is not punishable under law. No 4 of the Chapter on Bestiality is attracted for the offense of unnatural sexual intercourse and such case is not included under the schedule 1 of the State Cases Act. Therefore, the judgment that convicted and punished the defendant is erroneous and hence be quashed and the defendant should be acquitted. Likewise, the learned Deputy Government Attorney argued that the defendant has not been charged by imagination. The unnatural sexual intercourse has been committed for the satisfaction of sexual desire and it has been clearly provided in the No. 9 Ka of the Chapter on Rape that a person who commits or causes to be committed sodomy (any kinds of unnatural sexual intercourse) with a minor, it shall be considered to be the offense of rape. The Number has addressed the punishment of No 3 and the punishment imposed by the decision is just and it has not violated the principles of justice and therefore, the decision should be sustained.

After hearing the argument made from the both sides and viewing the facts seen from the case file the court has to decide the following questions:

(1) Whether or not the punishment pursuant to No 3 of the Chapter on Rape for the Offense under the No. 9 Ka of the same Chapter could be attracted ?
(2) Whether or not the offense as per the charge sheet committed by the defendant against the informants is proved?
(3) Whether or not the decision of the Court of Appeal that convicted and punished the defendant as per the charge should be sustained?

First of all, to consider about the first question, the charge has been filed against the defendants stating that the defendant Molhuysen Hendrik Otto committed the unnatural sexual activities against the children times and again by different types of allurements to the children resided at the 'Our Life Protection Child Home' , hereby the defendant Molhuysen Hendrik Otto is charged for committing the offence pursuant to No 3 (2) and 9a of the Chapter on Rape urging for imposing the punishment pursuant to No 3(2) and also the additional punishment pursuant to the Section 9(A) of the same Chapter and the defendant Reshamraj Shinkhada who acted as an accomplice to Molhuysen Hendrik Otto by indulging himself in the act and therefore, defendant Reshamraj Shinkhada has been hereby charged for committing offence pursuant to No 4 of the same Chapter and thus urging for imposing punishment pursuant to the same Section.

The trial court has convicted the appellant/defendant Molhuysen Hendrik and punished him with imprisonment for 8 years pursuant to No 3(2) of the Chapter on Rape and additional punishment of imprisonment for one year pursuant to No. 9 Ka of the same chapter and also decided to provide Rs. 25000/ to the victim informants from the defendant as compensation and acquitted the other defendant Resham Raj Simkhada. The Court of Appeal has sustained the judgment of the trial court. Leave petition for revision has been filed against the judgment of the Court of appeal and leave for revision

has been granted and the case has been presented for delivering judgment.

Going through the legal provision charged against the defendant, in the No. 9 Ka of the Chapter on Rape it is stated that " If any person commits or causes to be committed sodomy (any kinds of unnatural sexual intercourse) with a minor, it shall be considered to be an offence of rape and the offender shall be liable to an additional punishment of imprisonment for a term not exceeding One year as referred to in Number 3 of this Chapter and the court shall make an order to provide appropriate compensation to such a minor from the offender, upon considering the age and grievance suffered by the minor." The learned advocates representing on behalf of the defendant have pleaded that the provision of this legal provision cannot be taken as an offense under No. 1 of the Chapter on Rape stating that the victim of the rape must be a woman, the offense of the defendant has been maintained in violation of the Article 11(2) of the Universal Declaration of Human rights, 1948, Article 15 (1) and (2) of the International Covenant on Civil and Political Rights, 1966 which is erroneous. Likewise, while granting the certificate of leave for the revision of this case, the provisions of those international documents have been referred; therefore, it is relevant to take into account of the provisions of these documents. Going through the Article 11 of the Universal Declaration of Human Rights, 1948, it is stated that

(1) "Everyone charged with an penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

(2) No one shall be held guilty of any penal offense on a account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was

committed, nor shall a heavier penalty be imposed than the one that was applicable at the time penal offence was committed.

Likewise, in the Article 15 (1) of the International Covenant on Civil and Political Rights, 1966 has provided the similar provision to that of the Article 11 (2) of the Universal Declaration of Human Rights. The above mentioned International Instruments have directed that no one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time penal offence was committed. The Article 24 (4) of the Interim Constitution of Nepal 2007 has recognized it as a right to justice.

Viewing it from the jurisprudential point of view, the criminal law is taken as a strict law and it must be clear. It means that it is not regarded as a crime unless it is defined as a crime and punishment is provided for its commission. It is the jurisdiction of the legislature to determine to what extent a behavior of a person should be accepted and what behavior has to be prohibited and criminalized. Legislature can criminalize a human act and also can keep out an act from criminalization. In this context, while determining whether a committed act is crime or not it should be looked whether it is accepted or prohibited by law. The provisions of international instruments mentioned above and Article 24(4) Interim Constitution, 2007 are directed toward these conceptions. Therefore, if any act or omission is not against the law in force it cannot be held as crime by giving a liberal interpretation to it. Thus, Principle of Strict Construction is attracted in defining crime.

While formulating criminal law, the objective of the legislature is to prohibit certain types of behaviors and determining punishment for such prohibited acts and thus the criminal law controls certain types of human behaviors. When a question is raised for committing an act

against such law, it is looked in the law in force to see whether or not the act has been regarded as crime by the law. However, when there is ambiguity in law about an offense and if there is a condition that it cannot be determined whether or not it is regarded as an offense, in such situation the legal provision is interpreted for the benefit of the defendant. The Principle of Strict Construction is based on it. Before, applying this principle, the intention of the legislature behind the making of the law is also considered. This principle can be applied if the charged act does not match with the objective of the legislature or there is ambiguity. The provision mentioned in law relating to any subject is interpreted in isolation, it is difficult to find out the intention of the legislature and therefore, the statute as a whole should be studied. If a section of law has relatively indicates the provision of other section the provisions of both of the sections must not be interpreted separating absolutely from each other. Both of them should be taken as complimentary to each other. In this way, taking into account of the related Section, if there is condition of ambiguity of whether the charged offense has been committed or not, the charge cannot be sustained. Therefore, the act which is not mentioned in the criminal law or which is not specified as crime cannot be held as a crime as per the law.

Criminal law is not a flexible but a law of strict nature and the legislature has privilege of criminalizing an act and keeps some act out from the crime according to time, therefore, the interpretation of this law is made according to the provision of prevailing law. The principle of interpretation of looking into the previous law or provision of law repealed or amended law before its repeal or amendment is not applicable in the interpretation of criminal law to determine whether an act is crime or not.

Now looking in the context of the present case, it has been charged that the appellant defendant has committed the offense of unnatural sexual intercourse against the informants pursuant to No. 9 Ka of the Chapter on Rape of Muluki Ain urging for imposing the punishment pursuant to No 3(2) of the same Chapter.

The No. 1 of the Chapter on Rape has defined the offense of rape as "If a person enters into sexual intercourse with a woman without her consent or enters into sexual intercourse with a girl below the age of Sixteen years with or without her consent shall be deemed to be an offence of rape." The eleventh amendment of the present Muluki Ain introduced on 2059/6/10 the No. 9 Ka has been added in the Chapter on Rape and mentioned that if an unnatural sexual intercourse is committed against a minor it shall be considered to an offense of rape. Thus, it has extended the offense of rape to an unnatural sexual intercourse against a minor and the same number has prescribed an additional punishment of imprisonment for a term not exceeding One year as referred to in Number 3 of same Chapter.

However, the learned advocate on behalf of the appellant defendant, in the process of his argument has stated that the provision of punishment provided in No 3 of the Chapter on Rape cannot be attracted in the offense of unnatural sexual intercourse and the provision of the No 4 of bestiality is attracted on it. While explaining the meaning of the unnatural intercourse in the context of that plea, it means the sexual intercourse committed unnaturally or abnormally, the types of unnatural sexual intercourse and its act and medium may be of different types. Going through the provision of No 4 of the Chapter on bestiality it is provided.

> *"Except as provided in the other Numbers of this Chapter, a person who commits, or causes to be committed, any other type of unnatural sexual intercourse shall be liable to the punishment of imprisonment for a term not exceeding One year and a fine of up to Five Thousand Rupees."*

According to the provision of the No. 1 of Bestiality it means that no person should commit, or cause to be committed, sexual intercourse with a female cattle, or commit, or cause to be committed, any other unnatural intercourse.

The provision of the No 4 of the Bestiality is an additional provision except the provisions made in different numbers of the chapter. No 4 is not structured in a way to mean that it may prevail whatever may be provided by the other provisions of the Chapter or other legal provisions. In other words, the provision of No 4 is not made to nullify the provisions of the No. 9 Ka. The provisions of other laws shall be effective if other provisions are made in any law in force, and the provision of the Chapter on Bestiality is attracted in the conditions not included in the provision of the other laws in force and mentioned in the No 4 of the Chapter on Bestiality exists. Thus, the plead made by the learned advocates of representing on behalf of the appellant is not acceptable. Apart from this, all the provisions of the Chapter on Bestiality has been made in the different context, it cannot be thought that the provisions of that chapter is attracted in this condition. That provision is related to the sexual intercourse committed with an animal and the Provision of the No 4 is also concerned with unnatural sexual intercourse with animal. In the condition that provisions relating to the modus operendi of unnatural intercourse are made in different laws, if the provision made in some law has not associated the provisions of other laws, the provisions made in different laws cannot be taken in the same sense.

Unnatural sexual intercourse mentioned in the Chapter on Bestiality and the provision of unnatural intercourse made in the Chapter on Rape has not been associated with each other. The provision made in the Chapter on rape is related with human being and the provision made in the Chapter on Bestiality is related with animal. To say that the unnatural sexual intercourse committed against a minor should be looked under the Chapter on Bestiality is to dangerously dehumanize the minor mentally. To consider minors as animal in the context of the criminal act of unnatural sexual intercourse committed against the minor cannot be accepted from the legal provisions as well as human values standard and morality. Although the naming of the offense is similar, there may be different activities in the offense and based on the gravity of the acts the legislature can make the

provisions of different punishment. Likewise, the legislature can mention clearly the conditions that constituted the offense of unnatural sexual intercourse and provided different punishment based on difference in activities, medium and the gravity of the subject matter and prescribe different procedure to be followed in different cases. In this viewpoint, it cannot be maintained that the provision of No 4 of the Chapter on Bestiality be attracted in the condition of unnatural sexual intercourse under No. 9 Ka of the Chapter on Rape.

In the No. 9Ka of the Chapter on Rape the victim is mentioned as minor and which has not differentiated between male and female and the sexual intercourse with minor is clearly addressed as an offense of rape and therefore, the provision is included under the No. 1 of the Chapter on Rape. In the condition that the legislature has included the unnatural sexual intercourse committed against a minor within the definition of rape, it cannot be regarded as child abuse through interpretation. In the case of Unnatural Sexual Intercourse of Samir Shakya v. Government of Nepal consisting similar subject and facts it has been held that " The legislature has placed the sexual intercourse against minor in the category of crime grievous than that of rape adding the No. 9 Ka in the Chapter on Rape and provided an additional punishment to that provided in the No 3 of the Chapter on Rape and it has been included in the No. 9 Ka. Therefore, the No. 9 Ka has criminalized the act of unnatural sexual intercourse committed against minor and provided an additional punishment in the punishment prescribed in the No. 3 of the same Chapter." (Some Important Precedents Established by the Supreme Court, Part 5, P. 86). Hence the above principle has been established showing the correlation between the provision of 9 Ka and No. 3 and it has clearly directed toward it, thereafter, the punishment provided in the No. 3 can be imposed for the offense under No. 9 Ka.

From the appellant side it has been specially highlighted that the provision of No. 1 of the Chapter on Rape covers only the rape committed against women and the No. 9 Ka should be interpreted in

that light and the condition of 9 Ka does not fall under the purview of No. 1 of the same Chapter. Whereas, in the No. 9 Ka of the Chapter on Rape it is provided that if any person commits or causes to be committed sodomy (any kinds of unnatural sexual intercourse) with a minor, it shall be considered to be an offence of rape and a question may arise whether or not the provision falls under the No. 1 of the Chapter on Rape and should it be considered under it?

Generally the provision under the No. 1 of the Chapter on Rape signifies the rape sexual intercourse committed between man and woman. However, the provision of the said No. 9 Ka cannot be such. Even if the sexual intercourse is committed between man and woman and if there is the involvement of a minor or in the situation of unnatural intercourse in which the sexual intercourse between man and woman is not understood, it cannot be said that the provision of No. 9 Ka cannot be attracted. In this section the element of minor is the central subject. Minors whether male or female are in the condition that they cannot protect their life, body and dignity and with the objective of protecting them from sexual abuse, the provision of No. 9 Ka has been made. If an accused commits a unnatural sexual intercourse with female child or a male child, the act is prohibited by the provision of No. 9 Ka. The learned advocate of the appellant have pleaded that the act falls under rape if there is precondition under No. 1 of the Chapter on Rape, such interpretation cannot be accepted.

In the No. 1 of the Chapter on Rape there is general definition of rape. However, the No. 9 Ka of the same Chapter taking into account of the limitation of the definition made by the No. 1, condemning the unnatural intercourse with a minor, extending the definition given by No. 1 has made a provision to consider the unnatural intercourse with a minor as a rape. It should be classified as a statutory rape. There is no reason that the legislature cannot update the definition of rape by revising the definition made in the No. 1 of the Chapter on Rape. If the legislature intends to include the unnatural sexual intercourse with a child under the concept of rape

and makes a clear provision in law, unnecessary conceptual cannot be imposed from outside over it. The law has been made for the protection of children and controlling the criminal activities, the provision cannot be interpreted to defeat that intention going against the Mischief rule of interpretation. The matter to be understood is that the No. 9 Ka cannot be considered as secondary law considering the No. 1 of the Chapter on Rape as a fundamental law. The No. 9 Ka is also equally independent and effective provision like that of No. 1, the view that the No. 9 Ka should be taken within the limitation of No. 1 cannot be lawful. If it is so construed the application of the No. 9 Ka comes to an end. If the legislature has made different provision in different sections of laws it is the duty of court to take these different provisions differently and therefore, the court cannot accept the argument made by the learned advocate. There is no ground to hold the provision made by the criminal law of the nation to be against the principles of international law.

The second question to be decided is whether or not the offense committed by the defendant Molhuysen Hendrik Otto against the informant has been proved? In this regard going through the FIR lodged by the victim Ka and Kha it is stated that while residing at 'Our Life Protection Child Care Home' located at Galkopakha the defendant Molhuysen Hendrik Otto asked them to take out the clothes and played their penis with his hand and mouth, administering different types of medicinal pest in their urinating organ (penis) and committed rape. The victims have been taking shelter in that child care house and the appellant defendant is the director of that care house. Although the defendant has pleaded that he had not committed any act as mentioned in the First Information Report, the victim informants have stated in the testimony that the appellant had committed rape against them for 10/12 times in the anus, asked to suckle his penis with mouth, he used to bring to visit to different places and to hotels for eating and bought new clothes if they did as he asked. From the testimonies of the witnesses examined in the court as Shiva Nyaupane, Anil Sapkota, Parsuram

Panta, Anil Ghimire, Tsring Sherpa, Sanu Kanchha Lama, Ashis Adhikari and Govinda Makaju it is stated that the appellant had done the behavior like that done with the informants and therefore they have stated that he must have done the behavior as mentioned in the FIR revealing the characteristic nature of the defendant.

Thus the children victimized from the defendant's act have mentioned about the atrocity committed against them and the persons examined have also stated that such type of behavior had been committed agaist them too. Since it has been proved that the appellant has committed unnatural sexual intercourse against the children held under its own custody by calling them in his own room making them sleep with him, there is no meaning to search for an eye witness and the plea of the appellant that there is no presence of an eye witness is not admissible. Likewise, Bala Giri working in that Child Care Centre has stated in her testimony in the court that when she inquired the children as the appellant had asked to expel the informant children and also asked to take out the new clothes bought by him, she heard from the mouth of Kha that that the defendant had raped (unnatural sexual intercourse) and he asked them to leave the hostel when they did not agree to do so on that day. Therefore, the fact that the appellant defendant had committed unnatural sexual intercourse against the children living under his custody by using different types of allurements has been corroborated.

The fact that the defendant has the habit of committing unnatural sexual intercourse has been corroborated form the testimony of the victims and the witnesses, the email correspondence made by the Interpol Madrid to Interpol Kathmandu (enclosed with the letter of Police Headquarter, Crime Investigation Division, Naxal dated 2063/12/6) dated March 12, 2007 informing that the Provincial High Court of Alicante has imposed 6 years jail term in the case of child abuse and rape. Interpol is the international organization of Police and Nepal being a member of that organization, therefore, it cannot be said that Nepal police cannot take the help from that organization

in the context of crime investigation. Although the recorded information sent by the Interpol through speedy medium cannot be sole ground for proving or rebutting the fact in issue, it can help for understanding the past character and habit of the defendant. The fact that the defendant has committed unnatural sexual intercourse against victim children has shown the evil character of the defendant and the information received from the Interpol has proved that the defendant has the past character of committing unnatural sexual intercourse or sexual abuse against the children. In the condition that the defendant has not been able to present a concrete evidence to corroborate his plea of not being guilty, it cannot be held that the defendant has not committed unnatural sexual intercourse against the victim informants.

To consider about the last question regarding to whether or not the judgment of the Court of Appeal Patan that convicted the defendant just, it has been already discussed in the analysis made while considering the first question that the offense charged against the defendant and the legal provision invoked are interrelated and the punishment invoked in the charge sheet. Likewise, the fact that the appellant has committed unnatural sexual intercourse against the informants has also been obvious from the analysis made over the second question. In the letter of the Faculty of Medical Sciences, Maharajganj Campus, Department of Forensic Medicine, dated 2063/10/10 it is written that the age of informant Kha is between 12 to 14 years and most probably is running in 13 years and the age of informant Ka is between 13 to 15 and most probably running in 14 years. The testimony of Dr. Harihar Wasti who conducted the examination of the age of the victims also shows the same age of the victim and therefore, it has been established that the victims are minors. The appellant defendant is a foreigner working as the director of the Child Care Centre named 'Our Lives' (Hamro Jeevan). From the case file it has been proved that the appellant defendant has committed the heinous, immoral and hateful crime of unnatural sexual intercourse against the orphan and helpless victim children

who are staying under his guardianship causing them to sleep with him by using allurement or coercion. If it is proved from the case file that such a hateful crime has been committed against the children taking shelter in the organization established for the protection and welfare of the children from the responsible person within such institution, the court cannot depart from the path of justice whatever logic the appellant rises to cover such act or keep away him from the offense. Since it has been undoubtedly proved that the appellant defendant has committed the offense as per the charge, the judgment of the Court of Appeal, which convicted the appellant for the offense under No. 9 Ka of the Chapter on Rape and imposed the punishment under No 3(2) and the additional punishment pursuant to No. 9 Ka cannot be held otherwise.

Thus, as discussed above the judgment of the Court of Appeal, Patan dated 2067/6/12 which sustained the decision of the District Court of Kathmandu dated 2065/12/25 that convicted the appellant defendant Molhuysen Hendrik for the offense under No. 9 Ka of the Chapter on Rape and imposed the punishment with the imprisonment for 8 years pursuant to No 3(2) of the Chapter on Rape and additional punishment of imprisonment for one year pursuant to No. 9 Ka of the same chapter and provide Rs. 25000/ to the victim informants as compensation is just and herby has been sustained. The plea of the appellant cannot be sustained. The record of the case shall be deducted from the case registration book and the notification of the judgment shall be provided to the appellant through the Prison Section. Let the case file be handed over as per the rule.

I concur with the above decision.

Justice Gyanendra Bahadur Karki

Done at this day of 27th Asar 2069 BS (11 July, 2012)

Translated by Rewati Raj Thipathi

The education should not be viewed in commercial term because it is one of the fundamental rights of the citizen. The state is liable to impart free of cost education at least up to secondary level.

Supreme Court, Division Bench

Hon'ble Justice Tahir Ali Ansari

Hon'ble Justice Baidhya Nath Upadhyaya

Writ No.: 067-WO-0990

Subject: Certiorari, Mandamus.

Petitioners: Advocate Srikrishna Subedi, a permanent resident of Bijuwawar VDC, Ward No. 7, Pyuthan district currently the Executive Director, INHURED International, with its office in Lalitpur and others

Vs

Respondent: Government of Nepal, Office of the Prime Minister and others

- **The petitioners are found to have shown their ultimate interest and concern for the unhindered enforcement of constitutional and legal rights pertaining to right of education of Nepalese citizen. The petitioners themselves are the legal practitioners and are found involved also in various social organizations. Their concerns and interests to preserve the fundamental right of Nepalese citizens relating to education can not be termed otherwise.**

- **While reflecting upon the writ of certiorari, this court issues the order of certiorari exercising extra ordinary jurisdiction in a situation when any office bearer of the government or any government agency entrusted the responsibility reached a decision in the lack of scope of authority or in the lack of jurisdiction, or the decision is illegal and injures the legal right and interest of any person, the writ of certiorari is issued by this court exercising extra ordinary jurisdiction to correct that errors and enforce the legal right dismissing the erroneous decision in a situation where there is no other way of remedy available or the available alternative is not effective.**

- **We can easily estimate that the education is going beyond the reach of the people when observed closely the way of operation of many primary and secondary level schools run in the private sector. The government agency accountable under Education Act, 2028 and the Education Rules, 2059 either not willing to discharge its duty effectively or have been incompetent to do so. It is being realized that the monitoring as well as the act of general control and guidance have been much feeble day after day. Keeping in view this circumstance it has been felt a constant need to bring about an immediate change and taken instrumental steps for timely reform. Taking into account this crucial situation a directive order is hereby issued in the name of Government of Nepal, Office of the Prime Minister and the Council of Ministers and to the Ministry of Education.**

Decision

Tahir Ali Ansari, J: The summary of this case instituted in this court under extra-ordinary jurisdiction in pursuant to Articles 32 and 107

(2) of the Interim Constitution of Nepal, 2063 and the content of the order made in this regard is as follows:

We, the petitioners are working for the safeguard of human rights, equality and the rights and interests of the citizens of the marginalized group or section of people. In addition to this, we have been advocating also on other issues of the public interests. With the commencement of the new academic calendar almost all the private schools throughout the country, in violation of education rules and regulations, are found to have sold books from the schools itself by exerting unnecessary pressure on the guardians and students to pay high cost for books including educational materials. The pages of the national daily news papers are covered with these facts and the T.V channels are broadcasting the similar news since the last week. Hence, we have Locus Standi to file a petition on this significant issue of public interests.

The respondents: private and boarding schools mentioned in No. 5 and 6 are collecting fees in violation of the rules and regulation and the government parameters in one hand are settling curriculum on their own without taking approval from the government on the other. They publish text books and fix prices on their accord without maintaining the quality standard prescribed by the government and pressurized the guardians and students to pay high cost. The price tag mentioned in the books last year are found covered by putting sticker and the new price tag placed over it and sold. The respondents No. 1, 2, 3 and 4 have made no efforts in the establishment of public schools in proportion of the population needing free of cost education as provided in the constitution, laws and rules rather have forced the people to surrender in private school. Nothing has been done for the welfare of the common people. The parents and students are being cheated day after day and have been prevented from enjoying their fundamental rights because of their economic backwardness.

The Interim Constitution of Nepal 2063, Education Act, 2028 and the Rules 2049 as well as Convention on Socio-economic and Cultural Rights, 1966 have all ensured the right of education to every citizen. Article 13 of the Interim Constitution of Nepal, 2063 has provided the right of equality whereas the Article 17 of the same has provided right of education and culture. Section 4 of the Education Act, 2028 reads "the school shall be operated in the manner as prescribed and Section 8 provides that the school is required to implement the curriculum and the text-books approved by the government". Rule 6 of the Education Rules, 2059 provides for the terms and condition to be abided by the school according to which the school is forbidden to apply extra-text books and reading materials without the approval of the Curriculum Development Center (CDC), nor teach or to have it taught such text books which contains material that weakens the nationality.

Rule 16 of the Education Rules, 2059 has provided the functions, duties and powers of the District Education Officer which includes carrying the inspection about whether or not the schools are operated as per Education rules and laws, and conduct supervision in matters relating to the promotion of quality standard or bring necessary reforms or about whether it is necessary for closure and forward action as necessary, for the promotion of quality standard, to bring necessary reforms or closure; assign the supervision team in school inspection and conduct field supervision to sure whether the supervisor has inspected the school collect opinion of the management committee and the teacher on matters relating to the curriculum and text books implemented in the school and report CDC and carry other necessary action in that relation. The Rule 31 provides that the school should teach the curriculum and text books approved by the government where as Rule 37 had a provision of punishment if the approved curriculum and text books are not found implemented or forced to buy text books. Under the provision of punishment:

1. In case any school is found not implemented approved curriculum and text book, the District Education Officer shall direct the concerned head master to implement such curriculum and text books.
2. No school shall force the student to buy text book from the school.
3. In case the head master found violated the order under sub-Rule (1) above, the District Education Officer shall punish such head master as law provides therefor.

Contrary to the above mentioned constitutional as well as statutory provisions, there has been created a situation of causing hindrance by the respondents on the enjoyment of the right of education enshrined in the constitution as the fundamental right, now therefore, it is requested to have an interim order issued in the name of respondents to stop without further delay the unlawful activities such as irregular and unconstitutional fee hike and sales of quality less text books, educational materials, cause hindrance in the enjoyment of the right of education provided fundamental right of an individual, provide free of cost quality education in public school as provided in the constitution and law, operate private school in the direct control and supervision of Nepal government, enact and enforce law for the control of excessive fee charged by the school and regulate the price of the text books. For this purpose, the private schools be categorized on the basis of their physical and academic status and determine the fee as prescribed by the government thereby creating an environment of enjoying the right of education available to every citizen. Now therefore, we the petitioners request to have an order of the writ of certiorari, mandamus or any other appropriate orders issued as required in the name of respondents No. 1 and 2 to create an environment conducive to the enjoyment of right of education.

This court orders requiring submission of written reply within 15 days of the receipt of this order save the time limit consumed for journey

inquiring why an order as sought by the petitioner should not be issued and table the case after the written response is received or the expiry of the time limit. Also, since the petition demands for an interim order, a date of hearing be fixed for 2068/1/15 to hold discussion on this matter and submit the case notifying the respondents about the same.

In this, an interim order is sought for an immediate stay of the act of teaching out of course text books and unlawful sales of the books and the collection of excessive fees from the students by the private schools.

The Education Act and the Rules thereunder has, besides teaching approved text books and other reference materials also provided for fees and deposits entitle to collect by the school as per Rules 146 and 147 of the Education Rules, 2059. In accordance with this all the school has legal right to collect fees determined in advance and liable to teach the approved reading materials accordingly. The schools, violating these norms if found collected fees from the students and taught text books in their own accord as well as make the students and guardians bound to buy books from the school itself are the acts prohibited by law.

Even though the questions raised in this writ petition may get finality at the moment of final disposal of the case, for now, any school collecting fees from students or guardians excessive to the predetermined fee rates or forced them to buy books from the school premises against the stated legal provision if not controlled at times there may arrive a situation where an unlawful act would get continuity and ended also the rationality and meaning of this writ petition.

Hence, until this writ petition is finally decided, this interim order is issued in pursuant to Rule 41 of the Supreme Court Rules, 2049 in the name of respondent Director General of the Department of Education and the respondent Ministry of Education directing them to bring about a provision for not collecting or to have it not collected

by others the fees from students and guardians more than what is prescribed by the authorized body and to teach or to have it taught by others the text books other than those approved by the authentic body and to force or have it forced by others to buy books from the school premises.

Also, this order shall equally take effect even in the case of the respondents the Office of the Prime Minister, Ministry of Education, CDC, PABSON, and N-PABSON, Nepal for implementing or have implemented by others the said order and provision and report this court within 7 days of each month about the monitoring provision and the report of the finding thereof after having had an effective monitoring system by the District Education Officer and the offices and the bodies working under them, until this petition is finally disposed off. This court orders as such in 2068/1/15 so as to sent this notice to the respondents.

The Office of Prime Minister and the Council of Ministers had a mention in its written response that for the purpose of sub-Article (3)(f) of Article 12 of the Interim Constitution of Nepal, 2063 there is no restriction on the establishment of any private school. The private schools established as above are required to be complied with the provision mentioned in the Interim Constitution of Nepal, Education Act, 2028 and the Education Rules, 2059. If any person or school commits any action against what is stated above, such person or school shall be taken action by the authorized officer or agency under Education Act, 2028 or the Rules 2059 in a manner and procedure as prescribed by law. The government of Nepal would like to express its commitment to this court on this fact. In this writ petition, the respondent has been unable to state the name of any particular school that has violated the law. So, it will be unjustifiable to punish all the schools at random. So far as concerned with the claim that there should be a uniform law to be applied equally to all the schools, there is no need of a separate law pertaining to the operation and management of the private schools in a situation where the Education Act and the Rules are the laws to govern also

the private schools. Therefore, the writ petition should be dismissed on the grounds and reasons mentioned above.

The written response of CDC states that this office is performing the functions stated in Rules 31, 33(h) and 34 of Chapter 7 of the education Rules (with amendment) as claimed in the petition, and it is the morale of this office to carry the order of the government, its rules and order if any, now therefore, any action performed by this office could not infringe legal and constitution rights of the petitioner. So the writ petition should be quashed.

The Department of Education in its written response had a mention that since the major issues raised by the petitioners in writ petition instituted in this court against the Department, the issues relating to teaching materials and the text books is provided in Section 8 of the Education Act, 2028 as well as the Chapter 9 of the Education Rules (with amendment), 2059 and in respect to classification schools as well as Chapter 24 and 25 of Education Rules. For the academic year 2068, this Department has issued a directive to monitor the fee status and implement as stated in monitoring report through the letters of various dates and a directive was issued in regard to fees, student enrollments and was notified also through a public notice published in Gorkhapatra. Similar directive was issued in the name of the concerned Regional Education Directorates to implement the decision of Fee Management and the Central Monitoring Committee held in 2067/11/02. The Department further states that since the community school is not allowed to collect fees up to class 8 with the objective of imparting free of cost basic education and has exempted the fee up to that grade as provided in Rule 147 of Chapter 25 of Education Rules (with amendment) 2059, the claim made in the petition by the petitioner is contrary to this fact and the prevailing law. So it is subject to dismissal.

PABSON works for the safeguard of the collective rights and welfare of the private boarding schools which also offers necessary opinion and advise to the government. Neither this organization prescribes

or collects fees, determine text books, imparts education accordingly nor it conducts the sales of books in the school. The District Education Officer who wass competent to take action against the wrong doers should have been made respondent. The writ petition which is filed against an unconcerned party like us is subject to be quashed on the face of it.

Rule 37(2) of the current Education Rules, 2059 does not impose any statutory restrictions on the sale of book from school in consultation without exerting pressure to none. No question is raised by the concerned agency or the guardians themselves. The writ petition which is unable to show and prove that this issue has involved the rights and interest of the public or the petitioners and has infringed their rights. So the writ petition should be quashed on the ground of locus standi. The principal as well as ultimate source for running the school is the fees to be collected from student. All the expenses including salary and allowances to the teachers, maintenance of school premises etc should be borne out by this source only. So the public and private schools must not be put into a single parameter. The Education Act and the Rules 2059 also has made distinction between these two entities about which the petitioner also has no objection.

Schedule 21 of Rule 145(1) of Education Rules, 2059 has categorized the schools in 4 groups from (A) to (D) on the basis mentioned above and has provided a Monitoring Committee on the basis of that classification in Rule 145. The main business of this committee is to classify the school and provide opinion to the ministry in regard to the fee entitle to collect by the school. The committee in order to conduct monitor about whether or not the school has implemented the prescribed fees has made the provision of a Monitoring Committee in each district as per Rule 145 a (1) (b) in the case of the institutionalized school and Rule 146 has provided for fee and deposit entitle to rise by the school. Since the fee monitoring committee consists of the guardian of the student, how could one believe that they may allow raising fee unlawfully.

According to the provision made in Rule 147 in relation to fee, generally, after the private school management committee, in consultation also with the executive committee of the teachers and guardians association, determines the maximum figure of the fee not exceeding the limit and submits to District Education Officer the proposed rate of fee entitle to collect from the students two months in advance of commencing the academic session under Rule 147 (3), the concerned District Education office shall approve such rate as provided in sub-Rule (4). This is the trend now in practice and no legal flaws have been encountered about it up to now. In such a situation if any private school raises fees exceeding the limit so fixed and violates the said legal provision this act shall be considered against Section 16 d (5) of the Education Act 2028, and the officer under such Rule (6) may fine up to Rs. 25 thousand to such school and order for the suspense of such activities. The petitioner found not adopted this alternative way of remedy available to him rather played an unnecessary game of satiating the intellectual curiosity and has made us respondent in a whim. The petitioner has no right to file any petition against this organization nor has his fundamental right been abridged. So, the writ petition should be dismissed.

Generally, the private schools uses teaching materials prescribed by CDC under Rule 34, however, the District Education Officer shall have the power to conduct inspection about whether or not the private schools have implemented the prescribed text books and curriculum. So, if any body is found not to have implemented the prescribed curriculum or text books, the District Education Officer under Rule 37, shall order the concerned headmaster to implement the prescribed syllabus. Where there is such a substantive as well as effective statutory provision, the petitioner did not adopt the path of alternative remedy so available but filed writ petition to this reverend court. It is nothing but to fabricate the things. Therefore, the writ petition should be dismissed.

N-PABSON is an umbrella organization of the institutionalized (corporate) schools. This institution has not done or committed any

act so as to infringe the fundamental right of the petitioners relating to education and culture guaranteed by Article 17 of the Interim Constitution, 2063.

All the corporate schools function within the limitation prescribed by the Education Act and the Rules. If any act found done or committed against the said laws and rules, there is statutory provision of punishment under sub-Section 2(e) of Section 17 of the Education (with amendment) Act, 2028. Rule 145 of Education (with amendment) Rules, 2059 deals with the classification of school, Rule 145 (a) provides for the classification of school and Fee Monitoring Committee, Rule 146 provides for fee and deposit entitled to collect by the school and Rule 147 provides for the fees. In Schedule 22 of Rule 147(2), there is a clear provision of methods and procedure of prescribing the fees by the corporate schools. The writ petitioners had to produce concrete evidence of conducting sale of books by the school, collecting expensive fees and has forced to buy teaching materials as well as state the names of the schools involved in such activities and had to file claim in the concerned agency about such irregularities by adopting the legal course of action. Despite these alternatives at hand the petitioners are found to have registered writ petition entering into the extra-ordinary jurisdiction of the Supreme Court being overwhelmed by the news printed in various newspapers and T.V channels. Now therefore, the writ petition should be dismissed. This is the version of N-PABSON, Nepal mentioned in its written response.

The Ministry of Education had a response that the school has the obligation of implementing the curriculum and text books approved by the government of Nepal as provided in Section 8 of the Education Act, 2028 and the Rules 31, 34, 35 and 36 of the Education Rules, 2059 further stress this fact. Rule 37 of the said Rules provides for punishment in case the approved text books were not applied. Similarly, Rule 145 of the said Rules provides for the classification of the schools whereas the Rule 147 has spoken of the fee to be collected. In accordance with this provision, the maximum

limit of the fee to be collected students from is found settled and the District Education Office is found taken action against the schools acting unlawfully, and if found violating the rules during inspection by a team deputed by DEO to check about whether or not the schools are implementing the prescribed curriculum and text books and sold books from the school and collected fees more than what is determined. All these facts are witnessed in the documents received from the District Education Office. In a situation where the provisions made in the law are being executed smoothly, there is no need of issuing a separate order. The writ petition should be vacated.

In this, the order made by this court in 2068/1/15 has prescribed also the procedure about how to implement the said order. According to the order, matters such as the collection of fees exceeding the prescribed limit, exerting pressure to buy books from schools, and teaching out of course books are prohibited. Besides this, the order suggests also about sending monthly progress report of all these things.

In this, the court while making the order in 2068/1/15 has determined also the procedure for its implementation. According to which, a monthly progress report in regard to the suspension of collecting fee exceeding the limit of the law, stopping to exert pressure for buying books from the school and not to use teaching materials other than those as prescribed has to furnish. As per the order the last such report sent by the Department of Education is found dated 2068/7/16. Though this report mentions about various actions taken in regard to collecting excessive fees etc, however, it is silent about the consequence of such steps. Similarly, no report is found submitted by both the PABSON and N-PABSON by monitoring the situation in course of implementing the interim order of this court dated 2068/1/15. Now therefore, they are directed to perform the following actions and report accordingly:

Notify to both the agencies in writhing for submission of updated report along with their opinion within 15 days about the mode of

collecting fees by the school till to 2068 Poush, whether or not they are collecting fees more than what the law prescribes and the names of such schools continued collection of fees and the actions taken in that relation and the consequence of such action.

Notify in writing to both the agencies requiring to sent the report within 15 days stating the appropriate reasons, if any, why they did not submit the report up to this period and the types and nature of the monitoring they carried in course of implementing the order of this court dated 2068/1/15 along with their opinion about whether or not the schools affiliated to these agencies have taken action as per the order of the same date.

This court orders in 2068/10/4 to table the file of the case after the report of the concerned body or the agencies is received within the date stated above.

The present writ petition which is duly submitted to this bench, the learned advocates appeared from the petitioner Mr. Sri Krishna Subedi, Mr. Bhimarjun Acharya, Mr. Raman Kumar Shrestha and the learned associate attorney general Mr. Krishnajibi Ghimire represented on behalf of the government, the learned advocates Mr. Parsu Ram Koirala and Surya K.C appeared from the PABSON and the learned advocate Mr. Khamba Bd. Khati represented on behalf of the N-PABSON put forth their opinions.

The learned advocates appeared on behalf of the petitioner in course of their advocacy expressed the views that the Article 17 of the Interim Constitution of Nepal, 2063 has provided the right of education as the fundamental right. The Education Act, 2028 and Education Rules, 2059 had a provision that the schools must implement the curriculum prescribed and approved by the Government of Nepal, not allowed to sell text books and teaching materials from school premises and shall collect only fee from students what the government has prescribed. Likewise, the said Act and Rules mention that the Ministry of Education and the Departments and offices thereunder are liable to conduct inspection

and monitoring about whether or not the school has implemented the approved curriculum and text books or forced to buy such text books to inflict punishment to such schools. Besides this, the Act and Rules also had the provision of regular monitoring about whether or not those schools have collected excessive fees and initiate action against them if they are found collected excessive fees. But the private schools are found indulged in collecting excessive education fees violating the Act and the Rules, conducting the sale of text books and reading materials in high price and forcing the students and guardians to buy those materials, teaching low grade text books and materials at their pleasure going beyond the quality standard set by the government and selling old books sticking new price tag of high price.

These activities of the private schools have directly encroached the fundamental right of acquiring affordable education by the ordinary people. The government agencies whose functions, duties and power was to supervise, monitor and take action against such activities found reckless and indifference towards the right of education of the people and has infringed the right. The right of education is accepted as the basic human right of education of the people is accepted also as the basic human right by the Universal Declaration of Human Rights various international instruments and the Interim Constitution of Nepal. But in Nepal it is made as the goods of merchandise and amassing the wealth and prevented the ordinary people from acquiring quality education. Now therefore, an order of writ of mandamus and other appropriate orders as may deem appropriate must be issued in order for fully implement the provisions contained in Education Act and Rules, and enact new laws if they are found inadequate to provide every citizen with affordable education.

The learned joint attorney general represented on behalf of the respondent government agencies argued that the Ministry of Education as well as the Department and the offices thereunder are anxious of the issues raised by the writ petitioners. The activities of

selling text books from schools have been stopped in accordance with the interim order of this court upon the request of the petitioner who claims it as an issue of public interest. There has been carrying regular monitoring and inspections about whether or not the schools are implementing the government approved curriculum and text books as well as collecting fees more than what was prescribed by the government. Some of the schools have been brought into books. However, the government agencies are not allowed to act going beyond the law and the concerned government agencies are fulfilling their respective duties and responsibilities prescribed in Education Act and the Rules. Now therefore, nothing exists so urgent as to issue order as demanded in the petition.

The learned counsels represented on behalf of the respondents PABSON and N-PABSON opined that these institutions are not the units to collect fees from the students. The petitioner has not named any school as respondent nor claimed over the District Education Office. The petition is silent about the school who collected fees more than what is prescribed. The school is entitled to collect fees as approved and determined on the basis of classification made in the Education Rules, 2059. If any school raises more than what is prescribed there is a provision of fine to such school. The schools who teach the text books scheduled in CDC and the Education Rules had a provision that they are at liberty to apply extra educational materials by obtaining approval. If there has been any act done contrary to law, the Education Act and Rules have made the clear provision of initiating necessary action through the concerned agency of the government, where there is an easy option of simple legal recourse, it would be unwise to enter into the writ jurisdiction waxing it as an issue of public interest. So the writ petition should be dismissed.

The present writ petition which is scheduled for today's hearing now therefore it is to finalize about whether or not an order as sought by the petitioner should be issued. The arguments put forth by the legal counselors represented by both the sides also heard.

While considering upon the decision to be reached in this case the petitioner is found made a claim that the private schools as provided in Education Act, 2028 and Education Rules 2055, were liable to implement only the curriculum and the text books prescribed and approved by the government of Nepal but instead they found to have determined the curriculum and teaching materials on their own without government permission and have exerted pressure to the students and guardians to buy books from the school compound in high price conducting sale of old books in new price by covering the old price tag with new sticker. The private schools have prevented the ordinary people to enjoy the right of education guaranteed by the constitution forcing them to pay expensive fee against Education Act and the Rules. The government agencies who were to control such activities are not taking any steps to stop these activity, now therefore a writ of mandamus or any other appropriate order be issued in the name of the respondents in order to create an environment of enjoying right of education to every citizen. For this, the private school be classified on the basis of their physical and educational status and the fee rate be fixed using definite parameter then bring about a system of collecting fee in the rate prescribed by the government. And, in the case of reading materials permit be given only to publish approved materials by fixing the price determined by the government.

While observing the provision of Section 8 of the Education Act, 2028 in regard to the curriculum and the text book to be taught by the private school it reads: "the schools shall implement the curriculum and the text books approved by the Government of Nepal." The definition part of Section 2 E provides- "school shall mean the community or the corporate school." Therefore, both the community and corporate schools as well as the private school run by Education Trust under Section 2 K and 2 L shall implement and teach the curriculum and text books approved by the government of Nepal, there is no room for dispute. Similarly, Rule 6 of Education Rules, 2059 provides that except what is stated in Education Act and the Rules about the terms and conditions to be abided by school, they are as follows:

(a) Only the curriculum and the text books that are approved by the government shall be implemented,
(b) No extra text books and teaching materials shall be utilized without the approval of CDC, and
(c) No text books which contain the teaching materials injuring the nationality shall be taught in school.

In Chapter 7 of the Education Rules 2059, there is an extensive provision in regard to the curriculum and text books essentially to be implemented by school. Section 31 of which requires the school to implement curriculum and the text-books approved by the government of Nepal. For that purpose in Rule 32 (1) there has been created a Curriculum Development Council to bring about a policy innovation in regard to the development and evaluation of the curriculum. Rule 34 requires CDC to prepare the text books to be taught in school and Rule 35 provides that the school which would like to teach extra-teaching materials or the text book shall apply in the District Education Office, and upon inquiry in such application if it is found appropriate to grant permission for teaching extra-teaching materials and the text-books and they are approved by CDC, the District Education officer may grant permission to utilize such extra teaching materials or the text books.

Likewise, Rule 36 provides that the Director and District Education office shall inspect and monitor about whether or not the school has implemented the approved curriculum or the text books as well as the reference materials. In Rule 37, under the punishment heading, there is a provision in sub-Rule(1) that if any school found not to have implemented the approved curriculum and text books or forced to buy text books, the District Education Officer may direct the headmaster of such school to implement approved curriculum and in sub Rule (2) it is provided that no school shall force the students to buy text books, in sub Rule (3) if the head master is found not to implemented the approved curriculum or the text books and in sub-

Rule (2) it is provided that no school shall force the students to buy text books, in sub-Rules (3) if the head master is found not to have implemented the approved curriculum or forced the students to buy books from the school against the direction made in sub-Rule (1) above, the District Education Officer shall punish the headmaster as provided in the Act. These are the statutory provisions in this regard.

While observing the provision made in the Education Rules, 2059 in respect to the fee entitled to collect by the school from students, in Rule 145 a (1) there is a provision to from in each district a school classification and fees monitoring committee to classify the school to tender opinion and suggestions to the ministry in respect to the fee entitled to collect by the school and to carry monitor about whether or not the school has implemented the prescribed fees. Similarly, in Rule 146 had a provision of fee and deposit entitled to charge by the school, Rule 147(1) provides for the individual fee system for community schools and schools run under company and the education trust, whereas in sub-Rule (2) the District Education Office, with consultation with the committee under Rule 145 a prescribe the maximum limit of fee entitled to determine by the school under category 'A' 'B' 'C' or 'D' within the district and publish notification 3 months prior to the commencement of the academic session, in sub-Rule (3) the schools shall on the basis of schedule 22 submit a proposed rate of fee to be collected from students for the coming academic session to the District Education Office two months prior to the commencement of academic session, in sub-Rule (4) the District Education Office after receiving the rate of fee under sub-Rule (3), shall scrutinize about whether or not the said fee is proposed as per schedule 22 and approve such rate, in sub-Rule (5) the school shall post in its notice board the rate of fee approved under sub-Rule (4) above. In the same manner, Rule 150 provides that the school shall post in its notice board the details of the rate of fee, time period and process for the knowledge of the students and the guardians, and Rule 15 a (1) provides for a central level fee management and monitoring mechanism in the coordination of

Director General in order to formulate policy in regard to the management of fees and scholarship of corporate schools, to improve the academic status of such schools and provide opinion and advise to the Ministry after conducting monitor of the prescribed fees.

The present writ petition which is filed claiming it as an issue of public interest giving in reference to the above mentioned statutory provisions and quoting various sources of international declarations, conventions and laws such as Universal Declaration of Human Rights 1948 and International Convention on Economic, Social as well as Cultural Rights (ICESCR) 1966, the petitioners are found to have shown their ultimate interest and concern for the unhindered enforcement of constitutional and legal rights pertaining to right of education of Nepalese citizen. The petitioners themselves are the legal practitioners and are found involved also in various social organizations. Their such concerns and interests to preserve the fundamental right of Nepalese citizens relating to education can not be termed otherwise. Nevertheless, they have fulfilled the duty of a conscious citizen. The present writ petition which is instituted pointing out the negative impact sustaining on the effective implementation of the statutory provisions on constitutional rights and the rights illustrated in Education Act and the Rules by explicitly mentioning the practical hurdles, commercialization and the government complacency in the enforcement of the right to education attached with all the Nepalese citizen. There are mainly two types of claims made in this writ petition:

1. Uncontrolled fee hike and unsystematic sale and distribution of text books and the educational materials from the school premises causing hindrance in the exercise of constitutional and legal rights of education must be stopped by issuing an interim order in the name of respondents.
2. The gradation of school should be made on the basis of physical and educational standard of the private schools. They are required to collect fee as prescribed by the government of Nepal and publish reading materials approved by law and create an environment of sale and distribution of these materials in the prescribed price, therefore a writ of certiorari, mandamus or any other orders as may deem appropriate must be issued in the name of the office of the Prime Minister and Council of Ministers to do as above.

While looking into the plea made by the petitioners, it is found to have issued an interim order in the name of respondents Director General of the Department of Education and Ministry of Education by this court in 2068/1/15 to make statutory arrangement by forbidding the collection of fees exceeding the fee predetermined by the authentic body in accordance with legal process in practice and not to teach books and reference materials by the schools other than those previously approved by the authentic body so concerned and not to force the students and the guardians to buy books from within school premises.

In course of the said order and its monitoring this court is found issued an order in 2068/10/4 has been addressed the petitioner's first demand of issuing interim order in the name of all the respondents. While noticing the letters sent by the respondents Department of Education in 2068/3/6 and 2068/11/16 the content mentioned in them has revealed the fact that a number of private schools were monitored and some of the schools collecting fees more than what is prescribed were also taken actions. In spite of this, the act of selling and distributing text books and reading materials from school premises has also been found suspended as per the order. Even the petitioner has confessed this fact during the hearing. Now therefore, this bench has no need to bother upon this fact and hold further discussion other than continuing the monitor from the concerned agency in the days to come.

While pondering upon the second demand of the petitioners they are requesting for the orders of certiorari, mandamus and any other appropriate orders to be issued. Now first of all, while reflecting upon the writ of certiorari, this court issues the order of certiorari exercising extra ordinary jurisdiction in a situation when any office bearer or the government or any government agency entrusted the responsibility has reached a decision in the lack of scope of authority or in the lack of jurisdiction, or the decision is illegal and injures the legal right and interest of any person, the writ of certiorari is issued by this court exercising extra ordinary jurisdiction to correct that errors and enforce the legal right dismissing the erroneous decision in a situation where there is no other way of remedy available or the available alternative is not effective. The writ of certiorari is issued also in a situation when a decision affects the rights and interest of the entire populace or of a large community of people or the mass of people or the people of any group class or region or the community to correct such wrong act by way of addressing the issue of public concern for the settlement of such a disputed issue.

While looking in relevance to this petition, it does not clearly specify the fact that which of the decision of which respondent made in which date is sought to declare void by the order of the writ of certiorari. Nowhere throughout the petition is it found stated that among the respondents such and such respondent has made such decision and has affected the rights and interest of the petitioners or of the entire Nepali people by that decision. There is no dispute that international law and the Interim Constitution of Nepal has provided the rights of education to all. In this context, it is certain that this petition has drawn the attention of this court towards the fact that in Nepal there has been lacking the effective implementation of the Education Act and the Rules for the enforcement of the education related rights of the people and no effective action proceeding is being initiated also from the government level for the enjoyment of right of education. So is the case, however, the petitioners in their petition are looked shy in pointing out any government agency or any particular authority because of which the right and interest of

these petitioners or of Nepalese people or of any particular community, class or region of Nepali people has hampered. This shows that the petitioners would like only to bring forth in public discourse the issue of poor implementation of education rights and the laws and rules relating to the rights of education.

In this writ petition petitioner advocate Sri Krishna Subedi in his written brief presented in this court has quoted some excerpts of Universal Declaration of Human Rights, 1948 and ICESCR 1966 on education right. In addition to this, citation of some decisions of this court made in respect to PIL as well as the decisions of Indian Supreme Court in the writ petition and written brief note also.

However, the writ petition is silent over the most central and fundamental elements needed for the issuance of writ of certiorari as to declare such and such decision made by such person void. The writ petition is found thus motivated only to hold theoretical, intellectual or policy-based discourse relating to public right and interest rather than concentrated in reaping concrete and substantial legal remedy since the claim made in the petition lacks concrete demand for the invalidation of such and such decision, now therefore, the order of the writ of certiorari can not be issued.

Likewise, the petition has not explained explicitly also the reasons and grounds for the issuance of a writ of mandamus. No order is sought in the petition to be issued in the name of the respondents the Department of Education, CDC, PABSON and N-PABSON. Those respondents against whom no order is demanded to be issued therefore no situation exists to issue any order either permanent or of a special nature going beyond the claim. The focal point of the petition is that the said agencies are involved in the act of not properly implementing the Education Act and the Rules too. But the order is found demanded to issue only in the name of Government of Nepal, Office of Prime Minister, the Council of Ministers and the Ministry of Education is clear. Now therefore, no order either of mandamus or any other orders are required to be issued in the names of other respondents except the aforementioned two agencies.

Now considering upon the question about whether or not an order of mandamus should be issued in the names of those two agencies as sought in the petition is not pointed out in the petition that what such an act forbidden by law has committed by the Office of the Prime Minister and the Council of Ministers and Education Ministry, or not in performing any act which they were liable to perform under law. In like manner, the nature of mandamus likely to be issued in their names also has not clearly stated in the writ petition. In the absence of the claim over particular matter, there exists no situation of issuing order of mandamus as demanded in the name of those agencies.

Notwithstanding the demand made for anything through this writ petition, the essence of present writ petition has some kind of interrelationship with some serious questions over the current educational system of Nepal prevalent in the primary level to the secondary level. Since there exists some serious hurdles in the enforcement of educational right upon which the attention of all the stakeholders is drawn, no situation subsists also to this court to remain as aloof or unseen towards it. There is a paramount need of regularization and systematization of things such as operation, management, text books and teaching materials to be taught over there, admission process, determination of fee as well as the charges to be raised from students and such other matters concerned with the community schools and corporate schools and the increasing numbers of schools registered and operated in capacity of a trust or company. The community and corporate schools run under government expenditure also have been the subjects of extensive criticism from different angles that they are not operating satisfactorily. A large number of private schools are collecting various types of charges other than the admission fee and monthly fees by which there has been created a serious problem to materialize in real term the right of education guaranteed by Articles 17(1) and 17(2), right of occupation or employment provided by Article 13, right of employment and social security provided by Article 18 and the right against exploitation provided by Article 29 (1). It is being experienced in all the sections and strata of society. Admission in some of the schools requires to pay special amount or

in the name of entrance exam they call for larger participation and charge huge or uncontrolled cost of admission form and enroll only a few of the competitors. They, besides monthly fee, ask deposit amount, library fee, lab fee, building maintenance fee, extra curriculum fee, educational visit fee, exam fee, sports fee, entertainment fee etc. It is known to all through various sources of means of communication printing and broadcasting time to time that many students and almost all the guardians have been really victimized and exploited and even roused public anger. No effective monitoring and checking have been done or carried out by the concerned agency complying with the Education Act and the Rules.

Apart from this, it has been a matter of serious concern that many private schools have been teaching curriculum as well as the reading materials without obtaining prior approval from the concerned agency. If such a trend is not controlled where there is still some time, it may create a serious problem in the nationalist spirit and even on the nationality. The education has been commercialized to the extent that many of the schools make the sales of student dress and the text books and reading materials on their own price. No fee should have been charged in the enrollment in the upper class after passing the exam but found denied and taken admission fee together with the increase in monthly fee every year. This fact has been revealed from the written reply because they are lamented that now it is stopped and also through the monitoring of the interim order issued by this court. Now we can easily estimate that the education is going beyond the reach of the people when observed closely the way of operation of many primary and secondary level schools run the private sector. The government agency accountable under Education Act 2028 and the Education Rules, 2059 either not willing to discharge its duty effectively or have been incompetent to do so. It is being realized that the monitoring as well as the task of general control and guidance have been much feeble day after day. Keeping in view this circumstance it has been felt a constant need to bring about an immediate change and taken instrumental steps taken for timely reforms. Taking into account this crucial situation a directive order is hereby issued in the name of

Government of Nepal, Office of the Prime Minister and the Council of Ministers and to the Ministry of Education to do or have it done by other as follows:

1. Conduct strict observation by the concerned agency on whether or not there has been established the proper and adequate infrastructures to run the school prior to granting approval for the operation of private school in accordance with Section 3 of the Education Act, 2028.
2. Carry out intensive and strict monitoring and inspection regularly by the District Education Office on the abundancy of the physical facilities and the standard of teachings.
3. Ensure that no fees shall be collected in any class up to secondary level by any school either private or institutional.
4. Make or cause any arrangements for not including the applicant students in entrance exam more than double of the number of seats available in the school taking such exams.
5. Ensure the matter that no fees shall be charged without obtaining prior approval from the concerned agency and no fees once settled shall be allowed to increase for 3 consecutive years and also ensure that no permission shall be granted for such an increase.
6. Impose ban on teaching unauthorized text books and reading materials other than main text books, reference or alternative text books and reading materials, and no school shall be allowed to include any other books or reading materials except what is approved in its curriculum.
7. Prohibit on the sale of school dress, text books, reading materials conducting sales counter (stalls) by any community schools, institutional or private schools.
8. Adopt monitoring system to be conducted under Education Act, 2028 by the Department of Education, Regional Education Directorate and District Education Office and initiate or have

initiated by others the effective actions proceedings against the schools not complying with the directions issued by those agencies.

9. Classify the schools in view the physical infrastructures in 5 (five) categories as A, B, C, D and E and determine the minimum and maximum rate of fee on that basis.
10. Enforce effectively the provisions contained in Rules 6, 7, 16, 31, 32, 34, 35, 36 and 37, and the provisions contained in Section 16 d of Education Act as well as in Rules 145 a , 146, 147, and 150 a pertaining to the fee.
11. Effect required amendments or innovations in Educational Rules in order for strictly executing this direction by making overall monitoring system contained in education act and the rules effective.

Provide the information of this order to the respondents the Government of Nepal, Office of the Prime Minister and the Council of Ministers and the Education Ministry through the Office of Attorney General as well as deliver a copy of this order to the Monitoring and Inspection Division of this court to monitor whether or not the said direction is implemented and then handed over the file of the case as per rule removing the writ petition from the regular inventory.
I concur with the above decision.

J. Baidhya Nath Upadhyaya

Done on this day of 10th Jestha 2069 BS (23rd May, 2012)
Translated by Bhim Nath Ghimire

No government agency shall have absolute power to cause interruption in the mobilization of the private property of a company or a person without the authority of law.

Supreme Court, Division Bench
Hon'ble Justice Tahir Ali Ansari
Hon'ble Justice Dr. Bharat Bahadur Karki
Writ No. 2067-wo-0472

Subject: Certiorari Plus Mandamus.

Petitioner: The Chief Executive officer Ratna Raj Bajracharya authorized on behalf of Nepal Credit and Commerce Bank Ltd.

Vs

Respondent: Commission for the Investigation of Abuse of Authority

- **In case the land once acquired is used as per the objective of the acquisition no earlier owner of that land shall have right to retain it again. It could not be the intention and objective of Section 33 and 34 of Land Acquisition Act 2034 that such a land should forever be used always in the same purpose and utility for which it was acquired.**
- **Section 34 of the land Acquisition Act, 2034 has not granted the earlier owner any rights either conditional or contingent over such land for an indefinite period of time, even after the acquisition. It could not be the intention of the Act that the land once acquired should be retained again to the earlier owner even if any obstacles come to pass or did not served its original**

purpose no matter how many years or decades there may have passed.

- **Since the petitioner is a private company, no property of such a company shall be appropriate to put in freeze by applying Section 39(3) of Corruption Control Act. No property of a person can be put in freeze in the investigation of any other person, without following the due process of law.**

Decision

Tahir Ali Ansari, J : The summary of the fact and the decision reached in this writ petition fallen under the extraordinary jurisdiction of this court in pursuant to Articles 32 and 107 (2) of the Interim constitution of Nepal, 2063 is as follows:

The petitioner bank is an institution established under current law and operated subject to Bank and Financial Institution Act, 2063 as well as Company Act, 2063. Since it was incorporated to conduct banking transactions, its activities covers collection of deposits and flow loans and carry such other activities. In that course of transactions, Hari Siddhi Brick and Tile Factory Ltd. requests to this institution for loan. This bank has floated loan finding it appropriate in view the Project going to be launched by the loan and the land proposed for collateral against the loan. Then this bank, through a registered deed has accepted as security 205-2-00 land in ropanies owned in the name of the factory. It did not pay back the debt on time; this bank has published a public auction notice in Gorkhapatra daily in 2066/2/30 to auction in bid 120-15-1-0 ropanies of land out of the land given in collateral. No one comes to accept the bid then the bank itself accepted and owned the land in accordance with Section 57 of the Bank and Financial Institution Act, 2063. The remaining portion of the land is still in collateral. Since the bank needs cash money to conduct transaction as per its purpose, it wanted to sale the said land owned in the bank's name. Hari Siddhi Medical Residence Pvt. Ltd. expressed its interest to buy the land and the price was negotiated between the bank and that residence. An agreement was reached between us in 2066/6/9 in regard to title

transfer of that land according to which the company buying the land would pay the price to the bank in four lots and the transfer of the title would be made on the basis of the amount paid to the bank. As agreed in the understanding, the buyer company had deposited a sum of rupees 13,84,4500/- for 25-2-3-0 ropanies land in the first lot and requested to this bank to transfer the title in the name of Bagmati Modern Housing Pvt. Ltd. It was 23rd Aswin, 2066, the bank after having taken the signature of the executants and the attestation of the witnesses in the instrument was reached in the field accompanying a team of employees deputed from the Land Tax Office.

After completing the verification of the deed as it was forwarded for registration to the respondent office, it denied to execute the instrument and endorsed the seal of rejection reasoning that this instrument, which is presented here in this office for execution has lapsed the time limitation as provided in Section 4 of the Chapter on Registration of Country Code (Muluki Ain) 2020 which lacks also a letter of recommendation from the local authority about the existence of any construction either building or road to ascertain the minimum price nor any evidence in regard to ceiling has been enclosed. A letter received from the Commission on the Investigation of Abuse of Authority (CIAA) dated 2067/2/16 stated a matter that the land now occupying by the brick and tile factory has been frozen. So this instrument is not found matured and therefore rejected in accordance with No. 27 of the Chapter on Court's Procedure of the Country Code, 2020. The bank approached to the Commission for the release of the land with a letter dated 2067/5/10 and requested many times thereafter, but the commission has not responded to till date. Though the commission has no right to take any decision has not provided also the copy of its any decision in this respect. A letter addressed to the respondent Land Tax Office in 2067/2/12 has stated that "while the particular of an application made to this office by the pressure and struggle committee formed for the resumption of Hari Siddhi Brick and Tile Factory submitted, the land apportioned for the operation of the said factory has been frozen until the Commission takes another decision. It is requested through a letter

to do as the decision." The bank has received such a letter from the Land Tax Office. The decision of the respondents and their activities has infringed the petitioner's legal right provided by Section 7 of the Company Act 2063, and Section 8 of the Land Tax Act 2034 as well as the constitutional rights provided by the Articles 13, 19 and 107 (2) of the Interim Constitution of Nepal, 2063 and where there is no other effective alternative remedy available for the protection and enforcement of the infringed rights, the petitioner has come to this court to have its extraordinary power exercised in pursuant to Articles 32 and 107 (2) of the Interim Constitution of Nepal, 2063.

After the instrument is signed by the executants and testified by the witness in the field it is kept in the custody of the respondent Land Tax Office. The instrument never accessed to the executants. Naturally, such an instruments belongs to the office concerned, we the executants made requests for the execution it is denied to do so showing various reasons and finally rejected on the ground of limitation under duress malevolently which is contrary to No. 4 and 12 of the Chapter on Registration, No.11 of the same stresses on the execution of such nature of instrument without delay but denied it showing various reasons. Hari Siddhi VDC deliberately denied issuing a letter of recommendation which this bank finally acquired from the Ministry of Local Development in 2066/9/19 and submitted immediately to the respondent office but the respondent office prejudicially ignores its possession. The land owned by the debtor factory is lawfully registered in its name which was accepted as collateral by this bank. There is no dispute of ceiling while transferring in the name of the bank through auction but after coming in the name of bank why there is a question of ceiling? Therefore the execution rejection order is arbitrary and malevolent.

The Land Tax Office which maintains the records of the land knows all about my established ownership. The petitioner bank secures the right of sale and transfer of land of its lawful ownership. The debtor company has executed several deeds of title transfer to the bank. The land which was secured in the name of bank through auction can not be suspended by any agency nor is the order of rejection

lawful. Though Section 8 B of Land Tax Act, 2034 provides in regard to put the land in freeze, however, it can not be exercised absolutely. It depends upon the relativity of the case in question. The rejection order made without any substantial ground is arbitrary and unreasonable. Section 7 of the Company Act, 2063 has entrusted the bank the right to manage its asset through sale or dispose of any kind. Section 57 of the Financial Institution Act, 2063 has given authority to the bank to recover its principal and interest through auction or any other means. The execution rejection order against the established right is archaic and self-centered.

The bank was incorporated for conducting financial transactions. It needs cash amounts for its various activities. The cash collected through deposits from the people helps to float the loan. If the land acquired through lawful means were suspended, it affects not only the right of the depositors but also of the bank. So such orders are unlawful and subject to void.

The respondent Commission can exercise the jurisdiction provided by the law and constitution. Assuming itself as a constitutional body having excessive right, its letter to the land tax office for freezing my land is erroneous and voidable. Its right originates from the Abuse of Authority Investigation Act, 2048 and can not initiate case under Corruption Control Act. The bank has announced sale and dispose through auction and accepted by the bank itself to recover its principal and interest. Such an act does not fall under the domain of CIAA Act, 2048 its forceful attempts are cool and reserved. Hence, the decisions and letters of the respondents are contrary to the constitutional and legal provisions claimed by the petitioner. Therefore the decision dated 2067/2/12 and the letter created on that basis, the order of freeze and execution rejection order made by the Land Tax Office in 2067/4/4 and all other activities done and committed by the respondents should be invalidated by an order of the writ of Certiorari along with the writ of Mandamus to release the land and execute the instruments by issuing other necessary orders as it may deem appropriate.

Why an order as demanded by the petitioner should not be issued. Let the respondents be notified to respond in writing through the office of the Attorney General within 15 days from the date of receiving this order save the time limit to be consumed for journey and table the case after the written response is submitted or expiry of the time limit.

The written reply of the respondent CIAA and its secretary had a mention in their similar version that in course of investigation upon a complaint filed to this commission alleging that Hari Siddhi Brick and Tile Factory Ltd. has committed irregularities, this office writes to the Land Tax Office Lalitpur as per the decision of this office dated 2067/2/12 to freeze the land occupied by the factory until it is decided otherwise. The land occupied by the factory has been put in freeze in course of an investigation and it is still continue. Since there is no possibility of issuing an order of writ, it is subject to cancellation.

Though the petitioner would like to sell the plots of land it has reclaimed and submitted the instrument for execution and also completed the verification procedure, however, could not produce the recommendation of the local VDC nor any letter relating to land ceiling. Apart from this, the instrument which is tested and verified in the field should have been submitted to this office for execution within 6 months under Section 4 of the Chapter on Registration of the Country Code, 2020 which the petitioner failed to accomplish. Before they could appear legally, the CIAA writes this office through a letter (dated 2067/2/12, dispatch No. 1646 Letter No. 1 relating to land 068/066/067) to put in freeze the land until the fresh order is made to this concern. Therefore, the said instrument which is proposed for execution lacks the above criterions and 6 months was already passed in that course, the rejection order issued by this office is lawful and the writ petition should be vacated. These are the contents of the written reply submitted by the Land Tax Office, Lalitpur.

In this writ petition which is duly tabled to this bench for judgment, the learned senior advocates Sarbangya Ratna Tuladhar, Krishna

Prasad Bhandari and Harihar Dahal and the advocates Krishna Prasad Sapkota, Megha Raj Pokhrel, Tulasi Bhatta and Bednath Pahadi represented from the CIAA put forth their respected opinion. Besides this, Mr. Ram Mukunda Maharjan involved in this case and summoned in accordance with Rule 42(2) of the Supreme Court Rules 2049 had their representation in pleading through the learned advocates Ambika Prasad Koirala, Borna Bahadur Karki and Vishwaprakash Bhandari.

The learned senior advocates and the advocates appeared on behalf of the petitioner argued in course of their advocacy that Hari Siddhi Brick and Tile Factory was given in collateral its fair and undisputed land to the bank as security. Since the factory could not pay back the loan, the bank had no alternative other than putting it up in auction whereby the bank had compulsion to sell it and like to handover it to Bagmati Modern Housing as per an agreement and the instrument had fulfilled the necessary formalities for execution. But the Land Tax Office, showing various obstacles, decided to repudiate the instrument merely on the ground that the CIAA wrote for the suspension of the land. So the rejection order is unlawful.

Section 7 of the Company Act, 2063 has protected the right of the bank to sell, dispose of and acquire wealth whereas Section 57 of the Bank provide in regard to recover its principal and interest through the auction of the surety given against its loan, the petitioner bank has already furnished the recommendation of building/road demanded by the Land Tax Office. There has been a decision by the way of a writ petition run between the petitioner Hari Siddhi Brick and Tile Factory and the respondent the CIAA with writ No. 2581 of the year 2059 to which the court has spoken that Section 21(D) of the Land Reforms Act, 2021 can not be attracted in regard to the land occupied by the petitioner factory. No question of ceiling was raised even when this bank had accepted the auction and acquired the land in course of recovering its principal and interest. Then how a question of ceiling could be raised when the bank wants to sell the same land. The issue related to ceiling falls under the domain of Land Reforms Office not of the Land Tax Office. The objective of

ceiling contained in Land Reforms Act is related with the amount of land entitled to own by an individual or by a family.

Now the land has been the property of the bank because it was acquired through auction. The factory has no right over it. In a situation where both the seller and buyer are agreed to sell and buy the land, the letter sent by the commission to the Land Tax office is erroneous. The stand taken by the Land Tax Office in the rejection order is baseless and unlawful. The loan was the part of the deposit collected from the ordinary people and has adopted the legal course to recover its loan amount. If the land acquired through auction is not allowed for lawful transfer and sale the rights of depositors may be effected and bank may rendered paralyze. So the decision of the Commission to put the land in freeze and the rejection order of the Land Tax Office is declared unlawful and void by issuing a writ of Certiorari and a writ of Mandamus directing the land tax office to execute the instrument.

The learned government counsels represented on behalf of the Commission and the Land Tax office pleaded that the petitioner bank has not privileged with the exemption of ceiling in the land it has claimed. It was granted only to the Hari Siddhi Brick and Tile Factory. That privilege can not be enjoyed by this bank. The CIAA is competent to examine over any complaints submitted to it. The order putting the land in suspension was made in course of an investigation upon irregularities in Hari Siddhi Brick and Tile Factory. It was effective as long as the investigation is continuing. It is not a writ jurisdiction to entertain for the release of something suspended. The right course was to approach the appellate jurisdiction in such matter as provided in Section 31 of the Land Tax Act, 2034. Where there exists an alternative way of remedy available under Section 35 (C) of CIAA Act, 2048 in failure of which the writ petition could not be materialized.

The learned advocates appeared on behalf of the persons summoned by the court pleaded that the bank has no absolute right over the land in dispute. Hari Siddhi Brick and Tile Factory had its contingent right over the land. The land which was acquired by the

factory for one purpose can not be utilized in other purpose. The bank has no right to transfer the title of this land to any other. The land could not be sold going beyond the terms and conditions what was promised at the beginning. Since the promoters of the factory, without operating it found indulged in corruption by giving the land in collateral to various banks and financial institutions and shown gross negligence, the Commission, upon the request of the pressure group was suspended the land. Section 34 of the Land Acquisition Act, 2034 provides that the land acquired for one purpose if utilized in other purposes, it must be returned to the land owners. No order of writ can be issued because the bank would like to sell the land unlawfully whom the exemption of ceiling is not granted. Where there is an alternative way available under No.17 of the Court's Procedure to challenge the rejection order of the Land Tax Office, no remedy can be provided through the writ jurisdiction. Therefore, the writ petition should be vacated.

With taking into notice the arguments put forth as above, now it has to be concluded whether or not an order of writ as requested should be issued by striking the following issues in question:

1. Whether an act of taking the property of Hari Siddhi Brick and Tile Factory by the bank as security is consistent with law or not?
2. Is the bank competent to sell or accept auction itself in the property taken by it as collateral in order to recover the loan amount floated by it?
3. Whether the bank is capable or not to sell or transfer the property of any other person upon which it has established ownership?
4. Is the CIAA is competent enough to issue an order so as to prohibit the sale of land owned by the bank and the Office of the Land Tax is capable to put it in suspension.
5. Whether or not an order as sought by the petitioner to invalidate the rejection order of the Land Tax Office for not executing the deed of sale proposed by the bank should issued?

While considering upon the decision to be reached, the main claim of the petitioner that Hari Siddhi Brick and Tile Factory had taken loan with this bank giving in collateral its land area measuring 205-2-0-0 in ropani when failed to pay back the principal and interest of the loan, a public auction notice was published in Gorkhapatra daily in 2066/2/30 to auction ropani 120-15-1-0 out of the total area having the rest secured in the bank as usual, nobody but the bank itself accepted the bid and an area of ropani 25-2-3-0 was proposed to sell to the third party in the first lot and an instruments was ready to that effect with seal and signature of executants and forwarded to the Land Tax Office for execution, however, rejected showing various reasons as lacking the recommendation letter of local VDC, expiry of time limit, lack of ceiling exemption letter together with a letter dated 2067/2/16 from CIAA to suspend the land, the Land Tax Office rejected to execute the deed. Therefore, an order of writ of certiorari for the invalidation of suspension and rejection order of the respondents Commission and Land Tax Office and an order of a writ of Mandamus to direct the letter to execute the deed is sought. The written reply submitted by the respondent Commission had a mention that this commission, upon a complaint on irregularities by the Brick and Tile Factory had written the Land Tax Office to freeze the land because the investigation was on. The respondent Land Tax Office has mentioned in its written reply that the instrument submitted for execution has not fulfilled the necessary formality, lacks the recommendation letter of local VDC, no exemption letter of ceiling and the time constraint plus a letter of the said commission, the rejection order was issued in 2067/4/4.

While pondering upon the first question to be settled, the fact is clear that the bank, accepting the collateral from Hari Siddhi Brick and Tile Factory failed to pay back the loan amount, the bank to recover its wealth called an auction bid to dispose of ropani 120-15-0-0 land out of total area and accepted by itself through auction. Section 57 of the Bank and Financial Institution Act 2063 allows the bank to accept the asset taken by it as collateral. No complaint has been found registered against the acceptance of ropani 120-15-0-0 land by the

petitioner bank. There is no dispute on the fact that the said asset is owned by the bank.

Against such a back ground, we have to contemplate also the plea of 4 other petitioners summoned by this court as the concerned party who complained that the factory could not be operated because of the reason as irregularities and the land should be returned to the owner. The respondent Commission orders for suspension in 2067/2/12 but to date it keeps silent about the collateral taken by the bank nor any complaint is found registered against the bank or sued any other person or investigated. The Commission has been unsuccessful to substantiate its plea. The CIAA Act, 2048 forbids the Commission to suspend or interfere the property of any person without any reason.

Now the question rests on the claim made by the concerned land owners and their legal counsels who plead that the land acquired for Hari Siddhi Brick and Tile Factory if not utilized in the original purpose should be returned to them under the Land Acquisition Act, 2034. For this, it is necessary to go through the Sections 33 and 34 of the Land Acquisition Act, 2034. Section 33 says that the land should be used in the purposes for which it was acquired and if it could not be done so, the government of Nepal may confer it for public utility. Section 34(1) provides that if the land not utilized in the original purpose or found unnecessary, the earlier owners may retain it. The intention of this clause is the land acquired from the private individuals if not utilized in the original purpose or if found excessive to the need is to return to the earlier owners. But prior to this being a private company, the land was acquired for a government owned company of the same identity. There is no room for doubt. The government owned company was run for more than a decades. It was sold to private individual only in 2049/7/14. Hari Siddhi Brick and Tile Factory, run by a private individual have also a long history of producing bricks and tiles. No one can refute also this fact. After operating for many years it has taken loan in view of its need and interest to meet its objective by giving in collateral its property of absolute right.

In this condition, the ownership of the land which was acquired under law had been transformed to the state owned Hari Siddhi Brick and Tile Factory and the record of the earlier owners has been corrected, how then the earlier owner could retain their right again? In addition to this, where the land has been utilized for a long time as per the objective of the acquisition even if it is found not utilized as before could not be returned even after a long gap of time to the earlier owners. This court has spoken of this truth in writ No. 662 of the year, 2063 run between Netra Raj Pandey and the office of the Prime Minister and the Council of Ministers has set a principle after an elaborative discussion. (Nepal Law Bulletin, 2066, Decision No. 8170, Page 978). The same condition persists also in the case of land of Hari Siddhi Brick and Tile Factory now owned by the bank as security and attracts the same precedent. Besides this, the Section 17 of the Privatization Act, 2050 which authorizes the government to issue directive to the privatized companies can not applied in the case of Hari Siddhi Brick and Tile Factory because the Privatization Act, 2050 was enforced in 2050/9/19 but the said state owned factory was sold to the private individual before that Act came into force. This is illustrated in writ No. 2581 of the year 2049 run between the said factory and the respondent Commission and was finalized in 2061/5/30.

In this way, in case a land acquired for some purpose failed to do the targeted business or did not utilized in that purpose the land could be returned to the earlier owner. But in case the land once acquired is used as per the objective of the acquisition, no earlier owner of that land shall have right to retain it again. It is not the intention and purpose of the Section 33 and 34 of the Land Acquisition Act, 2034 that such land should be utilized forever in the same purpose and utility for which it was acquired. The earlier owner terminates his right in the conditions stated above. Section 34 of the Land Acquisition Act, 2034 does not provide the earlier owner any rights either conditional or contingent over such land for an indefinite period of time even after the acquisition. It could not be the objective of the Act that the land once acquired should be retained again to the earlier owner even if any obstacles came to press or did not

served the original purpose no matters how many years or decades there may have passed.

While assessing the situation now at hand, it comes to reveal that once the land was acquired for the purpose of constructing the Brick and Tile Factory for the state owned Hari Siddhi Brick and Tile Factory as provided in law and the factory is found operated accordingly. Immediately after the acquisition of the land, the individual have terminated their rights and transformed to the state ownership. After arising a situation of not running the factory by the government, it is sold to Sundar Lal Bhavanani and Narsingh Bahadur Shrestha in 30 October, 1992 the entire assets along with its business transactions. The individuals who procured it found to have established Hari Siddhi Brick and Tile Factory as private company and also operated it. Though a government decision dated 052/053 had imposed restriction on the transfer of title of land in purposes other than in running the factory however, it is found released by a decision of Ministry of Finance, in 2056/12/18. Then again the CIAA had a decision directives in 2058/10/11 raising a questions of ceiling under Section 12(d) of Land Reforms Act, 2021 prohibiting to transfer of title of that property in purposes other than in operating the said business together with decision of Finance Ministry made in 2058/1/14 and also a decision made by the same in 2059/4/3 refusing the release as well were challenged by the purchaser company Hari Siddhi Brick and Tile Factory in a writ against the said Commission with writ No. 2581 of the year 2059 in which this court has issued the orders of writ of certiorari and Mandamus arguing that the purchaser was the government of Nepal, so the provision of ceiling will not be effective in the case of purchaser under Land Reforms Act, 2021.

The property which Hari Siddhi Brick and Tile Factory had acquired by the government through the title transfer shall have right to dispose of by any means whatsoever and mobilize it giving in mortgage or security for its benefit. In a circumstance, where a decision once made by this court is final, no hindrance or obstacles could be created from any person anywhere in the use of such

property. Since the assets along with the business was procured by the then government and this court spoken of on the exemption of ceiling as per the Land Reforms Act, the procurer Hari Siddhi Brick and Tile Factory is competent to mobilize such a property of its ownership either movable or immovable, through sale or otherwise. Hence, the Factory is free to put such property in collateral against the loan from the bank. Since the Hari Siddhi Brick and Tile Factory is capable to put it in collateral it is lawful to accept by the bank such a property as security in pursuant to Section 46 (1) (g) of the Bank and Financial Institutions Act, 2063.

The next question to deal here with is whether the property accepted as collateral by oneself could be put in auction and accepts it by oneself to recover the amount of loan it floated. There is no dispute on the fact that the Hari Siddhi Brick and Tile Factory had obtained loan from the petitioner bank and transferred the title of a land measuring 205-2-0-0 in ropani for security against the loan. Moreover, there is no dispute also on the fact that the debtor factory did not pay back the loan amount whereby the petitioner bank released a public notice for auction up the 120-15-1-0 ropani out of the total land given in security in Gorkhapatra daily in 066/2/30 and the bank accepted the bid by itself in accordance with Section 57 of the Bank and Financial Institutions Act, 2063 since no potential bidder came in sight to accept the bid. The act of accepting certain portion of land by oneself did not found against the law because nobody came to accept the auction bid which is favored also by the legal provision contained in (1) (g) of the said section. No complaints are found registered against the valid registration of the land owned by the bank through the process as mentioned above.

Now the third question to be settled here is about whether or not the bank is competent to sale or dispose of the land of its ownership. The bank is a commercial institution. It collects deposits from the commoners and through that it conducts business activities as of floating loans. Even though the bank has accepted the landed property in consideration of the amount of loan it floated, however, it is not enough to meet the need of the bank. The bank can not carry

its banking transactions through slack and idle assets. So it is necessary for the bank to sale and dispose of the property it received. Section 48 (1) (a) of the Bank and Financial Institutions Act, 2063 has provided that the bank except in purposes of its own, the 'A' class bank can not procure the immovable property. When it can not procure, it is not allowed also to keep it. Clause (d) of Section 47 (1) of the same Act necessitates either for manage or the sale of such an immovable property.

As stated above, the petitioner bank initiates process to sell some of the lands and enters an agreement with the potential buyer to sell in the negotiated price prepares a sale deed fulfils the necessary formality as of attestation and verification through a team assigned by the concerned land tax office in 2066/3/23 and submits for its execution. The land Tax Office is found rejected it mentioning the reasons thereof. Basically, the said rejection order is found made on the following 4 grounds:

(a) Failure in the submission of a recommendation letter of the VDC in regard to any construction as of building or road.

(b) Failure in the submission of a letter relating to the exemption of ceiling.

(c) Default of limitation.

(d) A letter received from the CIAA suggests for the suspension.

The first ground of issuing rejection order as claimed by the Land Tax Office is failure in producing a recommendation letter about the existence of any building or road from the concerned VDC but the writ petitioner has submitted it obtaining from the Local Development Ministry in 2066/9/19 and furnished on the same date about which the Land Tax Office can not refute. Hence, the order of rejection is found groundless and unlawful. The sale deed is prepared in 2066/6/23 by the team assigned by the Land Tax Office itself and the petitioner has submitted the said recommendation in 2066/9/19.

In such a situation, it can not be called that it was submitted after the expiry of the time limit.

So far as concerned with the claim that the proof of exemption of ceiling is not submitted, this court in reference to Writ No. 2581 of the years 2059, has spoken so as not requiring in the case of Hari Siddhi Brick and Tile Factory who is now the receiver of loan by giving in security the said property. As it is not needed for the factory, the bank which accepts the same property as collateral from the said company is simultaneously not needed to produce about which it is already described in various paragraphs above while answering the question No. 1. Since, the petitioner is a financial institution, it collects deposits from the commoners and flows loans and carries other banking transactions about which there is no room for dispute. Section 7 of the Company Act, 2063 provides the bank the right to acquire, hold, dispose of and other way manage the property as an individual, and Section 57 of the Bank and Financial Institutions Act, 2063 provides the right to recover its principal and interest by selling the property received as security while conducting the business transaction. Arriving the similar condition, the petitioner bank found put in auction some 125-15-1-0 ropani land out of total 205-2-0-0 ropani accepted as collateral while floating the loan and accepted the bid by the bank itself. It is also evidenced that the land accepted as collateral is still in the bank as security. In such a situation, the second ground of issuing rejection order by the Land Tax Office also found inconsistent with law.

While considering upon the another ground taken by the Land Tax Office while issuing rejection order alleging that the petition did not appear within six month of preparing a deed attested in the field in accordance with No. 4 of the Chapter on Registration along with a recommendation letter of building and road, the deed was prepared in 2066/6/23 and the petitioner has furnished the said recommendation in 2066/9/19 is described above. While preparing the deed required to be registered, the No. 4 of Registration Chapter provides that "both the executants be appeared in the registration office and make request to have their deed prepared and executed

by the office itself, or can be registered appearing both the parties in the office of registration within six month if the deed was prepared and signed out of the office, or can be registered appearing in the office of registration signing and attesting in the presence of the office if the deed was prepared lawfully out of office but not signed and attested. If it was requested to have it done by the office, and if brought signing and attesting out of office but was not signed and attested meeting the required criterions, the office shall examine the deed whether it is legally prepared or not and shall prepare by the office, and if it was found legally prepared, the executants and the witness shall be made signed and attested in the presence of the office and have the deed registered.

The writ petitioner in his petition has stated that after the deed was signed and attested by the parties and witness in the presence of the team assigned by the Land Tax Office it was deposited in the same office and never made available to the bank and the buyer. The land tax office, in its written reply had no comment on it. The deed which is prepared through the team deputed by the land tax office it should be deposited in the custody of the office not with the executants depending on the nature of the deed. Besides this, the petitioner has furnished the letter of recommendation pertaining to building and road in 2066/9/19 in the Land Tax Office; it will be ridiculous to say that the instrument was brought after the expiry of the time limit provided in No.4 of the registration chapter.

The fourth stand taken while issuing rejection order by the Land Tax Office appears to be a letter sent by the CIAA directing to put the land in freeze. The written reply furnished by the respondent Commission has stated that this commission, upon complain of irregularities committed by Hari Siddhi Brick and Tile Factory was directed to the Land Tax Office to freeze the land. But the written reply is silent about what type of irregularity was smelt. It is found lamented only that it was done in course of investigation but the nature of the investigation is found unexplained. The learned

government advocate has confessed the truth that no complaint is filed against any body. So far as concerned with a clause contained in Section 28. 2 of the agreement reached in 2049/7/14 so as to handover the state-owned Hari Siddhi Brick and Tile Factory to private sector, it does not put any restriction on the transfer of title or sell to any other person by the buyer. Besides this, there has been issued an order of a writ by this court in writ No. 2581 of the year 2059 so as to invalidate the suspension order made by the said Commission. In this way, no provision contained in Section 12 a and 12 b of CIAA Act, 2048 granted to the respondent Commission right to decide so as to put in freeze the property owned in the name of a private company over which the petitioner bank has created its right and has established the ownership. Hence, the decision made by the respondent Commission in 2067/2/12 to put the land in freeze and the action forwarded to the Land Tax Office to suspend the land also does not appear consistent with law.

While considering upon the plea of the learned deputy Attorney General who argues that the decision of suspension reached by the respondent Commission was challengeable in the jurisdiction of the special court by way of an appeal under Section 35 (c) of the CIAA Act, 2048, so the commission did not feel necessary to inform the petitioner bank while reaching the decision of freezing the land. The petitioner was not involved during suspension process nor any fine or penalty is awarded against the bank or any order made for the recovery of any amount of fine. Only in the presence of above situation Section 35 c was attractive if it was made or done as above and in otherwise condition, to consider that every order of the commission should be challenged in the special court by way of appeal is illogical. The appeal was possible only in a situation where the Commission inflicts any fine or punishment and orders for the recovery of the same. No appeal can be entertained against all the orders. It is decided in 2068/8/6 in Civil Appeal No. 0507 of the year 2066 run between Bhawati Kumar Kafle and Vishan Devi Rajbhandari in a case involving the cancellation of registration and

has enunciated a principle. In such a situation this bench can not agree with the defensive points of the learned government advocate that there was an alternative remedy available.

Now comes the fifth question to be answered on whether or not the rejection order of the Land Tax Office refusing the sale deed to execute is lawful and whether or not an order to invalidate the refusal order as demanded should be issued. While talking in this relation the grounds which the Land Tax Office had taken in the rejection order of 2067/4/4 are discussed in the foregoing paragraphs as unlawful. While this court writes to the Land Tax Office to send the file related to the freeze as per the order made by this court in 2068/2/19, the Land Tax Office, Lalitpur is found responded through a letter dated 2067/2/12 that the land was frozen only on the basis of a letter, no separate file is maintained in this relation. Besides this, as we observe the respondent Commission's letter dated 2068/2/12, dispatch No. 698, the letter mentions that the Commission, upon a complaint filed by a pressure and struggle committee formed for the operation of the factory, it was ordered for the suspension of land in accordance with Section 39 (3) of the Corruption Control Act, 2059. But while observing a letter of the commission dated 206/2/12 dispatch No.1146 sent to the Land Tax Office, Lalitpur, it is found only mentioned that it was according to a decision of the Commission which remains effective until the Commission makes a fresh order. In one hand, the letter does not explicitly mention to freeze the land and on the other hand as we study Section 39 (3) of the Corruption Control Act, 2059 it provided that if the investigation officer in course of investigation finds necessary to demand the particular of property of a person holding public office he may do so or freeze such property.

For the application of the said Section 39 (3), the investigation must have been initiated lawfully, the name of the authority deputed in the investigation must have been announced and the property involved in the dispute must have been owned by a person who holds public office. All these three elements are totally lacking in the given context. Neither the investigation has been lawfully initiated, nor there has been any investigation officer appointed and the most

fundamental part of the episode is such that the property of a person who holds the public office. Since the petitioner is a private company, no property of such a company shall be appropriate to put in freeze by applying Section 39 (3) of the Corruption Control Act, 2059. No property of a person can be put in freeze without the authority of law only in the instigation of any other person. In such a situation, the decision reached in 2067/2/12 by the respondent Commission to put in freeze the land of Hari Siddhi Brick and Tile Factory and the action of the Land Tax Office Lalitpur to put in freeze is beyond the authority of law and the rejection order made in 2067/4/4 for not executing the sale deed of the petitioner bank dated 2066/6/23 in respect to the transfer of title of the land of the petitioner bank appears in contravention to No.27 of the Chapter on Court's Procedure of the Country Code (Muluki Ain).

Hence, on the basis of the grounds and reasons mentioned above, the decision of the respondent CIAA dated on 2067/2/12 and the action of freezing the land as per that decision by the Land Tax Office as well as the rejection order made by the Land Tax Office in 2067/4/4 refusing to execute the deed is erroneous in the eyes of law, and therefore is invalidated by issuing an order of writ of certiorari. So it is decided also to issue an order of writ of Mandamus in the name of Land Tax Office, Lalitpur directing it to execute the said sale deed by collecting necessary fees payable by law in order for the bank in 2066/6/23. Let the respondents be notified this order through the office of the Attorney General and the file of the case be handed over as per rule after removing the case from the regular proceeding.

I concur with this decision.

J. Dr. Bharat Bahadur Karki.

Done on this day of 4th Magh, 2068 BS (January 18, 2012)

Translated by Bhim Nath Ghimire

People with disability are entitled to receive extra and special care from the home and state both. Disable-friendly access to government offices and easy transportation facility has been the major issues of the day.

Supreme Court, Division Bench

Hon'ble Justice Tahir Ali Ansari

Hon'ble Justice Kamal Narayan Das

Writ No.: 2068-WO-0188

Subject: Mandamus & others.

Petitioner: On behalf of Nepal Disability Human Rights Center and on his own advocate Sudarshan Subedi, a permanent resident of District Bardiya Kalika VDC Ward No. 3 Mayurvasti currently residing at Kathmandu District, Kathmandu Metropolitan City Ward No. 7 Chabahil Sarswotinagar

Vs

Respondents: GON, Office of the Prime Minister and the Council of Ministers

- **The persons with disabilities need extra and special care and facility than the ordinary man. Therefore, their physical capacity as well as mental and intellectual conditions must be identified by the state and treated them distinctively than the ordinary man.**

- **The state requires to be more serious and thoughtful about what could be done ensure the right of life of those extremely disabled people.**
- **It is most urgent to build disabled residential homes, operate them properly, or make provision of unemployment allowance to such disabled who is unable to earn his bread himself.**
- **It is a matter of great national pride and honor to ensure the fact that the disables are provided with their just requirements and are facilitated with the services and facilities as per the international standard and norms.**
- **Extreme judicial activism or an unnecessary judicial inaction both may cause interruption in the path of getting the justice by the people. So the doers of justice must always be attentive and careful to judicial self-restraints.**

Decision

Tahir Ali Ansari; J: The summary of this writ petition filed in pursuant to Articles 32 and 107 (2) of the Interim Constitution of Nepal, 2063 falling under the jurisdiction of this court and the decision reached thereto is as follows:

Nepal Disabled Human Right Center is a non-governmental organization operated in the leadership of the persons with disability registered in 2056 with District Administration Office, Kathmandu. This organization has always been working actively for the protection and promotion of human right of the disabled persons and conducting programs on social awareness, raising voices on just causes and running advocacy as well as promotional activities on the issues of human rights of persons with disability.

I, Dipendra Shakya, one of the petitioners, am also a person having extreme disability myself. Although I am a person with extreme disability, however, I have continuously been raising voices for judicious rights and interests of my own and other disabled persons like me. Hence, our plea that we have locus standi to institute this writ petition on behalf of the persons with extreme disability and mentally retarded persons.

In Nepal, the life of the mentally retarded and the persons with extreme disability have been deteriorating day after day. We the persons with mental retardation and extreme disability are not being rendered the services and facilities which were required to be provided by all the state agencies. There is no person or medium to negotiate in conveying the voice and request of these persons to the concerned agency and the lack of self-accessibility now therefore there is no dispute on the fact that the life of mentally retarded and extremely incapacitate disabled persons have been worsening day by day.

Rule 8 the Disability Protection and Welfare Rules 2051 has made a provision for the establishment and operation of Disability Homes focusing the persons having extreme physical disability and mental retardness. The legal provision which has encouraged in the establishment and operation of disables like me and similar others has proved to be a respite from being a victim of neglectful treatment within home and in society. It is the sacred and pious objective of the state to provide security and protection to her citizens to live a life of man as a human being. Similar provision is incorporated also in Self-Governance Rules such as collection of data of the disabled persons and the establishment of the disability Homes. Though there is the Rules pertaining to the protection and welfare of persons of disability in force its implemented aspect is almost zero.

Nepal has been the signatory to the Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on

the Rights of Persons with Disabilities, 2006 which has endeavored also to create legal rights.

The research studies conducted by various institutions and organizations in Nepal have reported that there are 6 lakhs people with mental disability and the number of the physical disability also has recorded almost the same. The life of mentally retarded and extremely handicapped disables has been more critical and deplorable day after day.

Kantipur, a vernacular Nepali daily has published news on 16th Bhadra, 2066 depicting a sorrowful state of daily life of a number of disabled people who are not providing with meaningful relief provision other than the mere allowance.

Hence, the respondents' failure in fulfilling their constitutional as well as legal duties has infringed the right to live a dignified life, right of equality and the right of social security provided by Article 12 of the Interim Constitution of Nepal, 2063 to the disabled persons which has violated also the statutory provision enshrined in Section 4, 5 of Disability Protection and Welfare Act, 2039 and Rule 8 of the Rules thereunder. Rule 8 of the Disability Protection and Welfare Rules 2051 which has direct concern and bearings with the rights, interests and social security of disabled people be implemented with the construction of a safe community residential building to house the extremely handicapped and mentally retarded helpless persons neglected by their lawful heirs in a separate residential building for men and women, accommodate such people in a community building if they so desired, have a provision of disable-friendly wheel-chair which can be accessed also in government buildings, offices as well as in the means of public transportation, have them compulsory daily unemployment allowance for their day to day expenses, provide them with income generating training fitting to their physical condition, bring about a special policy and implement thinking about how to protect the handicapped and mentally retarded at the time of occurring various types of natural havoc, have formal

and informal vocational education, make provision for an attendant and his remuneration until the persons having any disability are rehabilitated, enact laws instrumental to the constitutional provision and the said international treaties and conventions pertaining to the protection of rights of such persons, rewrite prevailing Disability Protection and Welfare Act, 2039 and the Rules 2051 so as to incorporate the norms and values of the convention. Thus the writ petition requests for the issuance of an order of writ of mandamus in the names of the respondents to bring about the necessary reform measures and implement them.

The single Bench of these court-orders in 2068/5/18 inquiring about what is the basic content of the case? And, why an order as demanded in the petition should not be issued? Submit a written reply through the Office of the Attorney General within 15 days from the date of receipt of this notice exclusive of the time limit consumed for journey. Deliver a notice to the respondents accompanying also with a copy of the writ petition and the acknowledgement of which be given to the Office of the Attorney General and them table the case after receiving the written reply or expiry of the time limit. Also, present this case giving special priority in view the significance of issue.

National Population Census 2068 has recently been completed by the central Bureau of Statistics and collecting the data of disabled persons from each family. Now it has been processing and analyzing the data which will reveal the exact number of disables of the country. The 3 years plan (2067/068-069/70) has mentioned about strategy, work plans and the major activities to be adopted by the Government of Nepal concerning the persons with disability. This runs through page 285-288 of the plans are formulated putting the disabled persons in mainstream so as to initiate the activities from the concerned agency. So the writ petition is subject to be quashed, responded the National Planning Commission.

The Ministry of Education responds that Rule 60-66 of Chapter (1) of Education Rules, 2059 to be administrated through this ministry has, under the clause of special arrangement internalized the fact that the persons with disability shall be treated in special manner. The ministry is always anxious of in the case of disabled persons and an claimed in No. E of the petition by the petitioner in respect to persons with extreme disability and mentally retarded there shall be taken necessary steps in days to come to provide them with formal as well as informal vocational education taking into account their physical condition. As in other public services, the recent Teachers Service Commission Rules 2067 has made the provision of certain percent of reservation facility to such persons. The ministry is aware of the question raised by the defendant petitioner and therefore requests for respite.

The Ministry of Local Development replies that this ministry is always striving for the protection and promotion of the rights of disabled persons. There has been implementing a Grant Mobilization Schemes, 2067 in each district, municipality and VDC to which 15 percent of total budget shall be appropriated in the programs and projects directly benefiting to the targeted group or community of people.

As per the statutory provision made in the Local Self-Governance Act, the concerned local bodies are working on the registration of the personal events of the disabled, issuing the certificate and distributing social security allowances as provided in law. Similarly, the community buildings are being constructed by the local bodies to house the disabled persons conducting a number of skill- oriented training programs and organizing various seminars and symposia on awareness raising. The notion of separation of power does not allow knocking the door of judiciary as claimed in the petition in regard to the matter which falls under the scope of executive. To the writ petition should be vacated.

The Ministry of Finance has responded that it is not the business of this ministry to enact law, effect amendment or declare them inoperative but of the legislature-parliament. So, this Ministry is unconcerned about promulgating any law and implements them as claimed by the defendant to respond the treaties and convention to which Nepal is a party. The budget speech of the 2068/69 has exempted transport tax and road cess in scooter with 150 cc assembled for the use of the persons with disability. Likewise, the state is always ready to provide them facility as much as it is allowed by means and resources by bringing various programs also in the future. So the writ petition which holds no ground for stand should be vacated.

The legislature parliament secretariat defending the content of the writ petition responds that this secretariat has no objection upon the plea and essence made in the petition that the Disability Protection and Welfare Rules 2051 and the Convention on the Rights of Persons with Disabilities as well as the Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2046 should be implemented by letter and spirit. In regard to the claim of the petitioner that the Disability Protection and Welfare Act 2039 and the Rules 2051 thereunder should be overlapped honoring the spirit of the Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Rights of Persons with Disability, 2006 that Section 9 (1) of Nepal Treaty Act, 2047 had a provision that the provision of the convention shall take effect as Nepal law and Nepal law will be rendered inoperative only when the Nepal law contradicts with any international conventions endorsed by Nepal. Therefore, nothing obstructs in the implementation of the said convention. Likewise, in case the provision of any rule is required to be amended, the agency enacting it shall be competent to effect amendment and correction on it. If any Nepal law has to be amended or overhauled, the government of Nepal or any member of legislature parliament may table such motion in the legislature parliament. The Interim Constitution of Nepal, 2063 has not

conferred any power to the legislature-parliament or secretariat as respondent alleging it did not effect any correction in the Disability Protection and Welfare Act, 2039. The writ petition in the case of this secretariat should be vacated.

The written reply submitted to this court on behalf of the Office of the Prime Minister and the Council of Ministers had a mention that the Government of Nepal is committed that the fundamental rights provided by the Interim Constitution of Nepal, 2063 shall be equally enforced also to the persons with disability. To realize these objectives, the Disability Protection and welfare Act, 2039 and the Rules, 2059 are in effect. The Government of Nepal has been providing reservation to the persons with disability in this enjoyment of service and facilities in all public services including civil service. The Government of Nepal has made arrangement of free of cost admission and exempted all types fees in schools, colleges, universities and training centers for the differently impaired and mentally retarded honoring the order of directive mandamus by this reverend court in reference to the Writ No. 3586. From the last 3 years, efforts such as preparing ramp to make the hospital disable-friendly to supply free of cost medicine concession or free of cost treatment facilities in hospitals and providing grant assistance to NGOs for the help of the disables, information and help desks are installed on 5 development regions relating to disability and the libraries are being established and operated for the visually impaired persons. In F.Y 2068/069, there has been conducting community-based rehabilitation programs in 75 districts for disables, the awareness programs for disabled persons installation and operation of residential protection and rehabilitation programs in 3 development regions a partnership programs for the production of accessory materials and has been operating the programs for the arrangement of the distribution of the disability identity cards.

The Ministry of Health and Population has a mention in its written reply that this ministry has been working in the preparation of ramp in hospital from the last year to make the hospital disable-friendly,

distribution of free of cost medicines, provision of treatment with special concession as well as free of cost treatment and providing grant assistance to the NGOs for the service of disables and helpless. This Ministry has not infringed any rights of the defendant petitioners such as right to live a life of a dignified citizen or any of the fundamental or constitutional rights guaranteed to them. The writ petition should be quashed.

The file of the case along with this writ petition submitted for hearing after duly enlisting in daily cause list is studied. The learned advocates Mr. Sudarshan Subedi and Mr. Major Thapa represented on behalf of the petitioner pleaded that the international conventions on disability, the Disability Protection and Welfare Act and the Rules thereunder have ensured the various rights of the disabled persons. Those provisions are not translated into practice. There has been a nominal arrangement for minor cases of disability but nothing substantial has been done from the part of the state for the persons with extreme disability. Rule 8 of the Disability Protection and Welfare Rules 2051 had a provision of a residence for the extremely disabled person. However, no residence as such has been constructed. There is no disable friendly-road not the government building has been made accordingly. The government local bodies and the municipality should be liable for this. The prescribed obligation has not been performed. The efforts which are said to have done by the office of the Council of Ministers in its written reply are not adequate. No provisions have been brought about who would protect the disabled after the death of attendant of an extremely disabled person. Since the person with disability has to be provided also with social security, provisions of foods, education and care, the order as demanded should be issued.

The learned Joint Attorney General Mr. Dharmaraj Poudel represented on behalf of the Government of Nepal maintained that there have been launched many welfare activities in regard to the disabled persons about which the written reply of the Office of the Prime Minister has made clear. The Ministry of Social Welfare has

defined the disabled and determined the disability. The Interim Constitution of Nepal has stated about the relief provision for the persons disabled during conflict era. Even in the current 3-years plan there are plans being implemented in respect to the welfare of the persons with disability. The fresh efforts are underway to make the hospitals and government offices the disable-friendly. There has been developed speaking software (machine) Dias. Since no Legislature Parliament is now in office there is no possibility or to work out any provision on. Disability Welfare Act, as enshrined in the General Conventions. Since the construction of disability homes and such other matters depends upon the resource availability to the state, the writ petition should be dismissed.

While observing the claim made in the petition, the petitioners Nepal Disabled Human Right Center and the extremely disabled Mr. Dipendra Shakya had a complain that the rights of the disabled persons and of every citizen living within the country should be entitled to enjoy the rights provided by the state, indiscriminately without hindrance. The Government of Nepal has endorsed and implemented the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Conventions on the Rights of Persons with Disabilities, 2066. In such a circumstance, the Disables Protection and Welfare Rules though has a provision of the establishment and operation of Disables Home however, no homes as such has been operated. By this, the disabled persons have been prevented from enjoying the right to life provided by Article 12 (1) and the right of equality and protection under 13 of the constitution. Hence, an order for the construction of a community residential home, the public physical structures and the means of transports be prepared in a manner so that the wheel-chair could be reached over there, provide unemployment allowance, frame policy to save the life of the disabled by the state at the moment of natural disaster, implement the vocational education and bring about reforms on Disables' Protection and Welfare Act 2039 as well as the

Rules 2051 thereunder in line with the international conventions on Disability.

The written reply submitted by the Office of the Prime Minister and the Council of Ministers has witnessed the fact that in the context of various directive orders issued by this court for having the hospital disable-friendly with the provisions of a ramp, to provide most needy free of cost medicines to the disables to provide treatment in hospitals giving special concession as well as free of cost treatment facility and granting donation to the NGOs for the service of disables and helpless have been carrying out.

After contemplating to the claim made in the writ petition, the written reply and the arguments put forth by the learned counselors, the key essence of the petitioners claim is found based on the following 3 things:

1. The state is liable to facilitate the persons with disability and the mentally retarded persons with daily allowance and special privilege.
2. The residential homes for the extremely disabled have to constructed and operated.
3. Effective enforcement of the prevailing laws and the rules.
4. Nepalese law and rules are required to be implemented in line with the international treaties and conventions after effecting amendments or revision on them.

In view the said claim of the petitioners, now the following questions are to be answered on whether or not an order of mandamus should be issued.

1. Whether or not they are required to provide allowances and special facilities or accommodated by constructing residential homes?

2. Whether or not the current statutory provisions and their implementation aspect is effective?
3. What sorts of orders of a writ should be issued in view the claim of the petitioners?

Now, first of all, while considering upon the first question, the Article 12 (1) of Interim Constitution of Nepal, 2063 has ensured every citizen the right to live a dignified life. For the enforcement of this right, it demands not only the fulfillment of the basis humanitarian needs but requires to meet also other physical facilities for living the life of a dignified citizen. There is no dispute on the fact that the state is liable to ensure them. Article 13 of the constitution has provided all the citizens the right of equality. It has internalized a feeling that not withstanding physical or societal status and conditions, no situation of discrimination between one and another man should exist. The restrictive clause of 13 (3) reads- "Provided that nothing shall be deemed to have made any obstruction to make special arrangement for the protection, empowerment or development of women, Dalit, indigenous, ethnic, Madhesi or peasant, laborers or of economically, socially or culturally backwarded class or of children, elderly people as well as disabled or physically or mentally disabled persons. Article 18 of the same has guaranteed to every citizen the right of employment and social security and Article 18 (2) has guaranteed the special constitutional right to women, laborers, old, disabled as well as to the helpless citizen as provided in law.

Article 33, Part (d1) under state liability provision the Interim Constitution has accepted the fact that the Madhesi, Dalit, Indigenous, Ethnic, women, laborer, peasant, backward class of people as well as the persons with disability shall have their proportionate participation in all the mechanisms of the state structuring of the country. Likewise, under the state policy, besides other things, Article 35 (3) of the constitution " the state shall make special arrangements of the social security for the protection and progress of single woman, orphan, children, helpless, old, disabled,

handicapped and the endangered race of people. Apart from this, in Article 35 (17), it is stated also to adopt a policy of providing allowance to the old, handicapped, women as well as the unemployed by the state making a statutory provision. All these constitutional provisions have directed the state to make special arrangements to ensure the right to live a dignified life to the disabled in addition to the fulfillment of their basic needs.

As we look into the current legal provisions brought about to translate these constitutional provisions into practice Section 10(1) of the Disability Protection and Welfare Act 2039 promulgated years before is found to have made special arrangements stating that the homeless disables shall provided land for house or if any disabled persons is desirous to run farming occupation the Government of Nepal may, subject to the prescribed terms and conditions, make available such land to him from the land to be distributed under law or from the land to be given for reclamation. Section 11 of the state Act has presented the family members or relatives the special duty stating that the family member, guardians or lawful heir shall be liable to take care and look after the disabled person. The Disables' Protection and Welfare Rules, 2051 promulgated to implement the Act in its Rule 8 besides other things has provision for the establishment and operation of a Disability Home.

In addition to this, Section 28 (1) (k) (6) of the Local Self-Governance Act , 2055 has mentioned that the records of the helpless, orphans and the disabled children within the village shall be maintained and make arrangement for keeping them in an appropriate place, whereas in Section 96 (1) (j) (10) imposes this duty to the municipality and in Section 189 (1) (f) (2) prescribes the duty of the District Development Committee to act in relation to the protection of the helpless, women, old disabled as well as of the handicapped persons in accordance with the national policy.

Article 28 of the Convention on the Rights of persons with Disabilities to which Nepal is a party has provided the rights of

adequate standard of living and Social Protection stating to ensure persons with disabilities to public housing programs. This has imposed the state a liability of operating public housing programs and ensures the rights of residence to the persons with disabilities. At a circumstance, when Nepal has endorsed this provision, it can not escape from its liability of its practical and effective implementation reflecting its domestic legal domain.

There is no dispute on the matter that the persons with disabilities is a group of persons needed special care compared the able bodied person. Reflecting on this reality, the state in view of their special physical and mental conditions required to have prepared special infrastructure in order for the increase of their contact and access to public places and ensure employment. So also, the restrictive clause of Article 13 (3) of the Constitution has made special provision for the persons with disability comprised under special group different to that of other ordinary people. Disability is a special type of physical or mental condition which may come either with natural birth or by various reasons later. Disability causes physical, mental or intellectual loss to a person due to which he faces difficulties in running life than other able bodied man. The persons with disabilities need extra and special care and facility than the ordinary man. Therefore, their physical capacity as well as mental and intellectual conditions must be identified by the state and treated them distinctively than the ordinary man. The state for the arrangement of their passing life shall feel its obligation to operate special program along with necessary physical infrastructure. For this the state must identify the disabled or extremely disabled persons and provided livelihood allowance or special privilege. Against this background, the claim made in the petition can not be called unreasonable.

Even for the implementation of the prevailing constitutional provision the state should feel obliged to make arrangement for the protection and welfare of these classes of people. Among the disabled some cases may be of simple nature and others rather critical who cannot perform even their simple daily routine worth business as taking

meal and conducting compulsory activities and needed to take service or the help of others. In such cases the state requires to be more serious and thoughtful about what could be done ensure the right of life of those extremely disabled people. The Disability Protection Welfare Act, 2039 has visualized the need of disables' home. Section 2 (C) of the Act defining a disables' home mentions that home means a home which is arranged for fostering the disables. The sub-Section (8) of Section 10 of the Act has included also the provision that in these homes the disabled may have a comfortable life along with the provisions of entertainment to pass their time in a pleasant environment. The Disability Protection and Welfare Rules 2051 promulgated after 12 years for the implementation of the Act, in its Rule 8 provides for the establishment and operation of disables' home. Rule 8 (1) states that the Government of Nepal may establish disables' home in different parts and until such home is not established any other homes may be prescribed as the house of the disables. Rules 9, 10, 11 and 12 has provided also additional provisions in regard to the operation of disables' home. Section 10 of the Act has provided for the rehabilitation of disables in society, their participation in social, cultural activities, provision of employment if nothing could happen as above, there will be the provision of employment provision or unemployment allowance as well as the provision of special allowance to the old and disabled who are unable to live by earning their bread themselves.

By realizing the need of a residential home for the person with disability, the Act and the Rules has provided for the establishment and operation of such homes. In case there is no family member to look after and take care of a physically or mentally impaired person, or though there is such a member who can not help or he is incompetent to take care or not willing to do so, in such a situation it is most urgent to build disabled residential homes, operate them properly, or make provision of unemployment allowance to such disabled who is unable to earn his bread himself. Now therefore, the

plea made for the construction and operation of disability home and for allowances or privileges is lawful and reasonable.

Now as we consider upon the second question, the provision laid down in the Interim Constitution of Nepal, 2063 for the persons with disability and the provisions enshrined in the Convention on the Right of Persons with Disabilities and Optional Protocol to the Convention of the Rights of Persons with disabilities 2006 to which Government of Nepal has became a party there is no ground to support the claim that the provisions made in Disability Protection and Welfare Act, 2039 and Rules 2051 made thereunder are sufficient and effective to implement those constitutional arrangements and international statements. The Act and the Rules have not been able to comprehend all the problems related to the disabled persons. As much as provisions as it has been implemented are not found fairly and effectively implemented. It has not comprehensively and substantially been made in a right manner though the disability is defined. The rights and interests of the disabled has not been accomplished in full-fledge as enshrined in Section 4 of the Disability Protection and Welfare Act, 2039. While observing the written reply submitted by the office of the Prime Minister and the Ministry of Social Welfare, the efforts made in this direction seems only in the initial state. There are still many things to be done and achieved importantly. The Disability Home as provided in the Act has yet not been built nor operated from the government side except granting donations to some non-governmental organizations. The education to disabled is not sufficient. The training and employment as well as privileges and facilities prescribed by Section 10 of the Act has not been facilitated adequately and appropriately.

Besides the current Act and the Rules this court has issued directive orders in various earlier writ petitions in regard to the welfare and protection measures for the disabled persons. For the implementation of the proviso clause contained in Article 13(3) of the constitution and formulate polices and programs so that the disabled

persons could have their unobstructed access to the public appearances and occasions (Petitioners Bimala Khadka Vs. Office of the Prime Minister and the council of Ministers, writ No. 0748 of the year 2065), get free of cost education by the visually impaired persons (Sudarshan Subedi Vs. HMG/ Council of Ministers Secretariat, writ no 3588 of the year 2057) and receive service facilities as mentioned in Disability Protection and Welfare Act, 2039 (Petitioner Baba Krishna Maharjan Vs. Office of the Prime Minister and the Council of Ministers, Writ No. 3666 of the year 2066) have issued directive orders by this court to enforce those statutory provisions and the courts verdicts.

In view the orders passed by this court in earlier cases and observing the written reply submitted by the respondents, it is difficult to reach a conclusion that the prevailing laws and rules pertaining to the protection and welfare of the persons with disability are adequate. Apart from this, the existing statutory provisions also have not been properly implemented. No effective and workable policies and programs have been developed or being framed relating to disability as provided in Section 20 of the Act. In such a situation it can not be assumed that the state has fulfilled its liability required to be responded towards the weakest section of the society. In order to bring about necessary improvements in the present conditions the statutory provisions of this field are subject to change and correction to protect the rights and interests of the disabled persons in real term. It is the main area of concern. A proper statutory provision fitting to the time not only makes the government and its agencies more serious for this but should be capable also to compel them to fulfill their duties. So the existing legal provisions are to be overhauled to make the government and related agencies more liable to workout for the protection and welfare of the disabled persons. Until these prerequisites are met the existing provisions of the relevant laws and rules are required to be made effective and result oriented.

While considering upon the third question about what sorts of order required to be issued in view the demand made in the writ petition, there is no dispute on the fact that the provisions made in the laws and rules are for their application and practicability. It is the duty of state and its agent to work out a concrete measures for their effective implementation. The state liability and directive principles enshrined in Part IV of the constitution are not only for the decorum and mere verbatim to make show. The makers of the constitution have perceived the need of such provisions and are mentioned in the constitution for their gradual transformation into action. It would not be proper also to render the comprehensive provisions and constitutional spirit inoperative as intended in the Part IV of the constitution. However, the practical application of the commitment expressed in constitution law and international covenants demands a high level of determination, ethical ground and the physical means and resources. It is a matter of great national pride and honor to ensure the fact that the disables are provided with their just requirements and are facilitated with the services and facilities as per the international standard and parameters. It must be taken seriously by the state and its relevant agencies. It is one of the most sensitive areas of the concern. The state or the government should demonstrate its readiness. Neither the court is desirable to issue such orders which can not be executed and immediately be materialized.

The court is always sincere and committed towards full compliance of the constitution and the laws. This court not only cares what the law explicitly mentions but is always active, ready and sincere to translate the objective of law and the essence of the constitution into practice. Since it is one among the other organs of the state, now therefore, a coordinative effort of all three organs alone could be instrumental to foster justice to the people and only then the state could function well. So this court is always anxious of this matter because it can not overlook also the ideals of judicial restraints. By this it does mean that it follows the regressive path or seems reluctant to the rights and interests of the disabled persons, or to adopt the judicial inaction rather than to pose judicial activism. In

such a situation, it will be wise to keep up with both the judicial activism and judicial restraint and strike balance between these two. Extreme judicial activism or an unnecessary judicial inaction both may cause interruption in the path of getting the justice by the people. So the doers of justice must always be attentive and careful to judicial self-restraints.

The petitioner has made a plea for the arrangement of the required scale of physical structures for disability home and their operation, a wheel chair for the excess to all government and public offices as well as in public transport and road, and separate track road for its easy movement. Demands are made also for regular allowance for extremely disabled person and a subsistence allowance for the livelihood of his attendant. Access to education, health, employment of the disabled person and such other things are requested in the writ petition. In order to meet all these needs, its is viable for the state only to the extent of means and resources availability and bring about necessary policies in this respect. It demands a huge amount about which this court can not fix the time limit until when the said demands could be met. There may cause obstruction due to the shortage of the physical means and resources at times. Now therefore, no order as demanded by petitioner for the immediate arrangement shall be rational and practical to be issued against all these backgrounds.

In this way, while observing the overall situation by conducting serious study and review of the fact some demands are found to be made at the moment and some others could be arranged in due course of time. It is certainly a matter of inspiration to have initiated some actions in the areas of education, health and social security for disabled persons by Government of Nepal and its various agencies. However, they are of tiny scales and inadequate. Now therefore a writ of mandamus has been issued in the name of the respondents Government of Nepal, Office of the Prime Minister at the Council of Ministers, the Ministry of Women, Children and Social welfare and Ministry of Finance directing them to carry out following activities more seriously and responsibly:

Activities to be carried out-

1. Make or cause to make arrangements for providing subsistence monthly allowance of minimum of Rs 500/- to 3,000/- to those persons with disability who is of old age, unemployed and have no source of income in view of their nature of disability so far identified and recorded.
2. Make or cause to make arrangements for providing special monthly allowance of Rs 3,000/- to Rs 5,000/- in the form of minimum subsistence allowance along with the attendant of the persons who are identified and recorded as persons with complete disability and is physically unable for movement or is in the state of complete mental disorder and has no family member to look after him or there are such members but are unable to take care of him depending upon the case.
3. Make appointment of at least a social welfare officer or designate any officer of Government in each district for identification and classification of the persons with disability to take care of their overall rights and welfare.
4. Make available the allowance and special allowance specified in Section 1 and 2 above within 3 months from the very date of the receipt of this order.
5. Complete the task of appointing the social welfare officer within 6 months of the receipt of this order.
6. Notify this court within 7th month of the receipt of this order after the completion of the tasks as stated above that the order has been executed.

Apart from the actions stated above the other welfare activities required to be carried out as per the constitution in regard to the persons with disability must be brought into implementation process instead of only in the pages of the state policy. These provisions must be included extensively in the Act itself. Besides this, the new challenges come across in the path of the welfare activities of the

persons with disability also are required to be addressed. Either the Disability Act or the Rules be incorporated the subject matters education, health and social security or there is a need to promulgate an unlawful law after conducting their thorough study. The Act and the Rules which were framed and enacted 2/3 decades back from now have not been unable to comprehend all the aspects of this area in one hand and there is the lack of effective implementation of those Act and the Rules on the other.

After conducting the critical observations of the constitution, Act, Rules and conventions now therefore this court thinks reasonable to issue directive order in the name of Government of Nepal Office of the Prime Ministers and the Ministry of Women, Children and Social Welfare to gradually carry out the following activities within the appropriate time limit:

Matters about which the Directive Order is issued:

1) Conduct or make arrangements for conducting the census of the persons with physical, mental and intellectual disability and fix their standard and class as soon as practicable on the basis of the universal principles of medicinal science and international standard for the purpose of Section 3 of Disability Protection and Welfare Act, 2039.
2) Construct and operate a Disability Home. It is compulsory to construct and operate at least one disability home in a planned manner in the districts and regions where there is the large number of disabled persons, from the coming fiscal year,
3) Ensure effective enforcement of the provisions made in the Act and Rules in respect to the residence, education, health, training, employment and of other facilities of the disabled persons,
4) Appoint an officer level monitoring officer in the cabinet secretariat as well as in the Ministry of Women, Children and

Social Welfare each and prescribe their functions, duties and power in the reformed Disability Protection and Welfare Act itself with the objective of conducting effective follow up of the activities to be carried out by the government and non-government level agencies in regard to the welfare and security of the disabled persons.

5) Develop the special types of provisions and programs for the disabled persons and implement them gradually as mentioned in the proviso clause of Article 13(3) of the Interim Constitution of Nepal , 2063 and Part IV of the same where the state liability and state policy has been specified,
6) Make arrangement of coordination and assistance as per need in the activities of the governmental and non-governmental agencies involved in the field of the rights of the disabled persons and their welfare.
7) Bring about timely changes or alternations in Disability Protection Act, 2039 and the Rules, 2051 having obtained necessary opinions and suggestions of the concerned experts and the stakeholders and enact an unified Act and Rules accordingly taking into account also a situation where Nepal has already been endorsed the Conventions on Disability, 2006.

Let the respondents be notified of this order through the office of the Attorney General and a copy of which along with the decision be provided to the monitoring and Inspection Division of this court and then handed over the file of the case as per rule after the case is removed from the inventory.
I concur with the above decision.
J. Kamal Narayan Das
Done on this Day of 30th Shrawan, 2069 BS (August 14, 2012)
Translated by Bhim Nath Ghimire

A crime of rape committed before marriage can not be pardoned only on the ground that there has been established a marital relations between offender and offended since our law prohibits a cohabitation as man and wife without legal or religious sanction.

Supreme Court, Division Bench

Hon'ble Justice Prem Sharma

Hon'ble Justice Ran Bahadur Bam

CR-0568 of the year 2064

Case: Rape.

Appellant / Plaintiff: Government of Nepal with the first information report of Samayakumari (changed name)

Vs

Respondent / Defendant: Rabin alias Nayaran Poudel Khatri, a resident of district Sindhuli, Tandigaon VDC, ward No. 6, upper Dhansari

[In accordance with Section 3(1) of the Procedural Directive issued by this court in 2064/9/10/3 / (Nepal Law Bulletin, 2064, Vol. 9, Decision No. 7880, page 1208) for keeping the name of the parties in the proceedings of the special types of the cases in convenience, the names of the complainant and the victim have been changed and their real name is kept in a sealed envelop and enclosed in the file of the case. Let the same sealed envelop be taken as an integral part of the decision and be entered into the heading of never decaying column of the inventory and maintain its record in pursuant to No. 21 of the Chapter on Court's Procedure of the Country Code (Muluki Ain)].

- **It has been necessary to contemplate without hesitation also the fact that various factors such as the awareness level of the society, the condition aggravated by economic, social and cultural disparity, geographical conditions, the family status, social outlook, background, superstition, irresolute psychology and the nature of the crime all have jointly working in matter of reporting the crime information on time.**
- **The provision of filing a letter of complain within 35 days of occurrence might have been adopted taking into account the possible obstruction likely to be caused by the factors such as social environment, family conditions, the awareness level of victim, geographical difficulties, fear of threat and irresolute psychology. It would be unreasonable to undermine the fact that a letter of complain could come to register by delay of some days or of such period arising various conditions stated above. For this reason, the statutory provision of 35 days time limit for filing complaint in a rape case is found to have perceived the reality of occurring this possible phenomenon. Now therefore, it is against the law to make a perception that the failure in filing complaint immediately after the occurrence should become the one and only ground to let someone loose from the crime.**
- **The re-examination affidavit which can be utilized only for the purpose of clearing the fact not cleared earlier shall have no legal validity if it introduces totally a new assertion by fully replacing the earlier particulars contained in the first information report.**
- **The re-examination affidavit made without following the modus operandi out lined by the existing legal provision**

as well as going contrary to the fact already cleared can not receive legal validity.

- **If the court deems necessary to further clear the fact in case of its obscurity, the re-examination statement may be taken more to clear only on matters which were not so clear previously. Taking this straight provision of Evidence Act arbitrarily, the act of trying witness in no time so as to overrule the entire fact already established can not be accepted as lawful.**
- **There is no room for dispute on the matter that the statement of the victim bears the central importance in a rape case.**
- **No respite from crime can be granted by accepting the certificate of marriage created at a date later than the date of registration of case and furnished in the court after completion of search and inquiry of a case which has happened previously.**
- **If a criminal is freed from a crime only on the ground of a marriage solemnized after the rape, it is certain that the impunity may held its head high and the society have a negative impact towards the state.**
- **We have already internalized a value that if any cohabitation took place between husband and wife without consent it will be a crime. Now therefore, it will be unlawful to reach a conclusion that the criminal should get a respite from the crime of rape merely on the ground that there has been established a relation of husband and wife between the defendant and complainant in a situation of marriage after rape.**

Decision

Prem Sharma, J: The brief fact of this case which is found submitted after the approval for the review is received against the decision of Appellate Court, Janakpur in pursuant to Section 12 (1) (a) of Administration of Justice Act, 2048 and the decision reached thereto is as follows:

It was the 24th Magh, 2060 and the final day of the completion of the observance of mother goddess Swasthani. After the worship was over and the sweets and flowers were being offered, the cassette recorder which was playing at the moment did not work properly. Prakash Basnet, who is a resident of our village, told that he has another cassette player. Let's go and have it. After such request, I, along with my friend Krishna Kumari left for his home at 9 o' clock of the night. With Prakash his niece Rabi alias Narayan Poudel also was accompanied. They told us to go ahead leaving them behind. Perhaps, they had to have a secret plan to rape me. According to their plan Prakash went into his home to take cassette. At the mean time, Narayan Poudel called me near him. As I opposed him, he caught in my arm, dragged forcefully and took me down to the field. I tried every possible effort to get rid of him but failed. As my friend Krishna Kumari approached, he threatened and stopped her to come. As I saw Prakash coming I cried for help but he appeared indifferent and went toward his home. Then Mr. Narayan Poudel threatened also me and blocked my mouth with a scarf, raped me and absconded. So I request to have taken action against Narayan Poudel on rape and to Prakash Basnet as an accomplice. This was the content of FIR registered in 2060/11/2 by Samaya Kumari.

The health check report submitted by the district health office Sindhuli has recorded that the aggrieved Samaya Kumari had her hymen of the vagina torn.

There is a statement signed by Krishna Kumari Ghimire stating that she was at Samaya Kumari's home on 24th Magh, 2060 in the invitation of observing the final worship of mother goddess Swasthani's vow. Since the cassette did not work and Prakash told that he has a nice cassette, I, along with Samaya Kumari accompanied also with Rabin and Prakash went to Prakash's home. As we got there, Prakash entered into his home. At the mean time, Narayan Poudel forcefully dragged Samaya Kumari, took her to the field below and attempted rape. As I tried to reach near Narayan Poudel he threatened me not to go near him. Then I hurriedly reached to Samaya Kumari's father and inform him about the event. In this manner, Narayan Poudel did rape to Samaya Kumari.

Samaya Kumari's father says, Krishna Kumari came and informed him that as she was participating in the worship of Swasthani's vow on the invitation of the complainant to her home in 2060/10/25, she saw Narayan Poudel attempting rape to Samaya Kumari with the help of Prakash Basnet, then I reached to the place of occurrence where I saw complainant coming in an abrupt condition with her trouser spoiled. I inquired about the incidence. She said that Narayan Poudel raped her using Prakash Basnet. The search carried out Narayan Poudel could not be tracked down. Narayan Poudel was raped her in the help of Prakash Basnet.

A deed prepared projecting the nature of the location where the incidence was taken place shows that there is Rajendra Karki's premise in the east, the west lies is a dry land of Dambar Bahadur Thapa, north lies a rice field of Chandra Bahadur and to the south there is the path heading toward village development committee. Within this territory there is a house of Prakash Basnet. From the edge of the gate of the foreyard of that house there is a mark of traction line of dragging the slipper, 200m below of which some 4 plants of maize were found samshed in one corner of a terrace and the grass there about was pressed and crushed as if the men were sleeping on it.

A deed of recognizance of recovery suggests that there is a house of complainant's father. There are 3 rooms in the house and the central room was occupied by the complainant as her bed room. The police recovered a torn light purple colored kurta together with a pair of soiled yellow colored kurta and suruwal from there which were found torn at the front part below the waist.

Prakash Basnet, in his statement made before the authorized officer has confessed that on 24th Magh, 2060 he had been in complainant's home in an invitation to observe the concluding vow of mother goddess Swasthani. Overtime, the cassette player did not work. He said he has a nice cassette player. Then he, along with complainant and her friend 'Sani' accompanied also with his niece Narayan Poudel went to his home. Along the way his niece expressed the desire of f**k to the complainant. When he was rushing into his home, the niece attempted to rape the complainant forcefully dragging her in the place of occurrence. As she cried for help he tried to approach there. But the niece stopped him to go there so he could not help her. The incident could be avoided if he had employed himself sincerely. After his return his niece raped her.

A deed signed by the father of the complainant had a mention that the complainant is my daughter, she is not married. It was 24th Magh, 2060 and an auspicious day of completing the vow of mother goddess Swasthani. A cassette player playing at the moment suddenly did not work and as they were going to bring the new cassette the rape committed in the help of Prakash Basnet as stated in the letter of the complain. As her friend Sani came and informed me about the event, I rushed towards the place of occurrence but there we could not track down Mr. Rabin. Narayan Poudel raped my daughter using Prakash Basnet, says Krishna Bahadur, the complainant's father.

I have mentioned in my letter of complain the matter that Narayan Poudel, using Prakash Basnet raped me on 24th Magh, 2060. When I was returning home in an abrupt state after rape, I met Krishna

Kumari along the way and described her all the matter. The complainant Samaya Kumari states in a deed signed by her on 20th Falgun, 2060.

A deed prepared depicting the situation of the incident and signed by 7 persons including Sooryadhoj Bhattarai had a mention that the defendant Narauan Poudel has raped to the complainant using Prakash Basnet as stated in the letter of complain, dated 2060/10/24. During search carried out at the night of the occurrence, we met complainant in tears returning from the place of incidence. We geared up the search but Narayan's father told us to deal the matter the next day. But the next day, Mr. Narayan Poudel found absconded.

The charge sheet had a claim that on the basis of the complainant's genuine complain and the proof and evidence so far collected it has been almost certain that Narayan poudel committed rape by tearing down the kurta and suruwal of the complainant. Now therefore, he has committed a crime in violation of No. 1 of the Chapter on Rape. So it is sought to have him a punishment under No. 3(3) of the same chapter and to Prakash Basnet under No. 4 of the same because he has committed crime as stated in the same clause. Let the aggrieved Samaya Kumari be provided with the half of the property on partition by confiscating the entire property of defendant Narayan Poudel in accordance with No. 10 of the Chapter on Rape of the Country Code (Muluki Ain).

Defendant Prakash Basnet in his deposition made before the court laments that around 9 o' clock of the evening of 24th Magh 2060, he was at home. He has not met complainant, Narayan Poudel and Krishna Kumari, that day. No rape as claimed has been done or committed incited by me. I know nothing about whether Narayan Poudel was involved in the incidence as said.

Defendant Narayan Poudel's witness Mr. Kul Prasad and Reet Bahadur Kaki have given their testimony that the defendant Rabin alias Narayan Poudel has not committed rape to the complainant. If

anything has happened as said that might have done with their consent because now they have been husband and wife after marriage.

Sindhuli district court reached a decision in 2061/12/23 declaring the defendants innocent since nothing has been revealed from the file of the case that they have committed wrong because there has been established a conjugal relation between complainant and the defendants.

The plaintiff government of Nepal files an appeal in the Court of Appeal Janakpur demanding punishment as claimed in charge sheet since the decision of the Sindhuli district court dated 2061/12/23 to declare the defendants innocent is erroneous and subject to void in a situation where the incidence is established through the institution of a confirmed letter of complaint, the deed of Krishna Kumari, the confession of Prakash Basnet in occurrence and the deed signed at that moment.

Janakpur appellate court concludes in 2062/12/23 that the decision of the Sindhuli district court 2061/12/23 appears lawful and therefore sustained.

A petition is filed in this court on behalf of the government of Nepal requesting for review order and punishment as claimed since the decision of the appellate court to confirm the decision of the original court declaring the defendants innocent by taking a re-examination affidavit of the complainant made in the absence of the plaintiff as basis. Besides this, there has been filed a legitimate complain of the victim and it is confirmed in a deposition made before the court. The occurrence of crime have been corroborated by the statement of eye witness, statement of the victim's father and the deposition of plaintiff's witness Narendra Karki made before the court. Physical examination report of the aggrieved has stated 'old hymen tear' which also proves the happening of the case. The defendant himself has confessed the crime happened in consent. Any suit filed within the time limitation had to dispose of on the evaluation of fact and

evidence but the arguments of original court in proving innocent stating it delay by six days is erroneous to sustain the same by the appeal. If we contemplated the notion that no rape shall be formed after marriage with the aggrieved no doubt it may encourage the impunity . Even if the defendant found married to the victim he should undergo punishment of his previous guilt. The defendant was absconded at the occurrence and has made deposition appearing in the court after a year. Since the re-examination statement of the complainant was made in the non-attendance of the plaintiff, the decision of the appellate court to sustain the decision of the original court declaring the defendant innocent only on the basis of such re-examination statement is erroneous where there is a legitimate letter of complain registered by the aggrieved party herself claiming that the defendant Rabin alias Narayan Poudel raped her and she is found appeared before the court and have made the deposition in line with her letter of complain in 2061/9/13. The persons such as victim's father Bahadur Krishna who signs in occurrence and Krishna Kumari Ghimire who was accompanying victim when the incident had taken place, the instrument they signed at the court and the physical examination report of the victim along with other independent evidences have been substantiating the accusation against the defendant. In a situation when the case-file reveals all these facts, the decision of the Appellate Court Janakpur to sustain the decision of the original court to declare the defendants innocent taking the basis of the application dated 2061/10/10 sent by the defendant through post pleading that there has been established marital relation along with a marriage certificate 2061/10/15 and has denied the fact appearing before the court on the same day plus victim's re-examination affidavit taken on the same day with an application are all corroborating the crime. Thus, the decision of Appellate Court, Janakpur is found to have reached in the gross-violation of Section 10, 18 and 54 of the Evidence Act, 2031, now therefore, the order of review is granted in accordance with Clause (a) of sub-Section (1) of Section 12 of the Administration of Justice Act, 2048 so as to review the case. So this court orders in

2064/11/10 to summon and present Rabin alias Narayan Poudel Khatri.

A written response filed in this court on behalf of Mr. Rabin alias Narayan Poudel Khatri had a mention that the order is found made taking into account the bond of the victim, the deed of occurrence of Krishna Kumari and Bahadur Krishna and their deposition which is already settled from the origin and appellate level. A bond signed by Rabin alias Narayan Poudel appearing before the court has revealed the fact that there has happened frequent sexual intercourse in the consent of both between him and Samaya Kumari before and after the occurrence. The justice doer has not paid sincere attention to the fact that the complainant has confessed this fact through her re-examination affidavit recorded in the court. Her such confession has defendend the particulars of the letter of complaint as well as the deed of occurrence made by other person. The person who signed up in the deed of occurrence are no more than the hearsay witness. Since, the case is found fabricated with the motive of culminating the defendant by instigating the complainant now therefore, the decision of the Appellate Court should be sustained because now their love affair has been converted to conjugal relation and settled their family life.

The present case which is duly submitted before this bench have studied the overall documents along with the letter of appeal. The learned deputy attorney general Mr. Dharma Raj Poudel on behalf of the government argued that the rape is a crime to be committed inhumanely and torturously by male against female in the form of sexual violence. The major essence necessary to establish this as a crime is the use of force and seduce against the will. The sexual crime to be committed against the protest of the woman is a rape. On some occasions, it becomes a social taboo and naturally causes delay to inform about such event. Such a technical delay must not be taken as the basis. In such cases the statement of the aggrieved deserves high evidential value. Even the defendant who was fled after the occurrence has confessed the crime appearing before the

court. He says it was done in consent. Anyway, he has accepted the happenings. In such a circumstance, the re-examination recorded against this fact does not bear weight of an evidence. So much so, we have internalized a legal value that even if there has been established marital relation between husband and wife a sexual intercourse taken without the consent of the wife becomes a crime, the rape occurred before marriage can not get license from the criminal liability. If any act of sexual violence takes place before marriage and the victims had no options other than staying with the perpetrator there is a great possibility of growing such events in future. Hence, the decision of the appellate court must be overturned and the punishment must be inflicted as claimed in charge-sheet.

The learned advocates Tikaram Bhattarai and Dekendra Prasad Subedi represented from the defendant/respondent Rabin alias Narayan Poudel Khatri pleaded that the statement of the defendant and re-examination affidavit of the complainant before the court has revealed that the sexual intercourse between the defendant and the complainant had been common in their consent. No bruises, wounds or injury have been traced as of a rape in the aggrieved. The letter of complain is found registered only after a week of an unsuccessful effort to make the defendant agree to take her custody and enter into his home as a new bride. Their age is matching for marriage. If the aggrieved or the complainant would like to change voluntarily his/her earlier statement, no one should hesitate to take it as evidence. In addition to this, they have started a married life. The last resort of the criminal jurisprudence is justice. If the defendant should undergo punishment the complainant may face an additional trouble. The defendant should go unpunished even for the well being of a married life. The decision reached by the original and appellate jurisdiction is therefore flawless. So the order granted for the review should be revoked and requested to sustain the decision of the appellate court.

After the study of the letter of complain of this case, the charge sheet , the defendant's statements, the re-examination affidavit of the victim, the marital relation established between the victim and

defendant, the ground taken while granting approval for review as well as the question raised by the learned counselors during the hearing, now it has been necessary to deliver judgment giving special focus on the following questions:

1. In a rape case the time period until when the letter of complain has to be registered from the date of occurrence and what will be the evidential value of a letter of complain filed by some days delay of the occurrence?
2. After the complainant has registered a confirmed letter of complain against the defendant and once having recorded a fixed affidavit appearing before the court whether or not an affidavit made against her fixed affidavit made at the time of recording the re-examination affidavit shall deserve the legal validity? And whether or the last affidavit could be accepted as an irrevocable evidence?
3. Whether or not the proofs and evidences accompanied with the case file substantiates a rape by the defendant against victim. And, take for granted that it proved, in such a situation whether or not a marital relation happened between the defendant and the victim after occurrence would allow to go unpunished the crime committed previously which was then considered as a crime by law?

First of all, while considering upon the first question it comes to reveal that on 24th Magh, 2060 which happens to be the auspicious day of her completion of the observance of mother goddess Swasthani. On that occasion, a cassette player playing for amusement did not work. As the aggrieved and Krishna Kumari along with Prakash Basnet were going to Prakash's home to bring the cassette, the defendant Rabin alias Narayan Poudel was also accompanied them and it was 9 o'clock of the evening. When they reached Prakash's home he entered into his home. At the mean

while, Narayan Poudel caught in her arm and took forcefully down to the field. Krishna Kumari was with her but he threatened her. He threatened also the aggrieved, block her mouth pushing a scarf. She cried for help with Prakash but he looked indifference. At the mean time, Narayan Prasad raped her. She has filed the letter of complain at 9.30 on the day of 2nd Falgun 2060, the 7th day of occurrence.

The original court while declaring the defendant innocent has complained of the delay and reached a conclusion invalidating the letter of complain. There is no room for dispute on the fact that the letter of complain undoubtedly takes the form of a backbone and plays a vital role in initiating and reaching a conclusion in the state run criminal case. In a state run criminal case, the crime can be unfolded either through a letter of complain or on the basis of any other information. This statutory provision has been adopted also in our legal system. In reality, the act of rape which suffers physical and mental damage to a woman deprieves her freedom and right of self decision against her will using threat by man has termed by all the countries of world as a heinous crime committed against the state and made provision for punishment. It is defined also as anti social and a most grievous nature of criminal offence and has developed necessary provision accordingly. There is no scope of doubt and debate on it. Hence, there is no space for debate on the fact that the act of rape is directly associated with the life, existence and chastity of a woman. Why a number of woman do not protest on time against sexual violence and oppressions made against them is because the factors such as social outlook, direct impact on their social standings and other multiple reasons stops them to do so. Now therefore, it has been necessary without hesitation also to perceive the fact that the factors such as the awareness level of society, the conditions aggravated by economic, social and cultural disparity, the geographical conditions, family status, social outlook, background, superstition, irresolute psychology and the nature of crime have all working collectively in matter of crime information on time.

While observing the statutory provision prevailed in this relation, No. 11 of Chapter on Rape of Country Code provides that when a rape occurs it is necessary to file letter of complain (lawsuit) within 35 days of the crime done or committed. The provision of filing a letter of complain within 35 days of occurrence might have been adopted taking into account the possible obstruction likely to cause by the factors such as social environment, family conditions, awareness level of the victim, geographical difficulties, fear or intimidation and irresolute psychology. It would be unreasonable to overlook the fact that the letter of complain came to register by delay of some days or period by arising unforeseeable conditions stated above. For this reason, the statutory provision which provides 35 days time limit for registering a letter of complain in the event of occurrence of rape has perceived the reality of occurring this possible phenomenon. Now therefore, it is against the law to make a perception that the failure in filing a complain promptly after the occurrence should become the one and only ground to let someone lose from the crime. As we look into the principles propounded in respect to the limitation in a rape case, our supreme court in a rape case run between government of Nepal and Dipak Tulasi Bakhyo has spoken of that the limitation is not a subject matter to be strictly determined by calculating it in a technical manner ascertaining that it should have been registered a letter of complain within such hour or day. In view the above precedent or legal provision it never seems to be justifiable to reach a conclusion that a letter of complain shall be rendered to worthlessness or diminish its value if it is not filed within such a hour or days of the occurrence.

The following excerpts adopted here as a reference from Indian Supreme Court in a case run between state of Punjab Vs Gurmit Singh and others:

> *The court can not overlook the fact that on sexual offences delay in lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family*

members to go to the police and complain about the incidence which concerns the reputation of the prosecutrix and honor of her family. It is only after giving it a cool for that a complaint of sexual offence is generally lodged.

By this it is known that the factors like unwillingness, irresoluteness, social reputation and such other reasons may cause delay in registering complain in the events of sexual offences. It has been a practice also in other countries that the existence of letter of complaint (FIR) must not be turned worthless only because it came to register after some days delay.

While taking into account the above mentioned grounds, reasons, the citation of the decision reached so far as well as the provisions made in our laws, the grievousness of the criminal act committed by the defendant does not seem unacceptable only on the ground that the aggrieved has lodged the information in 2060/11/02 for a crime of rape committed by the defendant in 2060/10/24. It is the only thing whether or not the letter of complain is registered within 35 days as the law provides and the court must not think otherwise if it is found registered as said. Hence, no further elaboration shall be needed by raising questions on the proceeding of a rape case moved on the basis of the letter of complain filed on the 7th day of occurrence, taking it as a minor incidence which is a serious anti-social offence.

Now while pondering upon the second question it is not necessary to repeat here the truth because the victim has lodged a confirmed letter of complain by herself against the defendant Narayan Poudel alleging that he raped her is already discussed above. After registering such a confirmed letter of complaint, the cpmplainat is found to have made her deposition in district court Sindhuli by fully supporting the content of her letter of complain that the defendant Narayan Poudel raped her taking her down to the field even by tearing down her Kurta Suruwal while she was going to Prakash Basnet to bring a cassette because the cassette playing at her home

did not work while she was celeberating the final observance of mother goddess Swasthani on 24th Magh, 2060. No dispute could be raised on the fact that what the victim claims in a rape case becomes most vital and authentic evidence in rape case.

Section 10(1) (a) and (b) of Evidence Act, 2031 has internalized a truth that the person aggrieved by the incident shall become the direct evidence of that incidence in a criminal offence. According to this the fact expressed immediately before or after the incidence by a person directly affected by such incidence or what he saw or knew about it are acceptable as evidence. In this case, the complainant while lodging the letter of complaint immediately after someday of the occurrence and while giving statement in court appearing almost one year after the occurrence has once recorded the criminal act of the defendant with a clear cut description in line with the particulars of her letter of complaint, in this situation, her such evidence must be adopted as an irrevocable evidence under Section 18 (b) of the Evidence Act, against the defendant.

While bothering upon the plea made by the respondent's legal counsel that the aggrieved in her statement recorded in 2061/10/15 in court has accepted the matter that the sexual intercourse taken on the given date was happened in their consent, now they are married, marriage certificate has been furnished by her and she has indorsed it and made a re-examination note all should be adopted as an evidence. In this, her re-examination affidavit is found to have taken 2061/10/15 by virtue of an application received in court in 2061/10/12 which the aggrieved has sent through the post in 2061/10/10. In her said application it is mentioned that there has been a sex in the said date in their consent, now they are married and the certificate of marriage is furnished. In order to draw a conclusion whether or not the said re-examination affidavit has any evidential value in a situation when the aggrieved complainant had recorded her statement appearing before the court in 2061/9/13 in support of the particulars stated in the letter of complaint it is proper to become watchful on the statutory provision contained in Section

49 (4) and 50 (1) (2) of the Evidence Act, 2031. While we study the legal provision in regard to re-examination affidavit it reads that a witness once tried may be tried again only in respect to matter which was not cleared before in case there exists a situation that he is any way to be tried. Here, the aggrieved becomes the principal witness of the plaintiffs and there is no dispute on the fact that she must any way be tested. As per the legal provision stated above, re-examination affidavit may be taken on matters not cleared earlier and it emphasize on the reason that a situation as such exists. The said witness has already given testimony appearing before the court in 2061/9/13 which fully corroborates the particulars of the letter of complain. The aggrieved (witness) who has been given testimony fully substantiating the content mentioned in the letter of complain in respect to the occurrence and the act of the perpetrator, no appropriate reason is visible on 15th Magh, 2061, that means the day on which the defendant was presented. In a circumstance when the particulars of the FIR has been corroborated by the first statement itself, what were those ambiguities to be cleared again? How it becomes so urgent for examination ? The reasons therefor are not explicitly opened. If the examination was apparent it was necessary to have taken the recourse through the government prosecutor as provided in State Cases Act,2049.

Likewise, Section 50 (1) and (2) of the Evidence Act, 2031 provides that the concerned party shall examine his witness on his own first and then the opposition party can cross examine such witness and both the party shall be present at the moment. But against this legal provision the court found to have taken the statement of the victim in the form of re-examination without involving the concerned party with the motive of supplying feedback to the application of the aggrieved, consequently it has violated the mode of trying the witness prevailed in our legal system. The re-examination affidavit which may be utilized only if the deposition made earlier could not clearly introduce the fact but here, it is found utilized to establish the new fact so as to fully overrule the statement made in 2061/9/13 which corroborates

the particulars of the FIR, can not be granted legal validity. In a condition when the re-examination affidavit taken afterwards would become ipso facto ended its legal recognition because it was taken going against the statement made earlier by the aggrieved such a re-examination affidavit shall bear no legal effect. The Evidence Act had a provision that the court may take the re-examination affidavit incase it is necessary only on the matter which were not cleared earlier is understood arbitrarily to mean that it may be taken in no time and going beyond the overall fact could not be referred as lawful. The court shall never incities any person who speaks against the incidence already corroborated. Here the complainant is appeared before the court and recorded the statement and the situation is such that the occurrence is substantiated by the evidences collected in course of the investigation. If such things happen, there may arise a danger of frequent appearance of the complainant and other witnesses and encourage the crime. To counter this situation there is the provision of punishment to a false witness in No. 169 of the Chapter on Court's Procedure of the Country Code. Now therefore, in a circumstance when the complainant has made a confirm affidavit appearing before the court so as to clearly substantiate the particulars of the fixed FIR registered against the defendant in occurrence, the re-examination affidavit taken against the said confirmed affidavit made even without fulfilling the procedure determined by law shall not receive legal validity and can not be accepted as evidence.

Now, in order to settle the third question, first of all it is appropriate to discuss about whether or not the defendant Narayan Poudel did rape as claimed in the charge-sheet. The fact that the victim has registered a confirm FIR and made a deposition also appearing in the court claiming that the defendant has raped her has been elaboratively discussed above. There is no room for dispute on the matter that the statement of the aggrieved party shall be vital. The defendant Narayan Poudel who was absconded at the occurrence has denied the crime while giving deposition appearing before the

court. He further states that the sexual intercourse was started since the year 2059 in consent and on 24th Magh 2060 also was taken place in consent and had thus denied the rape. His saying has not been corroborated by other independent evidences. It is the most sacred notion of the law and legal principle that unless the defendant's denial is corroborated by other independent evidences such a denial can not be the ground for proving innocent. So the said statement can not be the basis for his amnesty from the crime.

As we look into the plea of Narayan Poudel who says that the sexual intercourse was taken place since 2059 in consent and the event of 24th Magh 2060 was the continuance of the same episode. Now there has been established a marital relation. So no punishment should be inflicted on the crime of rape. However, the aggrieved has registered a confirm FIR at the occurrence, Krishna Kumari who was along with the victim has informed to the victim's father in detail about the incidence, the another defendant Prakash Basnet has heard her cry for help and lamented that he could not help her because Narayan Poudel made him stop to go there, a light purple colored Kurta found torn at the front part and recovered a soiled trouser, some maize plants found broken at the place of occurrence all suggests that the incidence was occurred as claimed. Similarly, the complainant is appeared in the court and made deposition in 2061/9/13 so as to enrich the FIR registered at the occurrence. But the defendant is found to have given a denial statement appearing before the court after one year complaining that the sexual intercourse was being taken in consent since long ago and would like to establish the odd date of occurrence. If it was true as lamented by the defendant that means it was happening in consent since 2059 and the incidence of the day of occurrence was the continuance of the same why then it is necessary to take to the field during night time? Why the victim had to cry for help and the tearing of her Kurta and trouser would cause or happened?. Since the defendant is unable to prove the reason why he remained disappear for a year from the date of occurrence, such claim can not be taken

as trustworthy. If the sexual intercourse had been taken in consent since 2059, there is no reason to claim rape by the victim coming in 2060. Krishna Kumari Ghimire, the eye witness of the event, who was in the company of the defendant and the victim has signed a deed before the investigation officer at the time of occurrence so as to verify the confirmed FIR of the complainant that while they were at Prakash's home to bring the cassette Nrayan Poudel forcefully dragged the victim towards the field and raped and about which the victim's father was informed because she was prevented to go at the place of incidence. Krishna Kumari given deposition in the court confirming the same fact. Krishna Kumari Ghimire which is said to be the eye witness of the incidence her deed and deposition must be accepted irrevocable evidence.

Since there is a need to give a cursory glance upon the claim of being innocent of crime because there has been established the marriage with the victim along with the submission of marriage certificate, a confirmed FIR claiming an incidence of rape in 2060/10/24 is registered, investigation carried and the case is proceeding demanding punishment on rape, a marriage certificate bearing the registration No. 12, dated 2061/10/15 claiming marriage with the victim in 2061/10/13 is found submitted. The given marriage certificate is found created mentioning the date of 2061/10/15 after the investigation is completed in regard to an event happened in 2060/10/24 and the case is instituted in court, the said certificate can not be accepted as evidence and the chance of granting amnesty from the crime is rare. On the other hand, the complainant in her application prepared in 2061/10/10 and submitted in court in 2061/10/12 has maintained that Mr. Poudel and myself have been enjoying conjugal life after marriage whereas the certificate of marriage produced by the defendants in court bears the date of 2061/10/13 as the date of marriage, thus these statement quarrels to each other and has lost the trustworthiness

The particulars contained in the deed which depicts the physical condition of a place of occurrence such as the line up mark of the

crawling the slipper by the side of the gate of the foreyard of Prakash Basnet's house and the breaking of maize plants 200m down to the field below, the crushing of grass on the ground as if the men were slept over there further corroborates the fact that there the force was used. In addition to this, the recovery of the complainant's light purple colored Kurta Suruwal in the torn condition at the front part from tassel and soiling on it further substantiates the rape by the defendant with the use of force. Besides this, the health check report of the victim states the tearing of old hymen. In a situation when Krishna Kumari Ghimire, Bahadur Krishna and Sooryadhoj Bhattrai have signed a deed that the defendant has raped the complainant, the FIR of the victim has been corroborated and established the crime of the defendant Narayan Poudel.

On the basis of the proofs and evidences accompanied to the case file as well as the grounds and reasons stated above, it is substantiated that the defendant, by use of force is found committed a crime of rape to the complainant as defined in No. 1 of the Chapter on Rape of the Country Code, now therefore, the defendants statement which claims for remission of the penalty and the argument of the learned advocates of the defendant can not be materialized. Hence, the defendant is found committed a crime under No. 1 of the Chapter on Rape of the Country Code.

The serious most question raised in this case is the defendant's plea who insists on the matter that where there has already been established a marital relation between the victim and perpetrator, the act will not be crime and no punishment should be inflicted. Now therefore, it will be expedient also to study the law of the other countries and court practice as well as the latest concept developed on rape about whether or not a crime of rape could be established in the case of marriage after rape. While observing the legal system of Philippines, the article 266-c of the Revised Penal Code amended by the anti-rape law of 1997 reads- The Effect of Pardon- the subsequent valid marriage between the offended party shall extinguish the criminal action or penalty imposed. Article 344 reads-

Prosecution of crimes of adultery, concubinage, seduction, abduction, rape and acts of lasciviousness: In cases of seduction, abduction, acts of lasciviousness, and rape, the marriage of the offender with the offended party shall extinguish the criminal action or remit the penalty already imposed upon him. In a case which involves a fact associated with marriage after rape run between People of the Philippines Vs Ronie De Guzman, G.R No. 185843: Base on the documents including the copy of the pictures taken after the marriage ceremony, if find that the marriage between appellant and private complainant have been contracted validly, legally and in good faith, as an expression of their mutual love for each other and desire to establish a family of their own. Given public considerations of respect for the sanctity of marriage and the highest regard for the solidarity of family, we must accord appellant the full benefits of Article 89 , in relation to Article 344 and 266-c of the revised Penal Court. So the appellant Ronie De Guzman is absolved of the two counts of rape and ordered released from imprisonment. The Supreme Court there releases the defendant from the punishment as decided in March 2010. By this, it came to know that the Philippines has adopted a value of relinquishing the punishment of rape in case the perpetrator married the victim and such marriage is legal and reliable. As we look into the legal provision existing in India and England on rape there is no clear provision in this respect. Criminal Justice and Public Order Act, 1994 has declared rape even when there is a relation of marriage. Either they are pairs or married couples living together rape is regarded as crime also between them. So, even if the perpetrator married the victim after rape, the action committed before marriage seems to be listed as a crime. Also in India marriage after rape is considered as an offence however, the state courts in some states or supreme court of India summons and consult the victim to reduce the punishment to the perpetrator if he desires to marry the aggrieved if the perpetrator expresses his desire before the court to marriage the victim with atonement of crime and if it does but seem to him that his such intention is only to avoid or reduce punishment, the court, in some

occasions, calls the aggrieved party and inquires about her real situation. The Indian law declares rape if sexual intercourse is found taken by making false pretension of marriage and really did not marry later, it is regarded a crime and in some occasion marriage after rape is found taken as a ground for releasing from the punishment of rape. In reference to the cases of Yelda Srinivasa Rao Vs State of Andhra Pradesh, Criminal Appeal No. 1369 of 2004; Pradip Kumar alias Pradeep Kumar Verma Vs state of Bihar, and another criminal Appeal No 1086 of 2007, it is taken as the ground for releasing the perpetrator from punishment of rape in case the victim, with her free will agrees to marry with the perpetrator. In India, the issue of marriage after rape is found running in a very highly flexible condition. Giving special focus on the issue raised in this case in reference to the legal provisions of other countries and our own if the perpetrator is pardoned from punishment on the ground of marriage after rape, there may arise an extra complexity of an incest taboo and an unwanted age difference between aggrieved and the perpetrator which must not be left as unseen. We must not undermine also of a problem likely to occur in case such a marriage did not continue within few span of time of giving amnesty from punishment. If a criminal is pardoned from crime only on the ground of marriage solemnized after rape, it is certain that impunity may held its head high and the society will have a negative impact towards the state.

There is no dispute on the fact that our law has declared an act of rape a crime. The goal of the criminal justice administration is to punish the criminal and maintain social harmony and well being as well as declare the anti-social activities as crime. The legislature will define any act as a criminal act and have it criminalization and if such act does not fall under a criminal act then declares decriminalization. This means that any act which the legislature has done criminalization through state declaration, to declare such an act as decriminalization lies beyond the periphery of the ordinary jurisdiction of the court. The court in course of hearing any case shall

not have power to remove any act from the list of crime which the statute declares it a crime. In reference to this fact this court in a writ involving certiorari plus mandamus run between Ratna Bahadur Baghchand and the Government of Nepal, office of the Prime Minister and the Council of Ministers (Nepal Law Bulletin, 2062, Decision No. 7491), has spoken of that the court, through its interpretation, can not declare new crime and give verdict in respect to the volume of punishment made in legislative law nor allow to do so through the jurisprudential point of view because it may go against the provision of separation of power enshrined in the constitution. Since the business of promulgating the laws falls under the scope of the legislature, the court by exercising its extra ordinary jurisdiction, may recommend to the legislature in the form of opinion or by way of issuing order to recommend for enacting any law or bring necessary provision when a law contradicts with the constitution and international norms and practices.

The defendant in this case has raped the complainant before one year and mere establishment of matrimonial relation between them if taken that their such relation established later than committing an act which the law defines as crime should be pardoned, the goal of the criminal justice which prohibits criminal activities to happen in society and maintains social harmony could hinder and the criminal activities as well as the impunity may be encouraged and occurs disturbance in social structure. The occurrence of rape is an act and condition whereas to happen marriage after that is another act and condition. The occurrence of rape is purely a criminal act whereas the marriage is the tying up of a sacred knot. In the present case, it does not sound as that the sexual intercourse was taken place on the false pretension of marriage and the marriage could have been performed without delay if so wanted but did not happened as such and the defendant is found in isolation for a year. In such a situation, it becomes prejudicial to the norms and values of the prevailing law and justice to reach a conclusion that the defendant should be

released from the criminal liability merely because there has been established a matrimonial relation.

In regard to rape there has been developed a new concept according to which not only the vaginal intercourse but all sorts of sexual activities to be regarded a rape. In England, the Criminal Justice and Public Order Act, 1994 has adopted a provision that any forceful sexual intercourse occurred even between pairs or married couples living together shall be a crime of rape. In our own country, the supreme court has internalized a value that if any sexual intercourse occurs against the will of wife that may be considered as crime. (Writ No. 55 of the year 2059, run between Meera Dhungana and the Government of Nepal, Ministry of Law and Order, and Writ No. 064-0035 of the year 2063 run between Jitkumari Pangeni and GoN , Council of Ministers, Nepal Law Bulletin, 2065, Decision No. 7973, Mandamus). No. 1 and 3 (6) on Chapter on Rape of the Country Code has internalized a concept that the rape may be occurred even between the husband and wife. Only on the basis of the mere establishment of relation of husband and wife between the defendant and the complainant after the incidence of rape, it will be unlawful to reach a conclusion that the defendant should be extinguished from the punishment for rape.

Prior to the amendment in No. 10 of the Chapter on Rape of the Country Code in 2063/7/17, the defendant is if decided to have raped the complainant, there was a provision in law to provide the aggrieved half of the share of the defendant's property, however, the amendment effected in 2063/7/17 has included a legal provision of providing a reasonable sum of amount as compensation in place of the share of the property. There shall be no debate on the existence of a mandatory legal provision of providing compensation to the victim by the perpetrator if the crime of rape is established. In the present case, there has been established the crime of rape by the defendant Narayan Poudel to the aggrieved Samaya Kumari. So there is no room for dispute on the fact that the aggrieved is entitled to receive the share of property as compensation. However, in the

present case the event developed later has had an elementary difference in the entitlement to compensation. About one year after the commission of rape to the victim by the defendant there has been established a matrimonial relation between them and in a situation when both of them have furnished a marriage certificate obtained from the concerned authorities the marriage is certain to receive validity and the aggrieved Samaya Kumari has been the rightful heir of the property owned in the name of defendant Narayan Poudel, in this situation there is no meaning and purpose of providing compensation. The issue of share property and compensation can not go parallel as in the case of criminal offence or the liability. Since the aggrieved Samaya Kumari shall have a secured right to initiate a legal course any time over the share property with the defendant Narayan Poudel, she is not needed to facilitate the share property by way of the rape case. Since the aggrieved shall not be entitled to claim in share property or compensation from the defendant through this case, there will not created a situation also of preventing her from the right of receiving share property from the defendant, her claim in regard to the share property can not be materialized through this case.

Now therefore, the grounds, reasons and evidences mentioned above, it is decided that the defendant Rabin alias Narayan Poudel has committed a crime of rape to complainant. The decision of the Appellate Court Janakpur dated 2062/12/23 to sustain the decision of Sindhuli district court which instead of deciding the crime of rape was declared innocent is therefore partially revoked and the defendant Rabin alias Narayan Poudel is hereby inflicted a punishment of 5 years of imprisonment in accordance with Clause 4 of No. 3 of Chapter on Rape of the Country Code.

In the case of another defendant Prakash Basnet who, while making statement before the authorized officer is found to have maintained that he has restraint the respondent Narayan Poudel from committing crime of rape, the decision of the Appellate Court Janakpur dated 2062/12/23 to the extent of declaring him innocent

arguing that the evidence enclosed in the file of case does not corroborate his role and direct involvement in the occurrence of the crime is consistent and therefore sustained. The claim made in the letter of appeal by the plaintiff GoN can not be materialized to that extent. Do as under in regard to other matters.

Particulars

Since the respondent Rabin alias Narayan Poudel is decided as to award a 5 (five) years jail term in accordance with Section 3(4) of the Chapter on Rape of Country Code (Muluki Ain) partly revoking the judgment of Appellate Court, Janakpur as mentioned in judgment part above, now therefore notify the District Court Sindhuli in writing to realize from him the said term of imprisonment by maintaining the record of the same as arrears because of his non-attendance at the time of decision making… …1

The file of the case be handed over as per rule after removing it from the record of regular proceeding.

I concur with the above decision.

Justice Ran Bahadur Bam

Done on this day of 32nd Ashar, 2067 BS (July16, 2010)
Translated by Bhim Nath Ghimire

The statutory strength of the essence of Promissory Estoppel must fully be honored to establish commercial good will and understanding between the parties concerned.

Supreme Court, Division Bench

Hon'ble Justice Prem Sharma

Hon'ble Justice Kamal Narayan Das

Civil Appeal No. 8546 of the Year 2062

Case: Request for the recovery of amout.

Appellant /Plaintiff: Arvind Majoomdar staying in Lalitpur district, Lalitpur Sub metropolitan City, Ward No. 3, rightful representative of branch office of Damodar Ropeways and Construction Company, situated at Kathmandu district, Kathmandu Metropolitan City, Ward No. 2, Lazimpat with main office situated in Vansitart Road, Calcutta 700001, India.

Vs

Respondent/Defendent: General Manager Hiroyuki Nomiyama at Representative office of Hazama Corporation situated at Kathmandu District, Kathmandu Metropolitan City, and Ward No. 35 with head office at 2-5-8 Kita Aayoya, Ku Tokyo, Japan, and others.

- **With the condition that Hazama Corporation is situated in Kathmandu and all its business run in Nepal, according to No. 29(1)(2) of Chapter on Court Management of Muluki Ain (Country Code), as the case**

is filed in the jurisdiction of Kathmandu District Court it cannot be claimed that the case has been filed in the court without jurisdiction.

- **If the contracting parties have any kind of conflict regarding the conditions of contract from that date or if any party rejects to work according to the conditions of contract then it has to be assumed that the cause of action has arisen and both the parties must accept the time limitation has started to file the case.**
- **With the consent of both the parties, if the other party of the contract performs its work and the first party of the contract doesn't perform its duty of doing a payment then it cannot be said that the date has come up because the other party kept quiet.**
- **If the exact time limit is not known, then the working party of the contract need to allocate the approximate time for them to fulfill their duty and if the party does not receive the payment in that approximate time period, the party has the right to file the case even when the situation has not arison.**
- **If any party performs or provides services to another party under the assurance of the another party's pledge of providing anything to that party through verbal or any other form of conduct, then under such situation the promising party cannot back out from the promise made to the other party. Those kind of promises fall under legal extension.**
- **The party who has performed the business being assured that it will receive the payment from the promising party cannot reject the payment otherwise it'll be against the legal order Section 34(1) of Evidence Act, 2031 and Promissory Estoppel.**

Decision

Kamal Narayan Das, J: The summary of the fact of the present case reigstered in this court in the form of an appeal in pursuant Section 9 (1) of the Administration of Justice Act, 2048 against the decision of the Appellate court Patan and the judgment there upon is as follows:

The opposition party of this lawsuit, Udaypur Cement Industry Limited will hereafter be called Udaypur Cement and Kawasaki Heavy Industries Limited and Tomeko Corporation Consortium will be hereafter called Kawasaki and Hazama respectively. In order to establish a cement industry in Jaljale of Udaypur District, the Udaypur Cement and Kawasaki had done a contract on 12th May, 1989 in which it was mentioned that all the construction work will be handled by Kawasaki in the turn key basis and Kawasaki itself had again given all the lease work given to them to Hazama under separate contract and as under that contract it is mentioned that amongst all the work, the ropeways construction work will be given to other company and not be done by Hazama, the joint company P.W.H and N.B.H (hereafter called P.W.H) has asked for the proposal through talks. According to that proposal, as P.W.H also wanted to work jointly with me, the complainant so with my(the complainant)consent, I, the complainant and P.W.H had a contract on 12th October, 1989 which mentioned that along with supply of ropeway (rajjumarg) and all the other construction work had to be done by me the complainant. After showing the proposal and doing the agreement with me, P.W.H also did another agreement with Hazama in July 16, 1980. According to the contract, I have been working and the materials required for the construction of rajjumarg was brought from India whose payment was to be made by opening a LC and for that P.W.H opened the letter of credit for the amount of 41,79,213|- German mark at Dresdenar Bank (known as Germany Bank) which is situated at A.G. Saarbrucken, Germany and I was receiving the amount that was required to supply the materials from

German Bank through United Bank of India (Later called U. B. I). According to the contract the total amount of two consignments supplied was German mark 4, 87,271|48 under the machine bill system and has not been received. The guarantee given by opposite party Kawasaki to opposite party Udaypur Cement, the guarantee given by opposite party Hazama to Kawasaki and the guarantee given by PWH to opposite party Hazama has been forbidden to release. As I was not able to receive the total payment of German Mark 4, 87,271|48 for the supplies, according to the terms of the LC, UBI requested German Bank to send the payment again and again and for this UBI received bill of German Mark 3,69,937|62 on 3-11-1992, another bill of German Mark 1,17,333|62 on 12-10-1992 showing the remittance from German Bank but still German Bank was not willing to do the payment stating that the documents were incomplete so after compiling all the required documents in December 14, 1992 UBI once again sent all the documents including the papers shown to UBI to the German Bank and again on 5-1-1993 a fax was sent requesting for the payment and even I, the complainant requested for the payment of my bills. Later, without giving the payment to the suitor, PWH received the payment of German Mark 1,25,198|77 and sent a letter to the suitor putting the terms that they will use the materials and also give the remaining amount. Even if I have completed all the construction work, I have not received the payment of previous bill. There is no debate as to the fact that the payment has to be received from Hazama. As Hazama is a famous company, I am still working for it with trust. After that an injunction was ordered stating not to clear the guarantee payment of the opposition parties until my payment is done. The ownership cannot be given by PWH to Hazama, Hazama to Kawasaki and Kawasaki to Udaypur Cement without the written document on that matter. There was a recent information that the performance guarantee given by Kawasaki to opposite party Udaypur Cement, guarantee given by PWH to opposite party Hazama until the payment done to suitor has been released which shows the violation of the order given by court and also shows the

unwillingness of Hazama to do the remaining payment to me so I would like to request for the remaining payment of the supply bill of German Mark 3,62,072|71 including the interest of 10 percent annually from January 15, 1993 to the complaint registered date October 25, 1997 i.e. for 4 years 9 months and 10 days and the exchange rate for one mark being Rs. 32.95, the payment thus required is Rs. 1,76,29,870|12.

The opposite party can make PWH as its opponent and does not have enough rights to make this company its opponent. Even though the complaint is done using the letter of the opposite party of 15th January 1993 A.D. the complaint that has crossed the time limit can be rejected. In order to construct Udaypur Cement Udhyog, Udaypur Cement Udhyog and Kawasaki Heavy Industries Limited did different contract to give the work to Hazama Corporation and along with that contract in order to bring the limestone needed for the manufacturing of cement to the factory, there was a need to construct a *rajjumarg* for which Hazama made contract with PWH for the construction of the road in July 16, 1990 and for this road construction PWH made different contract with Damodar Ropeways which does not create any doubt when we say that Udaypur Cement Industry's contract is supported by Kawasaki Heavy Industries and Hazama's contract is supported by PWH. Kawasaki Heavy Industries and Hazama Corporation have jointly requested for the cancellation of the claim of opponent as they have not done any agreement with the opposite party and do not have any contractual liability.

On January 15, 1993 A.D., Hazama Corporation sent a request letter to Damodar ropeway saying that they would provide the payment to Damodar ropeway. Damodar Ropeway had completed the work on that basis. The suitor's witnesses Yadunath Gautam and Rajendra Prasad Bhandari have given separate testimony saying that Damodar Ropeway has not received the payment till now.

In order to do that ropeway work, Hazama Corporation and PWH had an agreement on 16th July, 1990. The opponent's witnesses

Durbasa Dahal and Tota Limbu have given separate testimony saying that there hasn't been any agreement between Damodar Ropeway and Hazama Corporation.

The contract was done on 16 July, 1990 and in the same way PWH and Damodar also had contract. Suitor's legal representative Deepakraj has testified that the agreement done on 16 July, 1990 is true.

The court has asked both the parties to give statement on the documents presented on 2055/9/6 but the respondent escapes the time.

Two files presented by suitor and the opponent are attached herewith.

The order sheet including different order dates and document of date receipt also included.

The judgment of Kathmandu District Court on 2055/12/1 saying the suitor is entitled to receive the claimed remaining payment of German Mark 3, 62,072|71 in Nepalese rupees from opponent Hazama Corporation. As there are no documents about the interest the court has decided that the suitor's claim cannot be entertained.

The verdict made by Kathmandu District Court was unsatisfactory. The lawsuit has been registered making even the appellant as opponent but PWH is not made opponent even when PWH made agreement with the suitor as soon as PWH made an agreement with us, the appellant. As we had not done any agreement with the opposite suitor, the suitor did not have any right to charge the lawsuit on us, the appellant, but still this point was neglected in the verdict given earlier and the payment was asked from only one opponent ignoring the duty of other opponents which makes the decision against the law and the principle thus the justice should be granted by quashing the wrongful initial judgment and the similar appeal from opponents, Hazama Corporation and Udaypur Cement are filed at Appellate Court, Patan.

The appellant suitor has filed the appeal at Appellate Court asking for 10 percent interest annually as compensation by quashing the decision of Kathmandu District Court of 2055/12/1 saying that regarding the interest there was no enough claims to make decision.

The suitor did not show the fact that a case was filed in Calcutta High court in March 1993 and they have also not claimed their part of contract. The Appellate Court, Patan decided on 2062/3/27 that the claim was done on October 1997 which does not lie in the time limit for the claim as the lawsuit was to be done between August 1995 to October 1995 and as there is no jurisdiction in this case, the lawsuit of the suitor is quashed so the decision made by Kathmandu District Court on 2055/12/1 for the payment according to the bill is dismissed.

According to Section 18(2) (C) of Contract Act, 2023, the lawsuit filed by Appellant was not without time limit and due to the situation; the lawsuit was filed with rough estimation so the decision made of the dismissal on the basis of time limit issue is wrong. Also, the Appellate court, Patan No. 2062/3/27 dismissed the case which was filed at Kathmandu District Court in pursuant to no. 29 of Chapter on Court Management of Muluki Ain (Country Code), and Section 7 of Judicial Administration Act, 2048 by saying that it was without jurisdiction. Thus the suitor has appealed to quash the decision of Appellate Court and to get payment as claimed.

The decision made by Appellate Court, Patan seem to be altered as the letter written by Hazama Corporation to Damodar Ropeways and Construction on 15 January 1993 cannot be kept different from Promissory Estoppel and the principal of estoppels as per Section 34 of Evidence Act, 2031 are not interpreted and there was no consideration taken about not mentioning the time limit so the court gave order on 2065/11/18 to call the opponent and to present the case as per the rule.

The present case is presented as listed in cause list and the file of lawsuit is studied. Learned senior advocates Mr. Mahadevprasad

Yadav and Mr. Shambhu Thapa and learned advocates Mr. Krishnaraj Pande and Mr. Narayan Ballav Pant from the side of appellant suitor presented that as the office of Hazama Corp. is in Kathmandu, its jurisdiction lies in Kathmandu District Court. The case starts from the date when the opponent rejects to give the payment. Thus, we cannot say that there was no time limit and as Hazama had taken the responsibility of payment from the letter of 15 January 1993, PWH was not made the opponent and we have to assume an unapparent contract from that letter so they said that the decision made by the Appellate court should be quashed as the suitor has right to ask the opponent for the payment.

The learned senior advocate Mr. Sushil Kumar Pant and learned advocate Mr. Narendra Prasad Gautam from the side of the opponent respondent said that who came for this case are foreigners. There has been no business conducted in Nepal All the business was done through letter of credit. There is no base for this case to be in the jurisdiction of Kathmandu District Court. The fact about the case being filed in Calcutta Supreme Court has been hidden. The letter on 15 January, 1993 was written for courtesy. This does not show the guarantee of payment. Thus, they said that the decision done by Appellate Court should be accepted.

According to the agreement done between Udaypur Cement and Kawasaki on 12 May, 1989, for the establishment of Cement Industry, the entire construction was taken by Kawasaki in turn-key basis and the company also gave all the work to Hazama. According to that agreement, for the construction of *rajjumarg* Hazama made an agreement with PWH and PWH made an agreement with us on 12 October, 1989 under which the materials required was supplied for the construction and the payment required according to the bill was being received from suitor's UBI bank through Dasdenar Bank, Germany by opening a letter of credit. When I reminded again and again about the payment of the two consignment supplied, Hazama sent letter for payment only after they received one, so when they were informed about this Hazama assured about the payment and

sent a letter saying that the payment of PWH will be held. The payment of the materials including interest should be taken from PWH. According to the letter sent by Hazama, the payment to the suitor is to be given by Hazama and if the bill for German Mark 362072|71 is not paid by Hazama, the suitor has asked for the payment of interest too and since the party who did an agreement with the opposite party was not Hazama but was PWH, the payment of the materials should be done by PWH. The letter written as a courtesy made Hazama the opponent excluding PWH. In the other hand, as they were not able to mention the date in which the reason for the case had come up, there was a response that the suit should be cancelled, but still Kathmandu District Court decided that the suitor should be paid the principal and as Appellate Court, Patan quashed the decision and cancelled the suit of the suitor, they appealed to this court. As there has been a discussion regarding the jurisdiction by the suitor and the opponent and also about the deadline there is a need of decision regarding whether the claim done by the suitor is enough or not and the decision made by the Appellate Court is correct or not.

While thinking about the decision, the first question that has arose in this case is regarding the jurisdiction so regarding that the opponent Hazama Corporation had mentioned the address as Kathmandu Office, Lazimpat, Kathmandu P.O. Box No. 4137, Telex no. 2663 HZM NP, Fax No. 414136, Telephone No. 412142 when sending the letter to Damodar Ropeways and Construction company with subject Non-Payment of Invoices as per List enclosed on 1993/1/15. From that letter, the office of Hazama Corporation seems to be in Kathmandu and if the business work is in Kathmandu then according to No. 29(1)(2) of Chapter on Court Management of Muluki Ain (Country Code) and as the lawsuit was made in Kathmandu District Court that lies within the jurisdiction, it cannot be said that the lawsuit was made in the court without jurisdiction.

From the mentioned record it is seen that the office of the opponent Hazama Corporation in Nepal lies within Kathmandu District which

makes Kathmandu District Court a rightful court. According to the Section 43(1), 43(3) and 43(4) of contract done between DRCC and PWH on 12 October 1989, if there is any kind of dispute between the contracting parties then the dispute should be solved through intercession so this raises the question regarding intercession. When thinking about this matter the given dispute doesn't seem like it is between the suitor and PWH but has arose because of the letter sent by opponent respondent Hazama on 15 January 1993 to suitor about the topic regarding the following of the contractual duties and there was nothing mentioned about the settlement of the dispute regarding the letter through intercession in the letter so the settlement of dispute through intercession does not apply for the appealing suitor. This situation would have been appropriate if the conditions that were decided among the contracting parties were also applied to the subcontractors as well.

4. Now in order to know whether the case has been filed within the time limit or not it is necessary to look into the provision of then Contract Act regarding time limit as the presented dispute includes the topic of contractual liabilities. According to then Contract Act, Section 18(2)(C), if the suitor needs to file a case due to any reason, then they can file a lawsuit within three months of the date from when the reason for the lawsuit arose. So in this case, the question arises regarding the date from when the reason for the lawsuit arose. In that case, whenever the dispute starts between the parties of the contract regarding the conditions of the contract or whenever a party of contract rejects to do the works according to the conditions of the contract, the cause of action for the case arises from that date and the time limit for the lawsuit also starts from that date. In this dispute, the opponent does not seem to have informed the suitor regarding the nonpayment for the work completed. Under the condition where one party of the contract completes the work according to the agreement and another party doesn't complete its duty to do the payment, in that case the date cannot be fixed giving the reason of silence. According to the provision of Section 18(2)(C)

of same Act they cannot say that the silence of the other party of the contract did not allow them to file the case or that this crossed the time limit. Thus, in this case there is no particular date from which the time limit starts. In situation like this, the reason for the case arises or the situation for the case arises when the party which has to perform the duty does not complete its duty in the time limit in which they have to complete it. Here, the opponent wrote a letter to the suitor telling that they were responsible to the suitor on 15 January 1993 and it is quite obvious for the suitors to believe the opponent as it is a prestigious multinational company. But even when the work was completed, the opponent did not do the payment or asked to do the payment so as they felt that the opponent is not going to do the payment the situation for the lawsuit arose. According to N.K.P. 2044, Issue 2, Decision No. 2988, Page 152,"The reason for the lawsuit will not be created just because the commission is due but the reason for the lawsuit will be created if the due commission is refused to be paid. The date for the reason of the lawsuit does not start with the claim over the commission on every payment of the running bill." So according to this established principle, in absence of the written proof that the opponent has rejected to do the payment; they have filed the case showing the condition that the payment was not received in the agreeable time and thus it does not mean that the time limit has crossed. In this condition, as lawsuit is filed within Section 18(2)(C) of Contract Act, 2023 and it cannot be said that the time limit was crossed.

If we look into the subject of the dispute it can be seen that in order to establish a cement factory, there had been an agreement between Udaypur Cement Industry and Kawasaki on 12 May, 1989 in which all the construction work was taken by Kawasaki on the turn-key basis and Kawasaki gave all the construction work as mentioned in the main agreement to the Hazama Corporation under separate agreement. The ropeways construction work under that agreement was proposed to PWH and PWH gave that work to appellant suitor DRCC with agreement. The appellant suitor, DRCC

had informed the opponent, Hazama Corporation that the payment was not received in time for the supply of materials from PWH and that they received a letter from PWH saying that they would do the payment once they received the payment from Hazama. Looking at the letter written by Hazama Corporation to the suitor, DRCC on 1993/1/15, according to the conditions in the letter of credit, as you were not able to receive the payment from PWH and because bank did not help with the financial matter you are going to stop the supply of materials. Also, we have the information that all the materials have already reached the construction area. In order to solve this problem, and help you we have not done any payment to PWH from October 1992. Also, until PWH hands over a proof that it has paid all your bills and until your bank does not give the original shipping document that was deposited in Dresdner Bank, the payment of PWH will be held and by sending the materials according to the new letter of credit and we make you believe that according to the new letter of credit you will not have to face any problems. In the same way on 18 January 1993, the opponent sent a letter thanking for helping in solving the problem and asking to come in the site to inspect the materials and discuss about the remaining payment and after that again as written in the letter on 5 February 1993 they asked the suitor to complete the sheaves as accepted in Calcutta Court and that they'll have talk with the suitor after the valuation of real cost price which provided an assurance to the suitors so they completed the work.

In this way Hazama Corporation has sent a letter to the Appellant suitor DRCC again and again assuring that the earlier payment will be provided and until and unless the payment is done, the payment that is to be received by PWH from Hazama will be held and in this way they were persuaded to complete the work. Likewise, even after the suitor informed opponent regarding the completion of the construction of sheaves, as the suitor had not received any payment for the supply of materials, they received problem regarding the letter of credit in the bank about which the opponent, Hazama

Corporation was informed through letter by the appellant suitor DRCC. From these letters there seems to be a defined deemed contract under Section 9 of Contract Act, 2023. Regarding the contract according to N.K.P. 2049, Decision No. 4447, the case of Tirtharajkumari Rana against Binod shankar Shrestha "In order to get to the conclusion regarding whether any document is contract or not, it should be seen that whether the document has made the party involved to work forcefully or not and whether there has been meeting of mind between parties or not as mentioned in the contract and there has to clearly mentioned that the contract document itself is contract or as there is no system that tells us how the proper structure of the contract should be, it should not be said so in the contract also." Contract means consent or agreement between two or more than two able people and the duty and result that comes up from doing or not doing any work that has not been restricted by the law. According to the current enforcement of Section 9 of Contract Act, 2023, if anyone has any connection with the payment of anyone's money then the person can do the payment and can compensate the money from the property of the person who actually had to do the payment and if any person gives anything to another person or if gives any work to the another person the person should receive the remuneration according to the work are all the subjects related to deemed contract.

In the presented dispute, according to letters sent by Hazama Corporation to the Appellant suitor, DRCC on 15-1-1993, 18-1-1993, 5-2-1993, until and unless the payment is done the payment that is to be received by PWH from Hazama will be held and had also assured that there will be no problem of payment from the new letter of credit and supporting this letter, a letter was written thanking for the help to solve the problem and again and again letter was sent for the payment of the materials used in the construction of sheaves and more shows deemed contract between the suitor and opponent respondent Hazama Corporation under Section 9 of Contract Act, 2023 and the letter of 15-1-1993 will receive the validation of

deemed contract. Deemed or implied contract is when a reason related to law and behavior related to justice is included without any specified contract letter between the parties of contract. (Implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts and conduct the circumstances surrounding the transaction making it a reasonable, or even a necessary assumption that a contract existed that between them by tacit understanding: Black's Law Dictionary, 5th Edition). In this, deemed or implied contract, as all these factors and characteristics are present there is no doubt that there has been a contract between the suitor and the opponent.

Another subject to be decided on is whether the opponent respondent should be guided by estoppels or not from the letter of 15 January 1993 and in this case whether PWH should've been made the opponent or not. All the construction work of Udaypur Cement Factory was given to Hazama Corporation from Kawasaki and under that agreement the construction of ropeway was given to PWH from Hazama Corporation and even though PWH gave it to appellant suitor DRCC there is no doubt of the matter that the main party of that agreement is opponent Hazama Corporation. As Hazama Corporation is the main party of the agreement, the appellant suitor sent a letter to Hazama saying that rest of the materials will not be sent as PWH did not give the payment for the materials supplied so regarding the payment of the bill Hazama Corporation wrote a letter to the suitor that until and unless the payment is received, Hazama Corporation will hold the payment for PWH and under new letter of credit the remaining materials should be supplied and the supplied materials' payment will be done without any problem. As Hazama Corporation is the main party in the agreement and as Hazama gave all the ropeway construction work to PWH, it has position to write the assurance letter of payment and after the letter sent by the opponent to the appellant, the appellant became assured. So it can be estimated that because of the request

of Hazama Corporation the construction materials were supplied and the work of sheaves were completed. As PWH pays the amount that it has received from Hazama Corporation to the suitor and as Hazama Corporation assured that the payment that is given to PWH will be held, the suitor performed the work. If any party does any kind of promises through its words or behavior in any subject and if another party does any work or provides any service because of the promise done then the other party cannot move away from their promised duty. Those kind of promises fall under legal system.

Regarding this matter, according to N.K.P.2063, Issue 1, Decision No. 7638 (Ganesh Kumar Agrawal against Information and Communication Ministry and others in the case including Certiorari) "After it is informed that the proposal has been accepted, according to that accepted permission, as the applicant planned to work according to the Network Plan and as it continued to put the devices the permission of the Ministry cannot be void unilaterally and the opposite party, the ministry will be obliged by promissory estoppel. If the government provides acceptance to start any industry and if any other party comes forward under same trust then the government cannot give some reason to take back the permission given. Those kinds of acceptance and permission should be fulfilled." In this dispute also, Hazama Corporation had assured that PWH will provide payment to the suitor and asked to supply more which makes the previous example's principle similar to this dispute. Regarding this matter, according to Section 34(1) of Evidence Act, 2031 "If any person provides trust regarding any matter through writing, words or behavior or if any work is asked to be done or is let to be done by making the person fall into trust, then the person cannot deny it if there happens to be any kind of case between those two parties. In the background of Act, principle and judicial system formulated by Supreme Court, Hazama Corporation who had the main duty of construction and management of cement industry wrote a letter to the appellant suitor on 15 January 1993 assuring about the payment of the bill for the supplied materials in which it

was written "To solve the problem and assist you, we confirm that we have not paid the billed any amount of 1st October 1992 and shall hold further payment against the unpaid invoices as per details enclosed bill we get original shipping documents submitted by your Bank, Dresdner Bank and PWH gives evidence of payment to DRCC" which assured the appellant suitor to continue other works, thus that letter should be taken as a promissory note. Regarding the Promissory Estoppel by Machael Spence in Protecting Reliance: The Emergent Doctrine of Equitable Estoppel (Oxford, 1999, pp 60-66) these eight factors determine the obligated estoppel or equitable estoppel:

A. how the promise or representation and reliance upon it were induced.
B. the content of promise/representation;
C. the relative knowledge of the parties;
D. the parties relevant interest in the relevant activities in reliance;
E. the nature and context of the parties relationship;
F. the parties relative strength of position;
G. the history of the parties relationship;
H. the steps, if any taken by the promissor/ representor to ensure he has not caused preventable harm.

In this dispute, the opponent presented the written promise and believing in that the suitor performed the work. There are no reasons for not believing in the promises of the opponent. Both the parties seem informed and assured that the suitor believed the responsibility and rights of opponent in the completion of work which is the deed of contract received by the opponent. The opponent is informed that since the suitor got the subcontract from PWH, the suitor has a meaningful relation in that work. As there is no dispute regarding the fact that the opponent has relative strength of position to do the payment, the suitor completed the work in assurance of getting the payment, so it is the legal duty of the opponent to give the payment to the suitor and trying to get away from it will be against the legal

estoppel and promissory estoppel of Section 34(1), Evidence Act, 2031.

About the injunction lawsuit that was filed in the Calcutta Supreme Court regarding the material supply and the payment, it looks that the suitor did not file the case in order to fill the payment that was to be given to PWH and there is no proof from the side of opponent respondent to deny the debate done by the legal businessmen that it was continued even after the interim court order. The opponent does not seem to be able to claim from the writ that there has already been decision regarding whether the suitor should receive the amount or not. Likewise, it doesn't seem like the lawsuit regarding the holding up of the payment will affect the lawsuit regarding the payment of the money which makes the plea of the opponent meaningless.

As the presented dispute is related to the 15 January 1993 letter and is not between DRCC and PWH, the Appellate Court, Patan asked to go towards intercession to solve the problem which is jurisdictionally wrong and according to letter written by Hazama Corporation to DRCC on 15 January 1993, Hazama Corporation had help the payment of PWH and had taken all the responsibility of the payment but even knowing this PWH was not made the opponent and that letter cannot be presented as a deemed contract and as the opponent had not clearly given information to the suitor and as they were not able to show the reason from which the lawsuit initiated, the earlier decision will be quashed because according to Section 18(2)(C) of Contract Act, 2023 the time limit of the lawsuit seems to have crossed and this makes the result of Appellate Court, Patan incorrect.

And from the letter sent by opponent respondent to Appellant suitor on 15 January 1993, the suitor had asked for the payment of the materials supplied in the construction site and writing there is no doubt that the payment to be given by Hazama is left. Considering this the letter was written for the remaining amount that was claimed

by the suitor was to be received from opponent respondent. The decision of Appellate Court, Patan to dismiss the claim of suitor dated 2062/3/27 is dismissed and according to the claim of the suitor, the remaining amount of German mark 362072|71 will be paid by Hazama Corporation in Nepalese Rupees and the decision made by Kathmandu District Court on 2055/12/1 should be confirmed that the claim was not enough for the interest along with the principal.
Let the rest be done as follows:

Particulars

As written above in the judgment part the appellant suitor filed a lawsuit regarding the payment of German Mark 362072|71 on 2054/7/12 whose Nepalese Rupees according to the regulated value has to be paid by the opponent so if an application is given in the court within the time limit at Kathmandu District Court will act in giving the claimed amount in return from 2055/12/1 by paying fees. ---(1)

Earlier the appellant suitor had put forward subject of court fee in the District Court about which that opponent respondent had appealed in the Appellate Court in 2056/3/9 and kept Rs. 1,80,068 ransom and as now that amount will be given to the suitor which is not necessary to mention. The court fee paid of Rs. 21,010|20 in this court while appealing shall be paid by the opponent during the time limit of the law without any charges if the suitor gives an application for it. This should be written to Kathmandu District Court to list down. --- (2)
The presented lawsuit can be taken out of the register and can be submitted according to the file of lawsuit. ---- (3)
I concur with the above decision.
J. Prem Sharma
Done on this day of 1st Falgun 2068 BS (February 13, 2012)
Translated by Prabinata Osti

It is not the court to finalize a dispute only on the basis of exparte hearing where the question of discriminatory treatment between the equal service providers is strongly raised by the complainant.

Supreme Court, Division Bench

Hon'ble Justice Sushila Karki

Hon'ble Justice Prakash Osti

Year: 2063-WO-0446

Case: Certiorari, Mandamus.

Petitioner: Demitri Jai, Managing Director/Chief Executive Officer authorized on behalf of Spice Nepal with its Head office in Krishna Tower New Baneshwor, KMC Ward No. 10 Kathmandu district

Vs

Respondent: Ministry of Information and Communication

- **Court can not enter into a petition which claims that there has been an unequal treatment between the petitioner and such other parties who are not mentioned as defendants. The parties concerned must have come to the court and registered his claim to decide about whether or not there has been unequal treatment. In many occasions it is hard to solve the question of equality and inequality only through the observation of the documents.**
- **As there is no relevancy of the question of inequality between those service providers who have acquired license under two different legal channels, it is the duty**

of the court to hear also such other party who, by changing the name directly is said to have enjoyed the facility at par with the petitioner. It would be unreasonable to enter into the question of equality and inequality only on the basis of exparte hearing.

- **The principles of equality are applicable only among equals. No principles of equality attracts among unequals.**
- **Once the bid is accepted in one's own accord the recognized principles of law do not allow any one to accept only things favorable to him and discard the unfavorable.**
- **No further decision shall be needed to notify about what would have done or happened as the existing law or agreement directs or ask to pay the amount of royalty already settled.**
- **It is unreasonable to think that there is no role and responsibility of any authority only because there is no full sized authentic authority body empowered to discharge the function at the moment. In a situation where the concerned authorities are discharging routine-wise business, it is worthless to mean otherwisely that there is no authentic body to carryout the official business.**
- **He who expresses commitment to pay any amount, fees, royalty or the charge through tender for any other documents most be thought that he has thoroughly studied the relevant documents in light of the existing laws and rules and has contemplated also the risk factor accordingly.**
- **Once it is agreed to pay to another party in the modes and procedures consented by oneself and taken**

advantages of obtaining license etc he can not breach those pledges and commitments showing this and that reasons later.

- **It is not the court to interfere in the personal affairs of the parties except in a situation when those pledges and commitment are broken with the apparent violation of law or they are initially against the law.**
- **It is not the matter of right to ask revision in the amount of fee, royalty, charge or installments later once it is pledged to pay at the time of obtaining the license. The right is protected by law and must be exercised in accordance with law. Unless and until the rights provided by law are unlawfully encroached they can not be the subject of judicial review.**

Decision

Prakash Osti, J: The summary of the fact of the present writ petition which in pursuant to articles 23 and 88 (2) has come to register under the jurisdiction of this court, and the decision reached there is as follows:

Petitioner, the Spice Nepal Pvt. Ltd. (changed into Ncell Nepal Pvt. Ltd. In 2068/11/29) is a company established under the then Company Act, 2053 with the objective of conducting telecommunication service which also mobilizes foreign investment. The respondent Nepal Telecommunication Authority used to recommend to the respondent Information and communication Ministry for necessary amendments and alterations in laws. The respondent Nepal Telecommunication was established under Section 3 of Telecommunication Act, 2053. It is an autonomous corporate body having perpetual succession which issues license, directives and conducts monitoring of telecommunication services. While publishing a notice of request for proposal document (REPD)

by Nepal Telecommunication Authority, for operating telecommunication service, so as not to hand over mobile service to another company for a period of five years. In view of all these facts, this company has participate in bid on the basis of that notification of the Nepal Telecom and obtains license in 01-09-2044 for the operation of telecom service using GSM technology. As per Section 3 of the license obtained by this company, it is conducting its service since 13th May, 2005. But, before passing a year of operating service by this company, United Telecom Limited has granted license for operating mobile service saying it as a limited mobility which was issued without participating in competition and issuing public notice. There is a vast difference in the license and facilities and fees between this company and United Telecom. The petitioner company has been greatly discriminated.

While obtaining license by this petitioner company though it was stated that all the telecom service providers such as Nepal Telecom as well as United Telecom will be placed on equal footing and provided privileges to attract and encourage foreign investment as per Telecom Policy 2060, however despite series of requests for interconnection access nothing could happen. Nepal Telecom was asked for full compliance of Interconnection Guidelines. This petitioners company which has obtained special license has applied for international gateway but denied to it and granted the same to other service providers. Now therefore the Nepal Telecom has not treated on equal footing among the equal service providers.

As we look into the provision of mode of payment of royalty for operating service by the service provider, it is clearly stated in sub-Section 1, 2, 3 of Section 32 of Telecommunication Act, 2053 as well as Rule 26 of the Rules 2054 that the person acquiring license has to pay royalty to HMG at the rate of 4 percent of the annual net income. The petitioner Spice Nepal Pvt. Ltd and the United Telecom Ltd are the same type of service providers. There has been made an unequal and discriminatory treatment between these two on the payment of annual royalty and license is issued so as to pay royalty

since the concerned law and Telecommunication Policy 2060. This company has made request to remove these unequal treatment but no action has been initiated in this regard. So this company has filed a writ petition of mandamus in 2063/5/21 in Appellate Court Patan requesting unitary rate of royalty among the service providers, the court has issued show cause order and was in subjudice. At the mean while a letter from respondent Authority bearing signature of Santosh Poudel dated 2063/6/24 with dispatch No. 712 in reference to the payment of royalty has been received. In a situation, when the respondent have been unable even to held a regular meeting the Authority sends an unlawful letter without providing information of such decision. Hence, we have been compelled to come to this reverend court to have that letter and any decision made in that regard declare void since we have no other appropriate alternative remedy available. The respondent Santosh Poudel has no right to decide that the limited mobility and full mobility service is the same or different. No decision was made upon petition registered by the petitioner to have the scrutiny conductied and to have taken the opinion of the expert of the concerned field and finalized the matter. The respondent has no right to notify us in capacity of a rejoinder without passing any judgment upon our request. So the said letter is invalid and full of jurisdictional error.

There is no difference in the working style and operating technique of both the limited mobility and full mobility. Both are the mobile sets, viable to carry and need not to install any accessories at home, both can conduct domestic and foreign calls and are similar also in term of receiving systems. The Section 3 of the letter issued by the respondent Nepal Telecom to this company in 2063/5/15 had a mention that if the amount is not furnished within 3 days there will be initiated necessary action. The letter bears a date of 2063/6/24 which shows that nothing has been done until for a period of one and half month and the letter is unlawful also because it denies any privilege under Section 2 of the said letter. Nepal Telecom has provided license in 2062/12/11to UTL through backdoor for CDMA

mobile operation charging tariffs and royalty lesser than to the petitioner which is against Section 22 (2) of the Act. The respondents have not complied with what the law provides therefor.

Going against the Article 11 of the Constitution of the Kingdom of Nepal 2047, Rule 26 of Telecom Rules and Telecom Policy 2060, the respondent Authority has treated discriminately not providing facilities like other similar companies and has sent letter giving no notice to our request. So the letter of the respondent dated 2063/6/24 with dispatch No. 712 and the action and decisions made in that regard should be invalidated by issuing an order of writ of certiorari and direct the respondent issuing an order of writ of mandamus to decide upon our request letter dated 2063/4/23 with registered No. 123 and grant license for international gateway collecting necessary fee, or issue any other orders as it may deem appropriate. This is the content of the writ petition of the Spice Nepal Pvt. Ltd.

This court issues an order in 2063/8/20 to duly table the case after the written reply is received or the expiry of time limit by sending notice in the names of respondent to present along with written reply within 15 days excluding the time period consumed for journey inquiring the basic content of the case and why an order as sought by the petitioner should not be issued?

The Internal Revenue Department responds in writing that the writ petition, which has placed this Department in respondent, should be vacated since the petitioner has been unable even to state what involvement this Department has in the action proceeding said to have done by the Telecom Authority as to push the petitioner in the justice.

The written reply submitted by the Ministry of Law, Justice and Parliamentary Affairs had a mention that nothing has been done by this Ministry so as to infringe the right of petitioner provided by the law and constitution. The petition is silent about any action done by this Ministry has hampered the right of the petitioner. So the writ

petition which has placed this ministry in respondent should be quashed.

The Ministry of Information and Communication responds that the Telecom Authority has the duty of offering advice to Nepal government. Besides this, Authority studies the development achieved in national and international spheres and adopts necessary policy accordingly. It also works for the telecommunication services and decides about what type of service should be made open and which medium should be utilized for this. The writ petition is under Section 23(1) not under Section 23(2) of the Telecom Act, 2053 and not under sub-Rule (5) and (6) of Rule 10 but sub-Rule (2) of the Rule 10 of Telecom Rule, 2054. So it is mandatory to pay fee accordingly. The letter was corresponded demanding payment for second installment as per the conditions mentioned in license but with the intention of avoiding paying the royalty filed a writ of prohibition in appellate court and has issued interim order from that court, and the case is in subjudice. Now the petitioner has raised the same issue before this reversed court. So the writ petition should be dismissed.

Assistant Manager of Nepal Telecom Authority Santosh Poudel had a written reply that the writ petitioner Spice Nepal Pvt. Ltd has applied to this office in 2063/4/23 for necessary decision on royalty. About the same period the appointment of the chairman of this Authority Suresh Kumar Pudasaini had been cancelled by virtue of a letter dated 2063/5/18 No 1/2, Sa. Pra. 63/063/064 dispatch No. 129, and the manager Ananda Raj Khanal, the senior officer had been working as an acting CEO and okayed the file forwarded as per rule and has sent a letter to the petitioner accordingly but the petitioner in a whim refers it as unauthorized and made me the unconcerned person as respondent without sufficient reason. Now therefore, the writ petition should be quashed.

In this, the legal counsel of the respondent Nepal Telecom Authority, Kailash Prasad Neupane mentions in para 3(a) of his written brief

that the petitioner was notified in 2065/5/13 through a decision No. 1442 of this Authority about what had happened in this connection. Reflecting on this fact, this court orders to pull the file of aforesaid decision as well as the original case file of writ of prohibition running in Appellate Court Patan. As per the order of this court, a copy of the decision reached in 2064/2/30 by Appellate court Patan along with file of the case is found enclosed here in the present case file.

The present case file which is submitted in this bench today after duly appearing in daily and weekly cause list is thoroughly studied and the arguments of the learned counselors presented from the petitioner and the respondents also heard. The bench studied also the written brief presented in the earlier bench by both sides. Precisely, the following arguments were put forth during the hearing from the petitioner and the respondents.

Advocate Kamal Prasad Khanal:

Nepal Telecom Authority has treated discriminately among the telecommunication service providers. Telecom and others have to pay royalty at the rate of 4 percent of their income but no such conditions have been applied in the case of the petitioner company. While reaching agreement with the petitioner it was granted five years monopoly in limited mobility but without passing even one year, Nepal Telecom has provided license to operate the same service. During the said five years period Nepal Satellite and Smart also given license in the name of basic communication service. As per that license, the license fee fixed Rs 25 lakhs for a period of 5 years but for the petitioner company it was charged Rs 21 crore for 10 years period. There has been great disparity also in renewal fee. This shows that no equal treatment has been done among the same scales of operators. The respondent Authority has made gross injustice over Spice Nepal (Ncell) making unhealthy competition. So the writ petition should be materialized.

Advocate Harikrishna Karki:

The applications submitted by the petitioner company to the respondent Authority were to be disposed of holding Board meeting and notify accordingly but the situation is this that the letter is sent by an authority staff Santosh Poudel. Mr. Santosh Poudel has no authority to write a letter in this manner. The agreement reached between the petitioner company and the respondent authority gives five years monopoly to this company but has provided license to other service providers also in cheap price and discriminated this company unlawfully. Hence, an order of writ should be issued.

Senior Advocate Sri Hari Aryal:

The content of the letter of the petitioners Spice Nepal (Ncell) was to have a decision on royalty and was addressed to a competent body Nepal Telecom Authority. Mr Santosh Poudel has no right to answer that letter. It was not by virtue of decision of the authority but by an administrative staff therefore, deserves no weight. The letter which was written earlier by an administrative staff was endorsed the same by the authority latter. So, it can not take the effect of the decision. The writ petition must be materialized.

Senior Advocate Badri Bahadur Karki:

The letter dated 2063/6/24 was not written after the matter is decided by the Board. Section 22 (2) of the Telecommunication Act, 2053 had a statutory provision that no license for the operation of similar type of other telecommunication services shall be issued for a period of five years after a license of any telecommunication service is issued. The proviso clause of the same Section has said that the similar type of license may be issued only when it is failed to provide telecommunication service in areas for which the license was obtained. Such a situation does not exist here. The procedure what the law clearly provides therefor has not been properly followed so the writ petition should be materialized.

Advocate Prakash Raut:

The petitioner has made request even by quoting relevant Section of law for uniform rate of royalty and has asked to determine it in accordance with law. Rule 26 of Telecom Authority, 2054 has included a provision that the royalty should be paid at the rate of 4 percent of the gross income earned. It is against law to mention in license exceeding the said rate. The respondent has no right to fix more than what the law prescribes.

Advocate Surendra Khadka:

In the case of one of the services providers UTL like the petitioner has granted exemption by the Government of Nepal making special decision. It is contrary to the practice and principles of free competition. One is given exemption by the executive decision while the other are treated discriminately. All the equal competitors should be treated in equal footing. The legislature has intended so while making the law. Contrary to it, the petitioners are treated discriminately. An order of writ should be issued.

Senior Advocate Harihar Dahal:

Telecom Service has 80 percent market in Kathmandu valley. The UTL and Nepal Telecom are granted license for limited mobility and pay royalty at the rate of 4 percent. This writ petitioner has come to this court claiming the similar rate of the royalty. No discriminatory treatment should be made on royalty between the same categories of service providers. As it has been cleared that the respondent Authority has treated discriminately, the writ must be issued.

Senior Advocate Shambhu Thapa:

It is necessary to go through the provision made in Rule 26 of Telecommunication Rules, 2054 which states that the royalty should be paid at the rate of 4 percent of the income. It is consistent with

law to state in license more than what the rules clearly prescribes. The respondent has no right to fix the royalty going beyond the legal provision. The UTL is one of the service providers like the petitioners. The government of Nepal has made special decision and given exemption to the UTL. The petitioner company has been discriminated so a writ must be issued.

Deputy Attorney General Hari Prasad Regmi from GON:

The letter sent by the Internal Revenue Department on matters pledged to pay to the Authority as per agreement is lawful. The petitioner has accepted the fact that there has been an agreement in this regard. No situation exists as that any action of the Ministry of communication has encroached our right. It is not appropriate to make us defendant. Telecom Authority is an autonomous body. GON can not intervene to it.

Advocate Kailash Prasad Neupane from Telecom Authority:

There are two ways of issuing license in Nepal Telecom Authority Act. The first is bidding process under Telecom Policy 2054, in which besides Telecom Corporation (company), the license shall be granted also to another company under WLL system. Similarly, there is a provision of releasing all systems after 2004 AD. Limited mobility was made open through a notification published in Nepal Gazette in year 2060. The monopoly granted to Spice Nepal has yet not withdrawn. In reference to responding the petitioners letter there was no sizeable Board at the moment and was just given information as per the call of a letter received from the Ministry of Telecommunication. Where the law itself has made distinct provisions relating to royalty it would be unreasonable to claim inequality. The principles of estoppels also compel the petitioner to respond what he has once pledged. Therefore, the writ petition should be dismissed.

Advocate Satish Krishna Kharel:

The writ petition is concentrated on three major issues. The first is concerned with invalidation of a letter dated 2063/06/24 sent by the Authority staff. The second is related with a decision upon a petition registered by Spice Pvt. Ltd to the Authority. And, the third is the demand of international gateway permission. Of them, the last one has been materialized. So far as concerned with the petitioners' letter it has been decided by then which is yet not challenged and been final. As we look into the third query, no one including the Authority has authority to change or modify the tariff once settled. The Authority Board had no compulsion to decide upon matter which is out of jurisdiction. Since, the letter corresponded by Santosh Poudel had no impact on any liability of the petitioners, there is no reasonability invalidating also sounds baseless because the license was granted to other companies through competition by calling bids with publication of notice in Nepal Gazette. If the petitioners were sincere of the matter that this monopoly was snatched they were free to hunt appropriate remedy. No situation as such exists. Hence, the writ petition is subject to cancellation.

Advocate Narayan Prasad Devkota:

The validity of license of the petitioners company as stated in validity No. 11 is for a period of ten years from the date of acquiring the license. The situation as such is that the license acquired after it is agreed to pay the prescribe amount each year. It is the rule of contract that once it is agreed to pay the largest figure, no one can deny paying it later.

Advocate Tilak Bahadur Pandey:

After accepting contract by oneself paying license fee, some parts of the installments and the surrendered value he can not refuse to pay it later. The writ petition should be vacated.

Advocate Rewati Ram Pant: At a situation where the letter of petitioner is tabled in the meeting of the Board and decided to send a fresh letter accordingly, the meaning of letter written by Santosh Paudel has been finished, the writ petition should be cancelled.

The petition in this case had a complain that the petitioners company would like to have necessary amendments in Section 15 (X) and Annex-3 of the license obtained by this company so as to receive the same facilities and equal treatment as other service providers, and an application with dispatch No. 123/063/064 dated 2063/04/23 was filed by this company to Telecom Authority to that effect and as a response of that application, a letter dated 2063/06/24 signed by Santosh Poudel asking the payment of royalty received from respondent Authority. It was the duty of the Authority first to decide upon our application from a regular Board meeting and notify us the matter, but the letter is found sent by an unauthorized person without deciding from the authentic body. So, it is requested nullify that letter. It is the key essence of the writ petition. Section 32 of the Telecom Act, 2053 provides for the payment of royalty, Section 32(2) of the same provides for the payment of royalty pledged by a person obtained License under sub-Section (3) and (4) of Section The petitioner company was granted license for the GSM-900-cellular mobile by releasing a public notice in pursuant to Section 22(1) of Telecommunication Act, 2053 and the royalty as per Section 24(4). Rule 7 of the Telecom Rules is relevant to Section 23(1) of the Act. It is relevant to Rule 10 of the Telecom Rules. Rule 10 (2) of Telecom Rule 2054 states that while conducting inquiry under sub-Rules (1) in case more than one persons are found qualified to operate such telecom service, the Authority may serve notice to all such persons in regard to license fee, renewal fee and royalty for the purpose of competitive bids and among the successful bidders who pledges the highest figure shall be granted license under sub-Rule (1). The petitioner company had pledged the largest amount and was granted the license. In this way, the amount of royalty pledged to pay by the petitioner himself in every fiscal year as mentioned RFPD is

consistent to Telecom Act and the Rules. In such a situation, the claim of unequal treatment for fixing royalty exceeding 4 percent under Rule 26 of Telecom Rules 2054 is irrational and motivated to avoid royalty amount. So the writ petition should be vacated. This is the version of the written reply submitted on behalf of the Telecom Authority.

While considering upon the decision to be reached precisely the following points have been necessary to be dealt with:

1) Whether or not there has been made discriminatory treatment between Petitioner Company and the service provider other companies from Nepal Telecom Authority, the regulatory body?
2) Whether or not the reply sent by he respondent Nepal Telecom Authority officer in respect to an application dispatched requesting amendments in Section 15 X and Annex- 3 of the license acquired by the petitioner company?
3) Whether or not a writ should be issued as demanded by the petitioner?

The history of telecommunication in Nepal begins with Mohan Telegram Service in 2006 B.S. and has been arrived is today's condition passing through a long course of its institutional structure namely Telecommunication Department, Telecommunication Development Board and Nepal Telecommunication Corporation 2032. Crossing many stages through wireless and wired Telecommunication Service, it has begun digital telecommunication service from the year 2044/045. In addition, to the basic telecommunication service of traditional fixed telephone technology, the wireless mobile telephone technology entered into Nepal after 2045, and the then Nepal Telecom Corporation began GSM mobile service from Jestha 2056. From its beginning to now 2 number of

statutory arrangement have contributed on its development. The present complication is the outcome of one of such phenomenon.

For the expansion of mobile service using limited frequency available to the nation the service providers should reap commercial well being and the government should benefited from the collection of revenue. For this, the necessary laws and policies are required to be framed ensuring transparency and accountability and their implementation and follow up must be conducted honestly. In failure of which there may incur revenue flaws, increased policy- based corruption, misuse of frequency the government instead of monitoring the service providers the later may use the former as well as decrease quality standard. These negative factors timely to be seen in the development and expansion of telecommunication are required to be addressed by the application of laws, their implementation and interpretation.

The petitioner would like to pick up an issue of providing license for operating mobile service to UTL using backdoor in the name of limited mobility service going against the legal provision of not granting license to other service providers under Section 22(2) of Telecommunication Act, 2053, for a period of five years. The written reply of the respondent Authority and the written brief and pleading of the learned advocates have maintained the fact that GSM and limited mobility mobile service has roaming facility whereas the limited mobility service do not, and limited mobility could be operated only in the limited areas.

Spice Nepal, now changed name Ncell Nepal is found submitted tender pleading to furnish Rs. 21 crore for license fee and 200 crore as renewal fees for the operation of mobile service based on GSM technology. Now the petitioner company is made available 3G Frequency which is not mentioned while granting license as well as the study report of the Nepal Telecommunication Authority Frequency Distribution Committee, 2058 enclosed in the file of the case is found mentioned the fact that the company while approving

the tender was made available the band of 900 Mhz, but before its operation, it was provided an additional 1800 Mhz facility also. By this it will be injustice to state right now that Nepal Telecom Authority has acted prejudicially over the petitioner company. Though the petitioner claims that there has been discriminatory treatment between UTL, Nepal Telecommunication Company Ltd and the petitioner itself however, the concerned service providers are not made respondents. The court can not enter into a petition which claim that there has been unequal treatment the petitioners and such other parties who are not mentioned as defendants. The parties concerned must have come to the court and registered their claim if it is to decide about whether or not there has been unequal treatment. In many occasions it is difficult to solve the question equality and inequality only through the observation of documents. The present case is of the similar nature. Because, in one hand, as there is no relevancy of the question of inequality between service providers who have obtained license under two different legal channels, it is the duty of the court to hear also such other party who, by changing the name indirectly, is said to have enjoyed the facility at par with the petitioner. It would be unreasonable to enter into the question of equality and inequality only on the basis of the exparte hearing.

There has been published the Notice of Request for Proposal Document by the Telecom Authority for the operation of cellular mobile telecommunication service, and while submitting the tender by the petitioner as per that proposal, agreeing the terms and conditions expressed in RFPD was taken part in the competition and then the tender was approved and acquired the license in 1-9-2004 AD. The letter relating to the operation of GSM cellular mobile bearing the date of 206/62-244(1-9-2004) given to the petitioner company reads: "we wish to notify that you are hereby issued the license to operate the GSM Cellular Mobile Service in the Kingdom of Nepal." Likewise the heading of the letter contains " The license is hereby given to you to operate the following telecommunication

service pursuant to sub- Section 2 of Section 23 of Telecommunication Act, 2053 (1997) and sub-Rule 5 of Rule 10 of Telecommunication Regulations, 2057 (1998).

Section 23 of Telecommunication Act, 2053 has the following arrangements in regard to licensing:

Section 23: Application for license Any person who is desirous to operate telecommunication service under this Act and has possessed with necessary capital, technical expertise as well as professional skills as prescribed by the Authority under Section 22 along with financial as well as technical study report and the operational planning relating to telecommunication service he is willing to operate.

Notwithstanding anything contained in sub-Section (1), may file application at any time for the operation of telecommunication service as prescribed and the government of Nepal on the recommendation of the Authority may grant license by notification in Nepal Gazette.

Likewise, Rule 10 and 7 of Telecommunication Regulations, 2054 has the following arrangement in regard to license.

Rule 10(5): In case any application is filed under sub-Rule (2) of Rule 7 for license the Authority shall examine the application and the documents accompanied with application and the findings revealed that it is reasonable to issue license, the applicant shall be granted license under sub-Rule (1).

Rule 10(1): In case any application for license under sub-Rule (1) of Rule 7 is filed, the Authority shall examine the application and the enclosed documents and in case only one person is found qualified to operate such telecommunication service, the Authority, after determining license fee, renewal fee and

royalty through negotiation with such person shall issue license to the applicant in the specimen form under Annex-4.

Rule 10(2): While conducting scrutiny under sub-Rule (1), in case more than one persons are found qualified to operate such telecommunication service, the Authority, after providing them the information for bid in regard to license fee, renewal fee and royalty, shall issue license under sub-Rule(1) to such a person who pledges the highest amount in bidding competition.

Rule 7(1): Any person desirous of operating Telecommunication Service under sub-Section (1) of Section 23 of the Act who has possessed capital, technical expertise and professional skills as prescribed in Rule 8 shall be required to file an application to the Authority in a specimen form under Annex-1 accompanying with financial as well as technical study report relating to the telecommunication service he is willing to conduct within the time limit mentioned in a public notice released by the authority in accordance with sub-Section (1) of Section 22 of the Act.

Rule 7(2): Notwithstanding anything contained in sub-Rule (1), the application for obtaining license of operating telecommunication service prescribed by GON under sub-Section (2) of Section 23 of the Act by notification in Nepal Gazette, may file an application to the authority at any time, in the specimen form under Annex-1.

There are a number of modes and procedures in regard to issuing license by Nepal Telecom Authorities for the operation of telecommunication service, Section 23(1) and (2) of Nepal Telecommunication Act, 2053 illustrates various processes in that connection. There is no dispute on the fact that the petitioner Company was obtained license under sub-Section (2) of Section 23.

The principles of equality are applicable only among equals. No principles of equality attracts amongst unequal. Once the bid is accepted in ones own accord, the recognized principles of law do not allow any one to accept only things favorable to him and discard the unfavorable. The photocopy of the cheque enclosed in the file of the case shows that the petitioner himself has filed the tender form, obtained the license agreed the terms and conditions of the license and has paid the royalty in different dates such as in 2065/10/13 and 2065/10/17. in this way, where the petitioner himself has accepted the fact in writing and also in behavior, in such a situation the claim made in regard to discriminatory treatment can not be taken as worthy.

Up to the period of 2065/10/17, the petitioner has no objection on royalty payable by him. It reiterates that UTL has given license through backdoor for operating mobile service of the same category even before passing one year of operating the service by the petitioner, and the same is challenged in this writ petition. Nothing has prevented the petitioner to come promptly to file writ petition. The petitioner has confessed the fact that he has been operating service from the date of 2062/01/30. Since the petitioner feels no problem up to 2065/10/17, its filing of writ petition smells something bad because it has come to register only about three years after the UTL has acquired the license.

As we go through the second question, the petitioner is found applied to the Nepal Telecom Authority in 2063/04/19, Ref No. 123/63/64 for having had necessary decisions on royalty. In response to that request, a letter signed by the assistant manager of the Authority Santosh Poudel dated 2063/6/24, dispatch No. 2063/64-142 in respect to the payment of royalty is found to have sent to the petitioner Company. The said letter contains 6 different points and in its concluding part there has been stated the provisions of laws and rules according to which the petitioner is notified on the matter that no royalty could be exempted as demanded in the application. The present writ has the demand of invalidating the said

letter. This letter is not the synonym of any decision made so far. No further decision shall be needed to notify about what would have done or happened as per the existing law or agreement to ask the amount of royalty already settled. The petitioner has claimed that nothing has been done upon the application of petitioner. The decision which has endorsed the earlier particular of response made upon the application of royalty exemption submitted by the Spice Nepal Pvt. Ltd through the decision No. 1442, agenda No. 1077 of a Board meeting held in 2065/04/31 has not been challenged in the writ petition. This situation has rendered the present claim of the petitioner void because the petitioner was notified in 2065/5/31 about such a decision.

It is unreasonable to assume that there is no role and responsibility of any authority only because there is no full-sized authentic body empowered to discharge the function at the moment. In a situation where the concerned authorities are discharging routinewise business appropriately as per law it would be worthless to mean that there is no authentic body to respond the official duty. If any agency established under law can not perform any action as per law and has to postpone the activities in the absence of authentic body to take any decision, there may arise a situation of closure of such body. There is no room for doubt that Santosh Poudel is an officer level employee of the Authority. As you study the content of the letter sent by him it does not seem imposing any additional liability to the petitioner Company depriving from any facilities so far being enjoyed, or to make any alterations in them but is found just quoted the decision made by the senior level officer available at the moment in the authority in matter of agreement reached between the petitioner Company and the authority, the particulars contained in license granted to the petitioner Company as well as the provisions of the current law in that relation. In this way it can not be assumed that responsible officers of any agency shall have no liability on matter relating to agency he is working or on any claim or application registered to it. It can not be considered otherwise to give finality of

matters stated above so as not to overrule any authority or in violation of law. Hence, there is no need to invalidate the said letter which is not inconsistent with law and had the jurisdictional errors.

The third and the last question is about whether or not an order as demanded by petitioner has to be issued. While bothering upon this question, the relevant documents enclosed in the file of the case reveals that the petitioner has already fulfilled his demand of international gateway one of the three demands of petitioner. No dissatisfaction is found expressed from the part of petitioner in this regard. So far as concerned with the second demand on whether the letter sent by the employee or the Authority Santosh Poudel to the petitioner company in 2063/6/24 is worthy of invalidation or not, the said letter is not a decision but just an acknowledgement and not challenged even if the decision of the Board itself was made known later to the petitioner. Now therefore, it is not necessary to declare invalid because of the reasons stated above.

In the case of unequal rate of royalty complained in the petition the writ petitioner which has come to registered with the motive of not complying with the conditions agreed while submitting the tender documents or applications and obtaining the license on that basis can not be called that it was registered with good intension. Since the proviso clause of Section 22(2) of Telecommunication Act 2053 had no problem in providing the telecommunication service also to other service providers as to the petitioner on the basis of material evaluation, however, the situation is such that the regulatory body the telecom Authority itself who issues the license is saying that the nature of the telecom service provided to UTL is different. The assertion made in written reply differences in technology has not been strongly defended in written brief presented by the petitioner's side. Section 26 of the Act has made arrangements of the provisions that the alterations may be made in the license; however, Section 26(2) puts demarcation lines that no such change could be made in the essence. In such a situation the revisions asked in the royalty pledged at the time of acquiring license and demanding an order in

the writ petition to pay only at the rate of 4 percent of annual income sounds illegal and irrational.

The petitioner had submitted tender on the reflection of laws regulations and the policies relevant to the communication service. No changes or alterations have been seen in them. He who expresses commitment to pay any amount, fee, royalty or the charges through tender or any other documents must be thought that he has thoroughly studied those things in light of the existing laws and rules and has contemplated the risk factor accordingly. Once it is agreed to pay to another party in the modes and procedures consented by one and taken advantages of obtaining license etc, he can not breach those pledges and commitments showing this and that reason. It is not the court to interfere in the personal affair of the parties except in a situation when these pledges and commitments are broken with the straight violation of law or they are initially against the law. Here, in this case, no apparent violation of law is visible. It is not a matter of right to ask for the revision in the amount of fee, royalty and installments later once pledged to pay at the time of obtaining license. The right is protected by law and must be exercised in accordance with law. Unless and until the rights provided by law are unlawfully encroached they can not be the subject of judicial inquiry. In the present case no reasonable ground exist to the extent of issuing an order of writ in the name of respondent Nepal Telecom Authority for changes or alterations in royalty pledged or committed to pay by the petitioner himself. Now therefore, no situation exists as to issue an order as demanded. The writ petition is decided to be vacated. Let the file of case be handed over removing it from the register of the regular proceedings.

I concur with the above decision.

J. Sushila Karki

Done on this day of 23rd Falgun 2068 BS (March 06, 2012)

Translated by Bhim Nath Ghimire

The defense for a criminal charge like murder and rape should be established beyond reasonable doubt that the perpetrator lacks actus reus while committing the crime.

Supreme Court, Division Bench

Hon'ble Justice Prakash Osti

Hon'ble Justice Gyanendra Bahadur Karki

067-CR-0380

Case: Homicide, Attempted Rape.

Appellant/ Defendant: Purna Bahadur Timsina, a resident of Belbari VDC, Ward No. 9, Morang imprisoned in Morang Prison,

Vs.

Respondent/ Plaintiff: Government of Nepal with the First Information Report of NBB (Changed name)

- **Though the various previous actions or expressions of victim may have prepared the ground to bring the defendant in provocation or excitement however, the victim should act any conduct at the moment to that extent in such a way that the defendant was incapable to control him/herself as a result. This shows that the provocative actions may be cumulative but its last segment must be occurred at the very moment.**
- **Similarly, such conduct that brings the defendant in provocation should not be occurred on the basis of**

behavior, action or expression of parsons other than victim.

- **Generally, such provocative action of victim should be intended towards the defendant or the victim should act any conduct intending to the defendant to bring him/her to such provocation.**
- **It is not appropriate to undue extension of this exception that can be admitted in special circumstances of the general rule provocative action of victim should be intended towards the defendant.**
- **The action of victim to bring the defendant into provocation should be capable to bring the defendant into provocation to that extent to create a situation under which the defendant looses mental control over himself. The defense is not available to the defendant if he himself suffered by the extreme excitement or provocation as a reaction of the normal action or expression of the victim.**
- **It is necessary to establish objectively that other person having normal understanding belonging to the similar situations or circumstances and status of defendant would also be provoked as equal footing to the defendant. There should be seen the proportional relationship between the provocative action of victim and provocation of the defendant.**
- **The defendant has no availability of defense of extreme provocation in the case where the defendant himself/herself suffered by the extreme excitement or provocation and detriments to the victim or does any action that likely to take the life of victim as a reaction to the legal conduct of victim performed pursuant to law for utilizing the legal rights like special privilege of defense available to the victim by any law.**

- **It cannot be accepted as a basis for the defense of extreme provocation as a reaction towards the legal action only on the ground of disagree of the defendant since it is a natural expectation that all persons should fulfill the duty to respect the legal rights of other persons.**
- **If there is an interval between the provocative action and its reactionary action, such interval provides time to the defendant for cooling off his provocation or creating of intention and defendant attacks to the victim after such interval of time, such attacking conduct of defendant cannot be taken as a provocational action.**
- **The defendant may plea the defense of provocation and receives the privilege of partial defense in the situation where defendant immediately does something under provocation absolutely losing the control over himself/herself as a reaction towards the provocative action of victim and that cause death of victim.**
- **To make an effort on the side of defendant to commit rape in absence of consent of deceased is itself an offence pursuant to the law in force, in this situation, the defendant argues that he was under extreme provocation due to denial of copulation.**
- **To constitute an offence of intentional homicide, it is not mandatory that there must be appearance of pre-intention, pre-plan and pre-enmity in every case. In the case where the *actus reus* exist in series of various segments, the accomplishment of criminal intention at any segment of series of *actus reus* is suffice to amount intentional homicide.**
- **It is not possible to confine the time-frame under which an intention to kill should be created. It does not affect the nature of crime committed regardless whether this**

mental state was in existence from the long past time or is created at the very moment that establishes crime as committed intentionally.

Decision

Prakash Osti, J; The brief description of the fact and verdict thereto in the case presented before this bench registered in this court as an appeal against the decision of Appellate Court, Biratnagar dated on Falgun 5 of 2066, on behalf of defendant pursuant to Section 9 of the Administration of Justice Act, 2048 is as follows :

Water, sand and mud splashed in the face, hair wet with water, legs were folded, frothy fluid discharged from nostrils. Mark of strain in the neck, seen the teeth biting the tongue was mentioned in the dead body examination report and crime scene.

My aunt Meena Biswokarma, aged 29, had been in Belbari bazaar on 2064/8/10 for buying the goods but she did not return up to the evening and in course of searching, her dead body was found in the morning on 2064/8/11 by the canal situated in Belbari VDC-9. It is noticed that while returning home Purna Bahadur Timsina was carrying her in rikshaw attempted to rape her and after her denial, he murdered her, therefore, he should be arrested and prosecuted as per law, was the content of First Information Report (FIR) of Nir Bahadur Biswokarma.

The arrested defendant Dipe alias Purna Bahadur Timsina in his statement before the investigation officer mentions that she was incapable for cycling due to consume of alcohol and she requested me to bring her in her home. In the course of returning home, we talked about sexual activities and she became ready for that. When I made an effort to have sexual intercourse reaching in the place of occurrece she denied for copulation against her previous consent. She also said that her brother will mutilate me, then I, in the anger of being incapable to fulfill sexual thirst, caught her hair by the left hand

and keeping down her in the ground, and stressed out her neck by the right hand until her death. After her death, tied her shawl in her neck, overturned her and pressing head by legs, I murdered her.

Cause of death could be ascertained after biochemical report mentioned in the post-mortem report of deceased.

The Sample No. 1-2 have shown negative tests for above mentioned insecticides, fungicide, herbicide, alcohol, fumigant and rat poison mentioned in the examination report of dead person in the scientific test of Central Police Scientific Laboratory.

One red ladies cycle having no left paddle, scratched seat, "ROVER CYCLES" written in English language, and one ladies sandal of ghee color of the left leg and black tape likely a lace were seized in the occurrence is the deed of recognizance of reovery.

The incident might have occurred due to drunkenness. We know this after we heard the defendant murdered the deceased. This is the statement given before the investigeting officers by the people including Laxmi Timsina and Neera Biswokarma.

On the basis of evidences analyzed, it is seen that the defendant Dipe alias Purna Bahadur Timsina kept the deceased in the occurrence in his rickshaw with an intention to have sex with her and killed the deceased person after her denial to have sexual intercourse by pressing her neck, and drowning her into water canal and tying her shawl in her neck. This act of defendant is a crime committed against No.1 and 13(3) of the Chapter on 'Homicide' and No. 5 of the Chapter on "Rape' Country Code (Muluki Ain). The defendant should be punished pursuant to No.1 and 13(3) of the Chapter on 'Homicide' and No. 5 of the Chapter on "Rape' of Muluki Ain accordingly. This is the content of the Charge Sheet submitted by the prosecutor in the Court.

In the course of returning with deceased boarding her in my rickshaw at the evening of 2064/8/10, she provided consent to sexual intercourse and at the arrival of incident place, I offered to

have copulation with her and she denied, again she said me to mutilate by her brother. I got anger and killed stressing her neck and tied shawl in her neck then I returned home. It is a statement of defendant Purna Bahadur Timsina before the Court.

Defendant had no witness on his behalf and no witness presented by the plaintiff for their statement before the court as per the court order.

The decision of Morang District Court dated on 2066/2/19 mentioned that there is no separate conviction and punishment for the attempted rape as demanded in the charge sheet but the defendant Purna Bahadur Timsina is convicted in murder pursuant to No. 1 and No. 13(3) of Chapter on 'Homicide' for killing of deceased. Therefore, defendant Purna Bahadur Timsina is awarded the punishment of life imprisonment with confiscation of entire property under to No. 1 and No. 13(3) of Chapter on 'Homicide'.

The appeal of defendant mentioned the plea that there is no intention to kill the deceased, there is any enmity to the extent of taking the life of the deceased. The punishment of life imprisonment with confiscation of entire property imposed by the District Court in the offence committed under loosing self-control due to provocation as a result of immediate anger is necessary to review.

The decision of the Court of Appeal, Biratnagar dated on 2066/11/5 mentioned that there is no situation to apply No. 14 of Chapter on 'Homicide' of Muluki Ain since defendent in his statement confesses that he killed the deceased under the anger of failure to commit a heinous crime as rape instead of killing under immediate provocation and the defendant confesses about his conduct of killing to deceased in the statement made before the authorized official and the court. Therefore, the decision of Morang District Court dated 2066/2/19 to convict the defendant Purna Bahadur Timsina and sentence him to undergo imprisonment for life with the confiscation of entire property pursuant to No. 13(3) of the Chapter on Homicide

in the offence of No. 1 of the same Chapter of the Country Code (Muluki Ain) is justifiable and hereby upheld.

In the course of going in the road keeping her cycle and deceased in my rickshaw, we talked about the sexual intercourse and she provided consent for it. When we reach to the *Tinpaini*, she was incapable to move from rickshaw and I took her from rickshaw and proposed for sexual relationship, till that time she re-consented to it. As per the consent I carried her into the jungle and made an effort to establish sexual relationship, she, suddenly refused and threatened me to kill by mutilation by her brother. I felt my life in peril from the bahaviour shown against her pre-consent and could not think anything at the moment, she was died as the result of the conduct committed by me under the immediate provocation. I fully help to the judicial function mentioning and accepting these facts in statements before the investigation and the court. I did not take the deceased by fraud with a purpose to establish sexual relationship. There was no intention to take her life. She was extremely intoxicated by alchohal and in the state of half-consciousness, as she requested me to take her and her cycle to her house I kept her in my rickshaw. In the course of going home, on the basis of mutual consent, when I made an effort to establish sexual intercourse, she suddenly refused against the mutual consent and I got extreme anger due to her behaviour and being incapable to think anything at the very moment, I stressed her neck and she died. To establish sexual relationship between us with free consent does not fall within the definition of rape. I had no intention to kill her, no enmity to the extent to take her life, in such a situation deceased threatened me to kill by mutilation by calling her brother that provoked me and I failed to control myself and committed the conduct. In this offence, it is not appropriate to impose life imprisonment with confiscation of entire property since No. 14 of Chapter on 'Homicide' of Muluki Ain has clear provisions not to impose the mentioned punishment in such situaiton. Therefore, the punishment imposed to the optimum extent should be

reviewed by using judicial mind. This is the plea of defendant in the appeal submitted in this court.

In this case presented for hearing as per the rule, learned advocate Mr. Lilamani Paudee on behalf of appellant submits his argument that there is no situation of intentional killing by the defendant. The defendant was a rickshaw driver and the deceased was in the state under which she was incapable to walk due to drunkenness and she requested to carry her up to her house. Then, he carried her and her cycle in his rickshaw from the Belbari Bazaar to home. Meanwhile they talked about sexual intercourse between them and they agreed to have intercourse. When they reached to Tinpaini, he stopped his rickshaw, took the deceased towards the jungle from the rickshaw and made an effort to establish sexual relationship as per consent, the deceased suddenly rejected and threatened to kill him with mutilation of his limbs by calling her elder brother in the next day. The defendant came into provocation and under provocation, he stressed the neck of deceased and consequently she died. There is no circumstances to prove intentional homicide since there is no any enmity and preplan to kill deceased in the defendant which have been mentioned in the statements of defendant made before the court and in the course of investigation. Instead of punishing to the defendant pursuant to No. 14 of Chapter on 'Homicide', in the case where deceased died from the conduct of defendant under extreme provocation as a reaction of an act of deceased contrary to the consent, the trial and appellate court convicted him pursuant to No. 13(3) of the same Chapter is wrong. Therefore, the defendant should be punished only pursuant to No. 14 which was confessed by him after making full hearing by calling the respondent.

After giving consideration on the pleading of learned advocate on behalf of appellant and studying the case file it seems to be decided whether the decision of Appellate Court Biratnagar dated on 2066/11/5 is correct or not and whether the plea of the defendant can be fulfilled or not according his appeal?

While considering upon the decision, it is seen that the investigation of this case initiated on the basis of First Information Report (FIR) read that my aunt Meena Biswokarma went to Belbari bazaar on 2064/8/10 but she did not come back up to the evening and in the course of searching, her dead body was found in the canal in Belbari VDC-9 and noticed that in the course of returning home through rickshaw of Purna Bahadur Timsina, he attempted to rape and after her denial, he murdered her, therefore, he should be prosecuted pursuant to law. The charge-sheet filed against the defendant demanding to convict and punish pursuant to No. 1 and 13(3) of Chapter on 'Homicide' and No. 5 of Chapter on 'Rape' on the basis of documents and evidences prepared in the course of investigation including the statement of defendant.

It is seen that the death of deceased is intentional homicide since the body and crime scene examination report mentions that water, sand and mud splashed in the face, hair wet with water, legs were folded, frothy liquid was discharging from nostrils. Mark of strain in the neck, seen the teeth biting the tongue and on the basis of FIR and statements of defendant made during the investigation and before the court.

To consider on the demand of prosecution on whether or not the death of deceased is caused by the conduct of defendant, it is seen that the defendant has confessed in his statement made before authorized officer saying that she was in incapable state for cycling due to drunkenness and she requested me to bring her in her home, while returning home in rickshaw in the course of talking, the consent to have sexual intercourse had been made and at the reaching to the incident place, I made an effort to have sexual intercourse, she denied against her previous consent saying that her brother will mutilate me, then I, under the anger of being incapable to fulfill sexual thirst, caught her hair by the left hand and keeping down her in the ground and stressed out her neck by the right hand until her death. In the statement made before the court too, he confessed the killing of deceased by accepting the description mentioned in his

statement made in the course of investigation. His confession is supported and corroborated by the content mentioned in the FIR and dead body examination report.

The defendant, in his appeal submitted in this court, and the learned advocate, in his plea, claim that the defendant should not be punished pursuant to No. 13(3) of Chapter on 'Homicide'. The conduct of defendant is of the provocational conduct under No. 14 of Chapter on 'Homicide', therefore, he should be punished pursuant to the same No. For considering the plea, it is necessary to analyze that in what circumstances the legal provision under the No. 14 of Chapter on 'Homicide' becomes attractive or an incident of provocational homicide could be constituted.

The defendant may plea of partial defense for mitigating punishment in the case where the defendant loses control over himself due to extreme provocation at the time of commission of criminal conduct having death of person in being and victim dies as a consequence of that conduct. Though the crime of homicide is relative crime, in case of absolutely absence of mens rea in the incident of such an act of dying a person in being, as an exception of relative crime, law arranges such an act as punishable but it consist less punishment than intentional homicide. In the case where the defendant pleas that the death of person in being occurs under the extreme provocational conduct of defendant, it is necessary to observe that whether or not the incident could be happened under the circumstances at the time of given incident. In the situation under which the defendant pleas partial defense of provocation in the homicide case, it is necessary to analyze whether the following circumstances was in existence at the time of incident or not to determine whether or not the plea of defendant is acceptable.

(a) Whether or not the defendant spontaneously and naturally provoked by any act of victim or his expression?

(b) Whether the provocative action of victim to bring defendant in provocation intended towards the defendant or not?

(c) Whether or not the behaviour of victim, conduct done by him/her, or his/her any expression naturally likely to capable to bring the defendant in extreme provocation, or whether or not any rational person belonging to the similar situation of defendant or alike circumstances could be provoked by the conduct or victim's activity?

(d) Whether or not the victim is legally free to commit the action that brings the defendant in provocation?

(e) How much interval of time between the provocative action of victim and the attack of defendant against victim or whether or not the cooling-off-time had been passed away?

Upon considering first question whether or not the defendant was spontaneously and naturally provoked by any act of victim or his expression, the provocation or excitement of defendant should be appeared immediately as a reaction of the provocative action or expression of victim. Though the various previous actions or expressions of victim may have prepared the ground to bring the defendant in provocation or excitement however, the victim should act any conduct at the moment to that extent in such a way that the defendant was incapable to control him/herself as a result. This shows that the provocative actions may be cumulative but its last segment must be occurred at the very moment. Similarly, such conduct that brings the defendant in provocation should not be occurred on the basis of behavior, action or expression of other parsons other than victim.

Upon considering second question whether the provocative action of victim to bring defendant in provocation intended towards the defendant or not, generally such provocative action of victim should be intended towards the defendant or the victim should act any conduct intending to the defendant to bring him/her such

provocation. But there may be some extension of this general rule. In some circumstances, between husband and wife or between the persons within the nearest family relationship, the action intended towards one person may naturally provoke another person. There may be circumstances, under which such excitement or provocation may be taken as natural excitement or provocation exceptionally. But it is not appropriate to undue extension of this exception that can be admitted in special circumstances of the general rule provocative action of victim should be intended towards the defendant.

Upon considering third question whether or not the behaviour of victim, conduct done by him/her, or his/her any expression naturally likely to capable to bring the defendant in extreme provocation, or whether or not any rational person belonging to the similar situation of defendant or alike circumstances could be provoked by the conduct or victim's activity, the action of victim to bring the defendant into provocation should be capable to bring the defendant into provocation to that extent to create a situation under which the defendant looses mental control over himself. The defense is not available to the defendant if he himself suffered by the extreme excitement or provocation as a reaction of the normal action or expression of the victim. It is necessary to establish objectively that other person having normal understanding belonging to the similar situations or circumstances and status of defendant would also be provoked as equal footing to the defendant. There should be seen the proportional relationship between the provocative action of victim and provocation of the defendant.

Upon considering fourth question whether or not the victim is legally entitled to commit the action that brings defendant in provocation, the defendant has no availability of defense of extreme provocation in the case where the defendant himself/herself suffered by the extreme excitement or provocation and detriments to the victim or does any action that likely to take the life of victim as a reaction to the legal conduct of victim performed pursuant to law for utilizing the legal rights like special privilege of defense available to the victim by

any law, or any expression or behaviour of victim in the course of utilizing his/her rights available according to the prevalent laws. It cannot be accepted as a basis for the defense of extreme provocation as a reaction towards the legal action only on the ground of disagree of the defendant since it is a natural expectation that all persons should fulfill the duty to respect the legal rights of other persons.

Upon considering the fifth question how much interval of time between the provocative action of victim and the attack of defendant against victim or whether or not the cooling-off-time had been passed away, the attack of defendant under the extreme provocation against the victim should be as an immediate reaction of the provocative action of victim. If there is an interval between the provocative action and its reactionary action, such interval provides time to the defendant for cooling off his provocation or creating of intention and defendant attacks to the victim after such interval of time, such attacking conduct of defendant cannot be taken as a provocational action.

Pursuant to the analysis made upon the aforementioned questions, the defendant may plea the defense of provocation and receives the privilege of partial defense in the situation where defendant immediately does something under provocation absolutely losing the control over himself/herself as a reaction towards the provocative action of victim and that cause death of victim.

Number 14 of Chapter on 'Homicide' of the Muluki Ain (Legal Code) has mentioned about the provocational homicide as: *"In cases where a person uses a stick, stone, kick or fist against another person, without intention to kill that other person or without having any malice or without hiding in a secret place (clandestinely), and with an immediate provocation, but without using any serious/hazardous weapons or poison, and the victim dies within the date due to the hurt or pain inflicted out of it, such a person shall be liable to the punishment of imprisonment for a term of Ten years."*

This provision has restricted the using any hazardous weapons or poison even in the provocational circumstances to amount an incident as a provocational homicide. This shows that the legislative intention is to amount murder to the death of person caused by any act committed with using any hazardous weapons even in the provocational circumstances.

In this case, the defendant has said in his statement that he took the deceased, who was intoxicated of drunkenness, in his rickshaw from Belbari bazaar to home and while returning talked about sexual intercourse with her and obtained her consent for it. The defendant kept the intoxicated deceased towards the jungle from his rickshaw for the purpose of copulation pursuant to the pre-consent, and in this situation, the deceased denied to sexual intercourse and she threatened to kill him next day. Then the defendant killed her being provoked with stressing the neck of deceased, it is seen in his statement.

It cannot be seen that the deceased created any eminent danger against the defendant. To provide consent for copulation is the matter of voluntary desire of deceased and it is not mandatory to provide consent for sexual intercourse at the moment of desire of defendant only on the ground of pre-consent given for it previously. In this case, the statement of defendant shows that the deceased was in subconscious condition by consuming alcohol while he carried her towards home in his rickshaw. It is also considerable in this case that at the time of providing consent for sexual intercourse, she might not be in sound mind condition. No. 1 of Chapter on 'Rape' has defined a sexual intercourse in absence of consent as a punishable crime. To make an effort on the side of defendant to commit rape in absence of consent of deceased is itself an offence pursuant to the law in force, in this situation, the defendant argues that he was under extreme provocation due to denial of copulation. Whether the consent for sexual intercourse is given or not is based on the desire of the deceased and in the case of absence of consent of deceased, if rape is committed against her and she does

something for preventing her from the perpetrator that cause death of perpetrator, she would have available valid defense pursuant to the No. 8 of Chapter on 'Rape'. In this circumstance, it is not the ground to the defendant to create a situation to bring him provocation to the extent of absolutely losing control over himself. In addition to this, there is no any plea of defendant that alcohol consumed deceased did any act that caused extreme provocation to the defendant and such situation cannot be seen from the case file. Thus, the pleas of defendant and his advocate that the defendant suffered from the extreme provocation due to become unable to commit an act of rape which is restricted by the current law in absence of her consent cannot be treated as an acceptable plea.

The defendant has plead that there was absence of intention, pre-plan and pre-enmity to kill deceased, therefore, it was not the incident of murder. Pursuant to the statement of defendant, he took the deceased in his rickshaw from Belbari bazaar to home, meanwhile the consent for sexual intercourse was made, but when the deceased denied to sexual intercourse then the defendant killed her being provoked with stressing the neck of deceased. To constitute an offence of intentional homicide, it is not mandatory that there must be appearance of pre-intention, pre-plan and pre-enmity in every case. In the case where the *actus reus* exist in series of various segments, the accomplishment of criminal intention at any segment of series of *actus reus* is suffice to amount intentional homicide. It is not possible to confine the time-frame under which an intention to kill should be created. It does not affect the nature of crime committed regardless whether this mental state was in existence from the long past time or is created at the very moment that establishes crime as committed intentionally. It is seen that the conduct of defendant to kill the deceased is an intentional conduct since the intention to kill her was created in the mind of defendant after rejecting to provide consent by the deceased for sexual intercourse to the defendant. This has proved beyond reasonable doubt that the defendant killed intentionally to the deceased.

Therefore, from the aforementioned bases and reasons analyzed, it is proved beyond reasonable doubt that the defendant Purna Bahadur Timsina killed intentionally to the deceased so that the decision of the Court of Appeal, Biratnagar dated 2066/11/05 sustaining the decision of the District Court Morang dated 2066/02/19 that convicted him pursuant to No. 1 of Chapter on 'Homicide' and sentenced him to undergo imprisonment for life along with the confiscation of the entire property pursuant to No. 13(3) of the same Chapter is herby sustained. The plea of the appellant cannot be sustained. 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.

J. Gyanendra Bahadur Karki

Done on this day of 24th Shrawan, 2069 BS (August 8, 2012).
Translated by Shri Prakash Upreti

The forest, enviornment, culture and religious heritages of the state are required to be preserved for the well being of all citizens. Historically and religiously significant places must not be encroached in the name of faith.

Supreme Court, Division Bench

Hon'ble Justice Prakash Osti

Hon'ble Justice Kamal Narayan Das

067-WO-0863

Case: Mandamus.

Petitioner: Mr.Chari Bahadur Gahatraj, a permanent resident of Mankha VDC-5, Sindhupalchok district and currently residing in Lalitpur district, Lalitpur Sub-Metropolitan City, Ward No. 13, Talchhikhel & others

Vs

Respondent: Office of the Prime Minister and Council of Ministers & others

- **In a secular State, it is generally observed that the government and its entities shall have to remain detached from religion. However, this does not signify that the government has no administrative liability in the protection of historically and religiously significant places. As the general populace is involved in the religious acts, the State harbors an inevitable responsibility in maintain public order and security.**

- **Despite being a secular country, Pashupati Area Development Fund has run, managed and organized the history, culture, tradition and religions in the form of a corporate body, which is not incongruent to the principles of religious secularism. Secularism is only a norm which connotes that the State should forge a non-intervention approach regarding religion and has to equally grant respect to religions of different faiths. To protect the infringement of one religion over the religious faith of another is also secularism and not religious relativism.**

- **It is the function of State to provide security for the protection of freedom of its citizens. To add on that, if the State abstains from according protection to the individual's right to perform an indispensable social ritual such as the funeral rites, then the right regarding religion conferred by the Constitution stands to be unguarded. It shall be the liability of government to provide security in performing the religious rites in the places managed by themselves or the religious community except in areas sensitive from the law and order perspective or in places of religious, historical, archaeological and environmental importance or in the event of hurting another religion.**

- **Since the right to select one's religion is an individual matter from a legal and constitutional perspective, correspondingly, it shall be an individual affair also to manage the outcomes of adopting a particular religion. While adopting a religion, one should also manage for religious shrines as well as cemetery. Hence, it would not be judicious to assign State liability for providing cemetery which should have been managed by an individual.**

- **It would not be realistic and lawful to direct that it shall be the State's liability to provide land and other amenities to all the religions and sects spread across Nepal so that they may build their respective cemeteries. Nor from the spirit of a secular State would it be feasible to provide such facilities to every religion and sect from the State. Hence, the liability to endow cemetery or burial ground to each community cannot be construe as a yardstick of secularism.**

- **Every religion and sect shall have to respect mutually the tradition and ritual of last rites. The fact cannot be negated that requiring land to bury the corpses and erecting permanent structure over that shall adversely affect the ecosystem. Hence, the first need is to feel the need of contemporary reforms as regards the prevailing tradition and custom by the concerned party. Another need is to initiate meaningful discussion among the concerned followers and individuals of sects for revision in these traditions and customs. This effort for a balanced and reasonable change in protection of forests, environment and culture and religious faith shall have to be backed by the public organizations including the government.**

Decision

Prakash Osti, J: The brief facts and conclusion of this case submitted before this Court within its jurisdiction as per Articles 32 and 107(2) of the Interim Constitution of Nepal, 2007 are as follows:

We, the applicants are Nepali citizens by birth. One of the petitioners, Chari Bhadur Gahatraj is the General Secretary of the Christian Suggestion Committee for New Constitution and another petitioner Man Bahadur is also an active law practitioner along with

being a Christian in himself as well as Central Committee member of the above organization.

As per Section. 9(1) of the Nepal Treaties Act, 1991, the International Covenant on Civil and Political Rights (ICCPR) is binding for Nepal. While defining the State of Nepal, Article 4(1) of the Interim Constitution of Nepal, 2007 has laid down that: Nepal is an independent, indivisible, sovereign, secular, inclusive and fully democratic nation. This way, secularism has been kept as an integral part of the Nepal State. Our Christian community is facing severe problem as we do not burn the corpses, bury them, but we have not been provided with any fixed place as the burial ground. For a long time, we had been using the Shleshmantak forest area of Pashupati Nath as our burial ground but following a decision of Pashupati Area Development Fund (PADF), we have not been able to use that place to cremate the dead. This has led to the storage of corpse in our houses for a long period in search of cemetery and has to burn them contrary to our religious custom. This problem is not only inside the Kathmandu valley but outside as well. Hence, we are compelled to file this writ petition.

We, the Christians, are at first Nepali citizens by birth. There can be no dispute to the fact that we are also entitled to entertain the rights conferred to all the Nepali citizens in an equal manner. Each citizen has the right to perform the death rituals. When we found that we could not perform the last rites as accorded by the Christian religion which we have been practicing in our free will, we requested the respondents for a long time. However, our problem wasn't addressed. The spirit of preamble of the Interim Constitution of Nepal, 2007, State's liabilities stipulated in Article 33(c) and (e) and the Article 23 has conferred the fundamental right to every Nepali citizen to perform his or her rites as per the religion he or she follows. It is the liability of the respondents to create a legal, administrative and systematic environment favorable to observe this right. Similarly, Article 18 of the International Covenant on Civil and Political Rights (ICCPR) has also guaranteed the right regarding

religion. Article 2 of the Covenant states that the State party is obliged to provide for all the arrangements needful to entertain the rights conferred by the Covenant itself. Hence, we pray the Court to issue an order of mandamus directing the respondents to provide specific sites for the Christian community to be used as burial ground within and outside the Kathmandu valley. We also pray that the Court issue an interim order as per Rule 41 of the Supreme Court Rules, 1992, in the name of respondents not to restrict the use by Christian community of the Shleshmantak forest area of Pashupati as their burial grounds which they have been using for so long. Moreover, since this issue needs to be decided at earliest we also request to grant it preferential hearing as per the Supreme Court Rules, 1992. The petition of the applicants read as such.

What has happened in this regard? Why a show cause notice needs not to be issued? The respondents be ordered to file their written replies via the Office of Attorney General within 15 days excluding thetime period to be consumed for journey and they be sent a copy of this writ petition and be informed of the case and the Office of Attorney General be also notified in this connection. As per the Interim Constitution of Nepal, 2007, Nepal has been recognized as a secular country. Every citizen shall require a specific site to conduct the last or funeral rites as per the religion, culture and tradition. The main stand of the petitioner is to seek the provision of land for cemetery so that last rites may be conducted as per the Christian religion. The case shall be decided through final hearing. The preamble of the Interim Constitution of Nepal, 2007 has laid down the State's commitment towards freedom of citizens, fundamental rights and human rights. Moreover, Article 12 which confers the right to equality and Article 23 which confers the right to every person to observe practice and protect the religion which has been descended through generations while upholding the dignity of prevailing social and cultural traditions should not be tampered in any manner. Hence, upon considering the civil rights ensured by the Interim Constitution of Nepal, 2007 as well as International Covenant on

Civil and Political Rights (ICCPR) and the spirit envisaged in these provisions, it shall not be fitting for any civilized and lawful State to impose restrictions in any manner on the indispensable and sensitive ritual such as cremating or burying the corpses as per the religious and cultural traditions in the site demanded by the petitioners or at any other place. Therefore, an interim order has been issued in the name of respondents as per Rule 41(1) of the Supreme Court Rules, 1992 not to obstruct in any manner in cremating or burying the corpses as per the religious and cultural traditions in the site demanded by the petitioners or at any other place. Since this petition relates to a sensitive and serious matter concerning religion, culture and tradition, the respondents be directed to submit their written replies before 7th April, 2011 and this petition be submitted before the Bench on 10th April, 2011 for a full hearing and it shall also be accorded a preferential status. The Bench of single judge of this Court ordered to this effect.

The Shleshmantak forest area (also known as Mrigasthali) is protected in the name of Pashupati Nath which is enlisted in the World Heritage List and is also a sacred, holy pilgrimage site of international level of Hindus alone. It commands a special position in Hindu religious history. Apart from Pashupati Nath, this area also houses the temples of Guhyeshwori, Baba Gorakhnath, Ram, Ganesh, Bishworup and Manakamana and several other deities as well. Several communities were indulged in haphazardly cremating their corpses in this protected Mrigasthali forest as well as erecting permanent tombs over it which could have led to the erosion of religious sanctity. Hence, in order to manage and protect this heritage, the meeting of Fund Management Council dated 29th December, 2010 decided to immediately prohibit the burial of corpses in the Mrigasthali forest of Pashupati Nath area and in case any community has a tradition to bury their corpses only in that area, then they shall have to furnish the evidence of same before the Fund and those communities shall be assigned a definite site with boundaries but without permitting to erect tombstones over the

ground. That meeting directed the management to submit a proposal to this effect in order to enforce the necessary arrangements. The claim of the petitioners that even Non-Hindus shall have to be allowed to perform their burial rites in a sacred pilgrimage site of Hindus alone is contrary to religious tolerance as well as it may trigger religious and communal riots in future. This act is also destined to breach the dignity of an international pilgrimage site of Hindus which is also scheduled in the World Heritage List.

Article 23 of the Interim Constitution of Nepal, 2007 confers the right to every person to observe, practice and protect the religion which has been descended through generations while upholding the dignity of prevailing social and cultural traditions. However, nobody shall cause anyone to change his or her religion nor is anyone allowed to work in a manner that would adversely impact each other's religion. In the light of this constitutional provision, the writ petitioners seem to encroach on the sacred pilgrimage site of the Hindus in a blatant manner. As per the above constitutional provision and to realize the preamble and objectives of Pashupati Area Development Fund Act, 1987, it is the legal obligation and liability of the Pashupati Area Development Fund to maintain the pristine form of Pashupati area in that manner. Since there is no doubt that the petitioners are Christians, their stand that they should be permitted to build cemetery inside the Shleshamantak forest area within the Pashupati region which is a center of devotion and ancient pilgrimage site of the Hindus alone, is antagonist to the constitutional arrangement as well as the Pashupati Area Development Fund Act, 1987. Contrary to the plea espoused by the petitioners, the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights (ICCPR) and other international instruments have not provided the liberty to a person of a particular community or religion to infringe on the dignity and sanctity of a sacred site of worship which belongs to another religion or community in the name of human rights, secularism or equality. As regards the demand of the petitioners to immediately provide for specific sites within and

outside Kathmandu valley for the Christians to be used as burial grounds, the Fund shall have no reservation if any area outside the Pashupati premises is provided for that purpose. Regarding the plea espoused by the petitioners regarding Chapter 4, Article 33 (c) and (e) dealing with the liabilities of State, it is well stipulated in Article 36(1) that no question can be raised in courts concerning their implementation status and since that matter is irrelevant to the Fund, the petitioners' claim in this area is unconstitutional.

Hence, as the petitioners have not demanded the revocation of decision made by the meeting of Fund Management Council dated 29th December, 2010 and since no decision has been taken that would infringe in any of the rights of the petitioners and as the Council of Fund has taken decision pursuant to Pashupati Area Development Fund Act, 1987 as well has enforced it, the respected Court cannot issue an order against the decision which was reached as per the current constitutional arrangement regarding religion and the Act. Hence, I pray to quash the writ petition outright. The written reply filed by Member Secretary Mr. Sushil Nahta on behalf of the Pashupati Area Development Fund and its Board of Directors read as such.

The written reply furnished by the Ministry of Land Reforms and Management, Government of Nepal stated: Since this Ministry has neither decided nor acted in any manner that would impact on the rights and interests of the petitioner, this writ petition deserves to be quashed.

The written reply furnished by the Ministry of Federal Affairs, Constituent Assembly, Parliamentary Affairs and Culture stated: As the Fund is an autonomous and corporate body established as per Pashupati Area Development Fund Act, 1987, it is independent in performing its functions. Hence, there is no rationale in linking this Ministry with the acts that institution has done and filing a petition thereto. Article 23 of the Interim Constitution of Nepal, 2007 confers the right to every person to observe, practice and protect the religion

which has been descended through generations while upholding the dignity of prevailing social and cultural traditions. The petitioners have failed to mention that any of the acts of decisions of this Ministry has negatively impacted on the enjoyment of their rights. Moreover, following the provisio of that Article, nobody shall cause anyone to change his or her religion nor is anyone allowed to work in a manner that would adversely impact each other's religion. In this context, a duty has been laid for all the religious communities to practice mutual tolerance among each other. The plea of the respondents urging for the creation of a conducive legal, administrative and systematic environment by interpreting the provisions in their favor is neither lawful nor logical. Hence, this writ petition deserves to be quashed.

Similarly, the written reply furnished by the Ministry of Law and Justice mentioned: The issue of providing burial grounds in a definite area does not fall in the purview of this Ministry nor is this Ministry involved in fixing any site to be used by the Christian community as the cemetery. Hence, this writ petition which has named an unrelated body like this Ministry as one of the respondents is futile in it and thus deserves to be quashed.

The written reply furnished by the National Human Rights Commission mentioned: It is the responsibility of State to respect, protect and enforce the human rights enshrined in international law, constitution and statutes. From the writ petition of the respondents itself, it is evident that the Pashupati Area Development Fund has restricted in building cemetery inside the Shleshmantak forest area of Pashupati. It is an express religious function to conduct funeral rites as per one's own religion and custom and followers of all the religions shall have to arrange that as per their own respective cultures. From the factual basis of the petition itself, it is obvious that the Commission has not posed any hindrances in performing such last rites. The Commission has no reason to be offended if the complainants themselves or the State provides for any such type of arrangement as the petitioners have sought. Since the Commission

has committed no wrongdoing nor has interrupted in the process, the respected Court need not issue any order against this Commission.

Likewise, Chief Secretary Mr. Madhab Prasad Ghimire, on behalf of Council of Ministers, Government of Nepal, in his written reply quoted: As regards the Article 4 of the Interim Constitution of Nepal, 2007, which has stated Nepal being a secular republic, the Constitution has imparted the State liability to remain secular in religious matters except while maintaining law and order. The Constitution has conferred the liability on State to remain impartial as regards matters of death rites. I would like to inform the respected Court that the present issue pertaining to death rites is a subject to be managed and regulated by the concerned person, family or individual on the basis of their own traditional values and norms. In case land should be provided to the Christian community as demanded in the petition, then it shall amount to be antagonistic to the principle of a secular State as that would be unequal towards other religious sects. The concerned agencies made rejoinders shall submit their written replies as regards the pleas aroused in the petition. Hence, I pray for this writ petition to be quashed.

In the present writ petition duly submitted before the Bench as per the daily cause list learned advocates duo Mr. Madhab Kumar Basnet and Mr. Binod Karki represented the petitioner's side. They argued that: Nepal is a secular country. Article 23 of the Interim Constitution of Nepal, 2007 confers the right to every person to observe, practice and protect the religion which has been descended through generations while upholding the dignity of prevailing social and cultural traditions. It is the State's liability to protect the rights regarding religion imparted by the Universal Declaration of Human Rights 1948 as well as the International Covenant on Civil and Political Rights (ICCPR). Pursuant to Section 9(1) of the Nepal Treaties Act, 1991, the provisions of international instruments to which Nepal is a State party apply as bindingly as laws in Nepal. The Christian followers have been exercising their religious functions in Nepal independently. However, Protestant Christians traditionally

bury their corpses. They had been using the forest east to Pashupati Nath inside Kathmandu valley as their burial ground. However, a decision of Pashupati Area Development Fund dated 29th December, 2010 has outlawed and banned this practice. The written replies furnished by the respondents indicate that the Christian followers are not allowed to build cemetery inside the Pashupati area. However, the petitioners have only requested to provide a land for cremation purposes according to their religious custom as they have no such sites. It does not imply that the site should be within the Pashupati area only. It shall be the responsibility of State to protect the right of practicing religions chosen by the petitioners. The State is not even providing protection to the site which has been managed by the Christian community itself. To accord protection in concluding these rituals is a duty of government. As this problem is prolific nationwide, even outside the Kathmandu valley, the Court shall have to issue an order of mandamus, as sought in the petition, in the name of respondents requiring them to impart and assign places to be used as burial grounds by the Christian community in Kathmandu valley as well as in other necessary places.

Learned senior advocates Mr. Sushil Panta and Ram Nath Mainali and learned advocates Kuldev Raj Shahi, Kamal Bahadur Bogati and Huta Raj Poudel representing the respondent Pashupati Area Development Fund argued that: The petitioners have demanded to erect cemetery for the Christians in the Shleshmantak forest area under the religiously, historically and archaeologically important Pashupati Nath sector. As per the preamble and objectives underlined in Section 6 of the Pashupati Area Development Fund Act, 1987, it is the duty of Pashupati Area Development Fund to preserve and promote the Pashupati area as it is the international pilgrimage site of Hindus alone. Permitting non-Hindu Christians to build a cemetery in the Shleshmantak forest of the Pashupati sector shall be contrary to the provisions of Pashupati Area Development Fund Act, 1987. Followers of all religions shall have a right to exercise their respective religions in a secular State. However,

nobody is allowed to intervene in other's religion. Though the petitioners have the right to enjoy the religious freedom accorded by the Constitution, the State cannot be forced to provide land for burial grounds. Neither the Constitution of country and the international treaties and conventions compel the State in doing so. Moreover, it is not that the Christians have to bury their corpses at any cost. Most Christians burn them. It is also not that the Christians have been using that land since time immemorial in cremating the corpses. As even the non-Hindu followers have started to bury their corpses and erect structures over them in a haphazard manner inside the religiously, historically and archaeologically acclaimed Pashupati area, the Council of Pashupati Area Development Fund, vide its decision dated 29th December, 2010 has outlawed and banned this practice. As the petitioners also have not sought the repeal of that decision, this writ petition sans rationale and as such this petition deserves to be struck down.

Learned Deputy Government Attorney Mr. Dharmaraj Paudel, also representing the Office of Prime Minister and Council of Ministers argued that: It is evident that Nepal is a secular country. This implies that the State should remain impartial in issues of religion. Though the State may be secular, it does not connote that the State should remain aloof from religious matters altogether. The State may have to intervene in religious activities in order to maintain public security and order. As regards the problem of burial grounds raised by the petitioners, a meeting chaired by Hon. Minister Mr. Ganga Lal Tuladhar and attended by the delegates of Christian community including the applicant Chari Bhadur himself, has rendered its decision in that regard. As the petitioner he was involved in that settlement, this writ petition sans rationale. Hence, this petition deserves to be quashed.

Upon hearing the arguments postulated by the learned advocates and studying the papers and documents enclosed in the case file, while delving towards the dispensation of justice, it seems that decision needs to be taken on the following questions:

a. What shall be the role of government over religious activities in a secular State?
b. What shall be the liability of State as regards the religious ritual of cremating a corpse?
c. Whether an order as sought by the petitioners needs to be issued or not?

The petitioners have stated that Article 23 of the Interim Constitution of Nepal, 2007 confers the right to religion to every person; it is the liability of State to enable practice of right to religion guaranteed by the Universal Declaration of Human Rights 1948 as well as the International Covenant on Civil and Political Rights (ICCPR) and as the Christians are lacking a place for burial grounds, and have demanded that the Court should issue an order directing the State authorities to provide lands in Kathmandu valley as well as other places to be used by the Christians as burial grounds to cremate their dead ones.

To this, the Council of Ministers on behalf of Government of Nepal has filed a written reply which states that though Nepal is a secular country, the State has a say in religious activities for maintaining public order and security. However, it is not the liability of State to provide lands to be used by each religious sect as cemeteries. Neither it is feasible from a practical perspective. The written reply submitted by Pashupati Area Development Fund maintains that the religiously, historically and archaeologically significant Pashupati area cannot be provided to the petitioners legally and constitutionally.

As Article 4(1) of the Interim Constitution of Nepal, 2007 has laid down that Nepal is an independent, indivisible, sovereign, secular, inclusive, federal democratic republic, it remains beyond dispute that Nepal is a secular country. As regards the right to religion, Article 23 of the Constitution has provided that:

Article ***23.*** *Right regarding Religion: (1) Each person shall have the right to observe, practice and protect the religion which has been descended through generations while upholding the dignity of prevailing social and cultural traditions.*

However, nobody shall cause to convert the religion of anyone nor is anyone allowed to act in any manner that would be detrimental to each other's religion.

The above Article seems to have granted the right to practice, follow and protect the religion prevalent through time immemorial by upholding the dignity of tradition not only to Nepali citizen but also to each and every person. However, the question worth pondering in this case is that what should be the role of State as regards the practice and protection of religion elected by any individual. That question needs to be dispensed within the periphery of constitutional provisions. Article 18 of the Universal Declaration of Human Rights, 1948 provisions that: Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching practice, worship or observance. Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) 1966 also condones the provisions of the same Article 18 of the Universal Declaration of Human Rights, 1948. Nepal is a State party to that Covenant. Pursuant to Section 9(1) of the Nepal Treaties Act, 1991, the provisions of international instruments to which Nepal is a State party apply as bindingly as laws in Nepal. That Declaration, international covenants as well as the secular columns entrenched in Articles 4(1) and 23(1) of the Interim Constitution of Nepal, 2007 are the complements to religious tolerance itself. In those treaties and conventions, nothing has been stipulated as regards what would be the role of State in protecting the religious activities of the individuals and communities. Hence, prior to contemplating on the role of State

in religious practices and activities in a secular State, we need to be clear about the principle of secularism first.

While observing the history of secularism, it seems that secularism stemmed from the belief and notion that politics should be kept separate from religion. Quoting the World Book Encyclopedia (Vol. 15, p.654), the theories of medieval philosophies were challenged in 1500s and 1600s. Nichole Machiavelli pushed aside Christian idealism in realistic power politics. His idea was generalized by Thomas Hobbes. He claimed that a person's entire life is ceaseless search for power. This approach became known as secularism, because it separated politics from religion. Black's Law Dictionary (5th edition, p.1214) has defined secularism as not spiritual, not ecclesiastical, relating to the affairs of the present (temporal) world. Thus, the principle of secularism which originated in 15th century to separate politics from the harsh laws of Church has maintained that government should exist separate from religion or religious beliefs. In principle, the government and its acts remain detached or religiously neutral, inside such detachment, the distance between religion and State is governed by the following tenets:

a. Policy of strict non-interference by the State

b. Policy of equidistance between the religions

c. Maintaining of principled distance as regards religion.

In a secular State, it is generally observed that the government and its entities shall have to remain detached from religion. However, this does not signify that the government has no administrative liability in the protection of historically and religiously significant places. As the general populace is involved in the religious acts, the State harbors an inevitable responsibility in maintain public order and security. Hence, though the State adopts a policy of total non-intervention or impartiality in religion and religious matters, the State cannot forbear its responsibility of protecting, promoting these religious sites and

maintaining law and order. The policy of equidistance signifies the government keeping equal distance among all the religions being observed in the country. Excluding the religious affairs, the State has to play a positive role in protecting the culture of every community residing inside the State. Hence, in these matters, policy of equidistance is warranted. In connection with the law and order, the State may have to play a proactive role in protecting the religious and cultural rights of each and every community. When reviewing the practice of other secular countries, it is found that the nations have exercised a principled distance as per the context when the State's liability seems to be necessary in promoting the State's duty of maintaining law and order as well as to foster the level of social awareness and status of social development, mutual relation between the religious communities, political and financial circumstances, cultural traditions, conservation of cultural heritage and to promote tolerance between various religions.

Regarding Nepal, Section 4.1 of Pashupati Area Development Fund Act, 1987 has declared the Pashupati Area Development Fund as an autonomous and corporate body. Programs for the protection and promotion of Pashupati area revered as the pilgrimage site of Hindus are conducted through that corporate entity. It also seems to be essential to preserve this historically, archaeologically and culturally acclaimed area through a corporate body established by a statute. Pashupati Area Development Fund Act, 1987 has formed the Pashupati Area Development Fund and Section 6 of the Act also lays down several objectives of the Fund. Apart from other objectives, Section 6.1.3 designates that: *The Fund shall protect, promote and maintain the antiques and sites of ancient, historical, religious, cultural and national importance, movable and immovable assets of Pashupati and its natural heritage.* Moreover, Section 6.1.3(a) further designates that: *The Fund shall arrange for the traditional cultural festivals, social and benevolent acts and provisions for worship as per the religious norms and practices in all the temples and shrines under the State trust including the temple of*

Pashupati Nath as well. This confirms that the Act was enacted with a view to protect the historical, cultural and traditional national glory of the Pashupati region. Hence, despite being a secular country, the Pashupati Area Development Fund has run, managed and organized the history, culture, tradition and religious in the form of a corporate body, which is not incongruent to the principles of religious secularism. Secularism is only a norm which connotes that the State should forge a non-intervention approach regarding religion and has to equally grant respect to religions of different faiths. To protect the infringement of one religion over the religious faith of another is also secularism and not religious relativism.

Now, upon considering whether the State is in a constitutional or legal obligation or liability to provide the Christian community, as demanded by the petitioners, lands for burial grounds in Kathmandu valley and other places of Nepal, and whether the petitioners have such type of legal or constitutional right to acquire land as such. The learned advocates representing the petitioners have pleaded, in course of their arguments, that as the Christians are minorities then they are bereft of security even to bury their dead ones in the land managed by them. They have also raised a plea that in order for ensuring the practice of religious right as per the Constitution, the State shall have to guarantee the practice of religious rituals in a safe manner by according the required security.

Article 23(1) of the Interim Constitution of Nepal, 2007 has conferred the right to every person to observe, practice and protect the religion which has been descended through generations while upholding the dignity of prevailing social and cultural traditions. However, in the provisio section, the constitutional provision is such that no one is allowed to act in any manner that would be detrimental to each other's religion. Moreover, Article 23(2) has guaranteed the right to every religious community to lawfully operate and protect their religious sites and trusts through keeping their independent existence. Following the constitution, every individual is free to follow and observe the religion chosen by him or her by their rationale.

Article 3 of the Constitution, through its choice of terms, has construed the affiliation of multi-religious Nepali people as the base of organization of nation. Likewise, Article 4(1) has included secularism in course of revealing the religious tolerance adopted by the Nepal State. While conferring the right to equality, the Constitution, vide Article 13(1) has guaranteed that all citizens shall be equal in the eyes of law and nobody shall be denied the equal protection of law. Article 13(2) further underlies that in the application of general laws, no citizen shall be discriminated on the basis of religion, ideological conviction, etc. and that a constitutional guarantee has been extended in that no citizen shall be discriminated on grounds of religion and the like. Human rights are also extensively inculcated in the points of commitment perceived in the preamble of Constitution. Though Article 36 has limited that the question of implementation of Liabilities of State, Directive Principles and Policies specified in Chapter 4 of the Constitution cannot be raised in any court of law, going through Article 34(5) of Chapter 4, it shall be the State's social objective to create and develop healthy social life through eradicating social and economic inequality based on factors like religion and language. Under the State Policies stipulated in Article 35, the State shall pursue a policy of consolidating national unity by maintaining equality and coexistence on the basis of various religions and cultures. However, though the above constitutional provision has conferred respectable treatment towards all religions, it has no provision as to the State having to assume special responsibility to any religion in particular.

It is the function of State to provide security for the protection of freedom of its citizens. To add on that, if the State abstains from according protection to the individual's right to perform an indispensable social ritual such as the funeral rites, then the right regarding religion conferred by the Constitution stands to be unguarded. In case the religious rites practiced by the minorities are obstructed by the majority religious community, and if the religious right is to be threatened, then the State shall have to step in and

assume the responsibility of protecting religious rights of those persons and to uphold law and order. It shall be the liability of government to provide security in performing the religious rites in the places managed by themselves or the religious community except in areas sensitive from the law and order perspective or in places of religious, historical, archaeological and environmental importance or in the event of hurting another religion.

This petition, seeking provision of land or plot to be used as cemetery by the Christian community, seems to have been filed in the backdrop of the decision of Board of Directors of the Pashupati Area Development Fund dated 29th December, 2010 prohibiting the burial of corpses of Christian community in the Pashupati area. The petitioners also could not claim that there has been a tradition since ancient times of cremating their dead ones in the forest of Pashupati region. Apart from the Pashupatinath temple, the Pashupati area is also a home to several temples of gods and deities such as Guhyeshwori, Baba Gorakhnath, Ram, Ganesh, Bishworup and Manakamana and that region is also recognized as a pilgrimage site of international level for the Hindus. Moreover, this place is also listed as a World Heritage site. In case the Christians continue with burying their corpses and erecting permanent structures over them, then the environment of this sacred faith-land of Hindus which assumes religious, archaeological and historical significance, shall not only deteriorate, but it would also breach the religious faith towards the Shleshmantak forest. Since it is a forest where it is believed that Hindu Gods often frequent, the burial of corpses has been banned. The written reply of Pashupati Area Development Fund elaborates this position.

Since the right to elect one's religion is an individual matter from a legal and constitutional perspective, correspondingly, it shall be an individual affair also to manage the outcomes of adopting a particular religion. While adopting a religion, one should also manage for religious shrines as well as cemetery. Even in Christian majority countries like USA and Britain, graveyard remains an

individual affair of the community and places shall have to be purchased to be used as cemetery. From the documents submitted by the legal counsels of the respondents pertaining to Cemeteries and Crematories Laws, Rules and Regulation of the new York Cemetery Board of the USA and Britain's Cemeteries, Churchyards and Burial Grounds, the above phenomenon is substantiated. The earlier provision of the Church managing the cemetery has been changed in favor of the individual providing for it. There are separate provisions regarding cemeteries in each of the US States and the burial grounds are being sold and bought under a management society and its use is limited between its members only. Besides, cemeteries also are managed on the bases of caste, nationality and religion. Hence, it would not be judicious to assign State liability for providing cemetery which should have been managed by an individual. Thus, the plea of petitioners seeking for the provision of cremation in the forest of Pashupati area until lands are not provided in Kathmandu valley and each district of Nepal to be used as cemetery could not be construed as lawful.

The Burial Law and Policy in the 21st century published on January, 2004 by the Home Office of Britain has offered alternatives in reforming the crematory practices. This document has, apart from other measures, suggested that cremation is the preferred funeral option as compared to burial. The fact is also noteworthy that since it has become tougher for the Christians to manage for the burial grounds, 72% of people in Britain and 15% of people in USA are adopting cremation as the preferred mode of funeral rites.

As the Christians worldwide have been procuring their own lands to manage as cemeteries, the petitioners may also operate and run their cemetery on an individual or institutional basis through purchasing plots of land. Even from practical perspective, it would not be realistic and lawful to direct that it shall be the State's liability to provide land and other amenities to all the religions and sects spread across Nepal so that they may build their respective cemeteries. Nor from the spirit of a secular State would it be feasible

to provide such facilities to every religion and sect from the State. Hence, the liability to endow cemetery or burial ground to each community cannot be construes as a yardstick of secularism.

Even the learned advocates representing the respondents have also highlighted that nowadays even the Christian communities have started cremating their dead ones on a large scale and as such there is no compulsion to bury them. The environment is also being degraded following burial of corpses and erection of permanent structures over them. An individual is free to observe his or her religious practices and rituals as he or she desires. Our constitution and statutes also have respectably incorporated this right within their domain. Any type of desire for change should emanate from the concerned individual or community itself. It is only natural that the religious traditions have to change as per the demands of time. In course of hearing, the learned advocates have brought to light the legal provisions made in the USA and Britain regarding cremation affairs and the efforts being made to reform the tradition of funeral rites. Upon studying the examples illustrated by the learned advocates too, the ritual of cremation among the Christians is mostly being regulated and managed by the religious institutions such as churches to which they are affiliated. The amount needed for this purpose is charged by the concerned church or institution from the concerned individual. Even there, we cannot find the State making available the land free of cost to be used as burial ground. Even the learned advocates from the petitioners' side have also failed to produce examples of a State rendering land free of cost for such purposes.

In course of social development, several religious rituals and practices also change gradually and continuously. In the context of Nepal also, it is natural that religious and social customs change incessantly. This topic is related to the need of society as well. Individuals have the freedom to adopt and observe the religion and religious activities which they have faith on. Nobody can hinder on that. Every religion and sect shall have to respect mutually the

tradition and ritual of last rites. The fact cannot be negated that requiring land to bury the corpses and erecting permanent structure over that shall adversely affect the ecosystem. Hence, the first need is to feel the need of contemporary reforms as regards the prevailing tradition and custom by the concerned party. Another need is to initiate meaningful discussion among the concerned followers and individuals of sects for revision in these traditions and customs. This effort for a balanced and reasonable change in protection of forests, environment and culture and religious faith shall have to be aided by the public organizations including the government. It is a matter of paramount necessity. The Hindus having changed the custom of burning the corpse on a wooden funeral pyre and easily adopting the electric burning of corpses is a remarkable fact here.

Though the petition is said to have been filed in the backdrop of the decision of Board of Directors of the Pashupati Area Development Fund dated 29th December, 2010 prohibiting the burial of corpses of Christian community in the Shelshmantak forest of Pashupati area, the plea of petitioners does not warrant the provision of such land inside Pashupati area only. The plea is such that until an alternative place is arranged for, corpses should be allowed to be buried in the Pashupati area itself. Therefore, the demand of legal and constitutional right to cremate the corpses in a traditional manner from ancient period has been raised as an alternative stand only. As such, from the written replies and arguments narrated by the legal counsels of respondents, it cannot be understood that the petitioners have challenged the religious outline of the Pashupati area. Moreover, from the objectives narrated in Section 6 of the Pashupati Area Development Fund Act, 1987 too, the act of providing the land of that area to the Christian community for burial grounds cannot be said to be in spirit of the Act.

The Nepal Gazette of 26th February, 1987 has outlined the boundaries of Pashupati area and the duty of protecting and promoting the forest, land, shrines, and temples, geographical and ecological condition of that area rests with the Pashupati Area

Development Fund. Not only from the historical and archaeological perspective, but the Pashupati area needs to be conserved as it is also enlisted in the World Heritage site. As such, the concerned community shall have to think of reforming the tradition and practice in a contemporary manner so as to preserve the sanctity of that area as an inviolable one. Only from this endeavor shall the cultural and religious rights be advanced and the national dignity is enhanced. The liability of initiating such debate rests with the respondent namely Pashupati Area Development Fund. Here, at this context, an instance of some of the followers who are allowed to cremate the corpses in Pashupati area since ancient times have erected permanent structures over the corpses buried. While constructing such permanent fixtures, it has been found that the natural environment of that religious site and other areas used as burial ground has been affected in a direct way. Hence, the Court draws the attention of Pashupati Area Development Fund and government to initiate necessary discussion with the concerned parties not to cremate corpses in the religious area and elsewhere as well as banning the erection of permanent structures in those places so that the glory of Pashupati area is further brightened.

The State shall not have to remain silent in the event of breach of law and order following any type of intervention over the religious and cultural rights of followers of any religion including the Christians. Except for a voluntary change in the religious custom, everyone has the right to exercise one's own traditions. Hence, this Court deems that the sensitivity of the place to conduct last rites by the Christian citizens has been addressed by the decisions of a meeting dated 1st May, 2011 and chaired by Hon. Minister Mr. Ganga Lal Tuladhar and which was also attended by the writ petitioner Chari Bahadur as well.

Upon studying the above decision submitted by the learned Deputy Attorney on behalf of Government of Nepal it is provided that: It has been agreed to recommend the formation of an all party committee within 3 days comprising of representatives of various political

parties, Joint-Secretary level representatives of Ministries of Home, Forest, Land Reform and Culture and 3 representatives of Christian community. That committee shall impart appropriate recommendations for resolving the problem in an appropriate manner and to chalk out government participation in this regard on the basis of national and international practices as well. The committee, thus, shall provide suggestions over the policies that the State should devise and the system to be adopted regarding the matters of management of permanent and temporary lands for the burial grounds and other similar issues. As for now, the Government of Nepal shall provide for an appropriate land to continue with the cremation of dead ones. The Court is convinced that measures shall be taken in accordance with the decision within the order issued by the Court.

Thus, from the constitutional and legal grounds analyzed above the State shall have to protect the religious freedom of an individual and it has to feel the responsibility to defend the rituals of persons associated with every religion and sect. As such, the government has to assimilate this instrumental role of State in maintaining law and order and to make appropriate arrangements according to the context of nation and its capacity. However, the State is not in a constitutional liability or obligation to provide lands to be used as cemeteries for performing last rites of each individual of every religion and sect including those of Christians as demanded by the petitioners when considered from the context of constitutional and statutory rights. In fact, the State is only entrusted to provide security and order to accomplish the last rite functions in the appropriate place arranged by the concerned religion or sect.

Therefore, as examined above, since the plea of petitioners seeking an order of mandamus directing the respondents to provide specific sites for the Christian community to be used as burial ground within and outside the Kathmandu valley and to issue an interim order in the name of respondents not to restrict the use by Christian community of the Shleshmantak forest area of Pashupati as their

burial ground cannot be accepted as a constitutional and legal liability of the State to enable the practice of constitutional and legal rights conferred to the petitioners. Hence, issuance of writ in the name of respondents as demanded in the petition is not warranted. The writ petition stands to be quashed. Since the writ petition has been struck down as a result the interim order of a single judge Bench on 18th March, 2011 is also dissolved. The case shall be written off the registry and the case file be duly handed over.

I concur with the above mentioned dicision.

Justice Kamal Narayan Das

Done on this day of 11th Jestha, 2068 BS (May 25, 2011)
Translated by Bishnu Prasad Upadhyaya & Narayan Sharma

The rule of law and the good governance will be strengthened only through the independene judiciary and the consitutional supremacy.

Supreme Court, Single Bench

Chief Justice Khil Raj Regmi

Writ No. 068-Wo-1085, 1086, 1087

Subject: Certiorari and others.

Petitioner: Advocate Raj Kumar Rana and others
Vs
Respondents: The Prime Minister and the Office of the Council of Ministers and others

Petitioner: Advocate Kanchan Krishna Neupane
Vs
Respondents: The Prime Minister and the Office of the Council of Ministers

Petitioner: Bharatmani Jangam and others
Vs
Respondents: The Prime Minister and the Office of the Council of Ministers.

Decision

What are the basic contents of the case? Is there any ground for not issuing issuance of order as sought by the petitioner? If there is any reason for not issuing an order as demanded by the petitioners, notify the respondents accompanied with a copy each of this order and the writ petition requiring them to furnish their written reply

through the office of the Attorney General within 15 days excluding the time period to be consumed for journey. The office of the Attorney General be notified the matter thereof, and then present the case as per rules after the written reply is submitted or the time period is expired.

In addition to this, while considering also upon the request made in the petition for an interim order, this court, in reference to a writ petition with writ No. 068-ws-0014 filed in regard to extension of term of the Constituent Assembly (CA) by 3 months effecting amendments to the Article 64 through the Tenth Amendment to the Interim Constitution of Nepal, 2063, has, besides other things, issued an order in 2068/8/9 in the name of the Chairman of the Constituent Assembly, Prime Minister and the Council of Ministers to ascertain the actual time period really needed for the accomplishment of the task of constitution writing within the stipulated time for the last chance as envisaged in the restrictive Clause of Article 64 of the Interim Constitution, 2063 and, if it could not be done or committed as above, to conduct referendum under Article 157 or for the fresh polls of Constituent Assembly under Article 63 or to make provisions in regard to forward other necessary action proceedings as may deem appropriate therefor since the term of Constituent Assembly has to be ipso facto terminated thereafter.

Even though the respondents are found to have extended the term of CA by 6 months from the date of 2068-8-14 by effecting Eleventh Amendment as directed by the above order, however, the writ petition has had a mention that the respondents, without giving the finality to the task of constitution writing, found to have registered an Amendment Bill to the Legislature Parliament Secretariat by reaching a decision from the Council of Ministers in 2069/2/9 (B.S.) with the objective of extending the term of CA for the next 3 months

since there was a possibility also of terminating the time period so extended.

Since a review petition filed by the respondents requesting the review of the order of this court has been repudiated by this court, which in accordance with Article 116 is the final (fall of the curtain) and therefore has binding effect to all else including the respondents. Likewise, since the respondents are found to have extended the term of CA for 6 months effecting Eleventh Amendment to the Interim Constitution as directed by the said order of this court, so, its first and foremost duty is to complete the task of promulgating the constitution within the said deadline -- that is 2069/2/14.

So was the case, however, no efforts are found made to opt for conducting a fresh poll, the referendum or adopt any other appropriate alternative measures as directed by the said order to resolve the possible deadlock in case a situation of not completing the task of making the constitution may arise even within the deadline fixed by the order dated 2068/8/9 within which the CA would ipso facto face its demise. Now therefore, the act of proceeding the Constitution Amendment Bill by reaching a decision of extending the CA term for next 3 months as was done previously in course of amending the constitution assuming as if that this court has made no order in this regard hereinbefore is the gross violation of the order of this court together with the Article 64 and Article 116 of the constitution.

Since the decision made by the respondents Council of Ministers in 2069/2/9 in regard to the extension of the term of CA is erroneous on the face of it and contrary also to the final order of this court and constitutional provisions mentioned above, now therefore, in view the balance of convenience, this interim order has been issued in

pursuant to Rule 41 of the Supreme Court Regulations, 2049 in the name of respondents Prime Minister and the Council of Ministers as well as the Chairman of the CA directing them not to execute their said decision and stay the proceedings of Thirteenth Amendment Bill of the Interim Constitution, 2063. The respondents be notified through the Office of Attorney General about this order as soon as possible.

Done on 11th Jestha, 2069. (24th May 2012)

Translated by Bhim Nath Ghimire