

Supreme Court, Division Bench
Honorable Justice Anil Kumar Sinha
Honorable Justice Sapana Pradhan Malla

Order

Date of Order: 2075/12/5 (corresponding to 19 March, 2019)

075-WO-0369

Sub: Certiorari

Petitioner: Senior Advocate Prakashmani Sharma et.al., resident to Kathmandu District
Kathmandu Metropolitan City Ward No. 14 and on behalf of Pro-Public

Vs.

Respondent: Bidya Sundar Shakya, Mayor, Kathmandu Metropolitan City

- Historical and archaeological heritage is viewed as inherently connected with the nation's past, and such heritage must be passed down from one generation to the next and they are also intertwined with the emotional sentiments of the people. Since such heritage is not related merely to an individual or a particular entity, but to groups, communities, regions, and the State itself, and therefore, it is indisputable that every nation must ensure that its future generations are informed about its historical, archaeological, and cultural treasures.

(Para No. 13)

- To advance untenable arguments, such as claiming that monuments of archaeological or cultural significance have become narrow or inadequate and, under the pretext of new construction, to refrain from their preservation, leaving them abandoned to collapse on their own or causing their demolition for the purpose of new structures, cannot be regarded as justifiable from any perspective. No one can evade the obligation to safeguard the heritage of the ancestors for future generations. This constitutes a matter of collective national responsibility.

(Para No. 15)

On behalf of the Petitioner: Learned Senior Advocate Mr. Prakashmani Sharma and Mr. Dinesh Tripathi and Learned Advocates Mr. Pankaj Kumar Karna, Mr. Kishor Kumar Bista and writ petitioner Mr. Sanjay Adhikari

On behalf of the Respondent: Learned Joint Government Attorney Mr. Sanjeev Raj Regmi, Senior Advocates Mr. Harihar Dahal, Mr. Shambhu Thapa, Mr. Lok Bhakta Rana, Mr. Damodar Khadka, Mr. Ram Prasad Bhandari and Learned Advocates Mr. Basant Acharya, Mr. Tikaram Bhattarai, Mr. Tara Bahadur Sitaula and Mr. Basant Acharya on behalf of Kathmandu Metropolitan City Mayor Mr. Bidya Sundar Shakya

Precedents Cited:

- Nepal Law Magazine 2047, Unit 6, Decision No. 9825

- Nepal Law Magazine 2074, Unit 6, Decision No. 9829
- Nepal Law Magazine 2072, Unit 9, Decision No. 9465
- Nepal Law Magazine 2064, Unit 11, Decision No. 7903
- Nepal Law Magazine 2057, Unit 4, Decision No. 6885
- Nepal Law Magazine 2054, Unit 6, Decision No. 6391

Relevant Laws

- Constitution of Nepal
- Preservation of Ancient Monument Act, 2013

Order

Hon. Justice Anil Kumar Sinha: The summary and facts of the writ petition and contents of the rejoinders submitted pursuant to Article 46, 133 (2) and (3) of the Constitution of Nepal before this court is as follows:

The contents of the writ petition submitted on 2075/6/16 (corresponding to 2 October, 2018) are as follows: Historical and archaeological heritage constitutes the patrimony of a nation, and it is on the basis of such heritage that the level of a nation's civility, prosperity, or backwardness may also be assessed. It is the duty of the present generation to preserve the treasures created by the ancestors and to transmit them to future generations in their original form. From the very beginning of human civilization, the knowledge of heritage has been handed down from one generation to another among various communities and ethnic groups. Cultural heritage represents the intellectual creations and developments of the human mind that emerged and evolved in the course of human civilization. Every nation must acquaint its younger generations with the country's historical, archaeological, and cultural heritage; otherwise, in the course of time, the nation risks losing its identity and may gradually face threats to its very existence. This matter, therefore, is a common concern for all Nepali. The historical Bag Durbar located within the Kathmandu Metropolitan City had suffered some damage during the earthquake. Instead of undertaking its preservation and moving towards its restoration, the failure to do so has placed the Durbar at risk of further deterioration, and even the land encircling the complex holds historical significance. Upon receiving information that the Kathmandu Metropolitan City had initiated activities to construct new structures within the historic premises where the Durbar is situated, the Department of Archaeology, on 2073/01/20, (corresponding to 2 May, 2016) addressed a communication to the Metropolitan City concerning Bag Durbar, directing that the originality of its Rana-era architecture, technology, design, and form be preserved; that no additional structures be erected in the outer or inner open spaces of the complex; and that necessary strengthening measures be undertaken after assessing the condition of the structure. On 2074/07/08 (corresponding to 25 October, 2017), the Department of Archaeology, referring to the matter of the preservation of Bag Durbar, requested the Kathmandu Metropolitan City that no Rana-era palaces be demolished and reconstructed without obtaining prior approval from the Department of Archaeology, and further requested that, in accordance with the decision of the Executive Committee of the National Reconstruction Authority dated 2073/12/04 (corresponding to 17 March, 2017), cooperation be extended in the preservation of Rana-era palaces. Despite the Department repeatedly issuing communications instructing that Bag Durbar not be demolished, the Mayor of the Kathmandu Metropolitan City, asserting that the structure was not Bag Durbar but Hari Durbar, proceeded to call for tenders for its demolition. Consequently, the Department of Archaeology, on 2074/07/15 (corresponding to 1 November, 2017) again informed the Metropolitan City that Bag Durbar had been constructed during the tenure of Bhimsen Thapa in 1803–1804 A.D. (1860/61 B.S.); that around 1874 A.D. (1901 B.S.) Mathabar Singh Thapa had resided in the palace; that the palace

was named 'Bag Durbar' by his son Nayan Singh Thapa; and that thereafter it was inhabited successively by his relatives, Raja Rajendra Bikram Shah, Surendra Bikram Shah in 1910 B.S., Upendra Bikram Shah, Dharendra Bikram Shah, Bhupendra Mohan Bikram Shah, and Chautaria Chandra Bikram Shah. The palace later came under the ownership of Hari Shamsher, son of Prime Minister Juddha Shamsher." Subsequently, the descendants of the said lineage sold the palace to the Government of Nepal. It had been communicated that the historical palace had suffered damage during the earthquake of 2nd Magh, 1990 B.S., and had thereafter been reconstructed. Despite this, the Department of Archaeology, regrettably and contrary to its own decision dated 2074/07/15, on 2075/02/15, in an arbitrary and unilateral manner and in breach of its legal obligations, issued a communication to the Kathmandu Metropolitan City stating that, without altering the original form of the building, using traditional construction materials, and preparing detailed documentation (inventory) of the materials recoverable during demolition for possible reuse in accordance with the Ancient Monuments Preservation Act, 2013, the Department concurred with the reconstruction of Bag Durbar as per its departmental decision dated 2075/02/14. Relying on this communication, and in contravention of the policy set out in Clause 27 of its Budget, Plans and Programmes for Fiscal Year 2074/075, which stated that the strengthening works of Bag Durbar would commence within the current fiscal year, the Kathmandu Metropolitan City, in its Municipal Council meeting dated 2075/03/02 (corresponding to 16 June, 2018) incorporated under Clause 59 of the Infrastructure Development Policy of its Policies and Programmes for Fiscal Year 2075/076 a proposal to initiate, within the same fiscal year, the reconstruction of Haribhawan, the central office building of the Metropolitan City. As a consequence, the continued existence of this historic palace has been placed in jeopardy. Article 57 of the Constitution of Nepal provides that the powers of the Federation shall vest in respect of the matters enumerated in Schedule-5 and shall be exercised in accordance with the Constitution and federal law, and that the powers of the Local Level shall vest in respect of the matters enumerated in Schedule-8 and shall be exercised in accordance with the Constitution and the laws enacted by the Village Assembly or Municipal Assembly. In view of this clear constitutional arrangement, the aforementioned act of the Kathmandu Metropolitan City is unconstitutional. Accordingly, when the petitioner, the Pro-Public, on 2075/03/19 (corresponding to 3 July, 2018) issued a communication to the Honorable Prime Minister, the Department of Archaeology, and the Kathmandu Metropolitan City requesting that such acts not be undertaken, no response has been received to date, and the respondents have proceeded towards vacating and demolishing Bag Durbar. We have therefore been compelled to file this writ petition. Therefore, the decision to demolish Bag Durbar, a historic structure and a unique work of art and to construct a new building in its place is unlawful and liable to be quashed. Accordingly, a writ of certiorari/mandamus, or any other appropriate order and directives deemed necessary should be issued in the name of the respondents to annul such decision. Since Bag Durbar and the land appurtenant to it constitute an international-level public monument and site representing a significant era of Nepal's history, being the residence of national luminary Bhimsen Thapa, along with other historically prominent personalities, and as various archaeological objects used by such persons are also located therein, and where, pursuant to Article 51(c) and (l) of the Constitution, the obligation to develop such an area lies with the Federal Government, an order should be issued directing that the Kathmandu Metropolitan City be immediately relocated to another appropriate site. Furthermore, the petitioner requests that an order of mandamus including any other appropriate order deemed necessary be issued directing the area comprising Bag Durbar, Bag Guthi, Taleju Temple, and other archaeological, historical, and cultural heritage located therein should, for the purposes of their preservation, promotion, development, study, research, excavation, and dissemination, be forthwith declared a Protected Monument Zone under Section 3 of the Ancient Monuments Preservation Act, 2013, and developed as a tourism site. Likewise, an

order should be issued requiring the respondents to undertake only such actions as are consistent with the obligations assumed under the Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, and the Convention for the Safeguarding of the Intangible Cultural Heritage, 2003. Furthermore, for the protection of all historical and archaeological heritage in Nepal including Bag Durbar and other palaces, monasteries, temples, ponds, and traditional water systems (*hiti/dhara*) constructed during the Licchavi, Malla, Rana, and Shah periods, all of which are adorned with unique artistic craftsmanship and bear significant historical and archaeological value, an order of mandamus or any other appropriate directive should be issued to the Government of Nepal to constitute, within three months, a high-level committee chaired by a former Chief Justice of the Honorable Supreme Court. The committee should include the former and current Director Generals of the Department of Archaeology, independent experts in the fields of history and archaeology, and representatives of the petitioner organization, and the Government should be directed to carry out preservation work in accordance with the recommendations of such committee.

An order had been issued by this court on 2075/06/17 (corresponding to 2 October, 2018) which reads as follows: Provided, there is any reason as to why an order as sought by the petitioner need not be issued, the respondent is hereby ordered to submit a rejoinder within 15 days excluding the period of travel. Since, the petitioner has also sought for an interim order, and taking into account that the matter raised is of serious public concern, interest, and importance, and that the Bag Durbar claimed in the petition is an archaeological and historically significant palace of Nepal, an interim order pursuant to Rule 49 (2) (a) of the Supreme Court Regulation, 2074, is hereby issued in the name of the respondent, directing the respondent not to alter or cause to alter the existing form of Bag Durbar or undertake or cause to undertake any construction-related work and that the palace be preserved in its current condition until the final disposal of the case and a notice of this order be served to the respondent.

The contents of the rejoinder submitted Bidya Sundar Shakya, Mayor and authorized person of Kathmandu Metropolitan City and Hiralal Tandukar, Chairman and authorized person of Ward No. 11 Ward Office are as follows: The fact that Bag Durbar, along with its extensive surrounding area, was constructed during the tenure of then Prime Minister General Bhimsen Thapa in 1805 B.S., is corroborated by various historical documents. Among these, it is clearly documented on page 29 of *Images of a Century: The Changing Townscapes of the Kathmandu Valley*, published in 1995 under the Urban Development through Local Efforts (UDLE) project of the Government of Nepal, with support from the German development agency GTZ. As this historical fact has not been contested anywhere to date, it clearly establishes the location of Bag Durbar. Bag Durbar is not merely a single building but denotes the expansive surrounding area, much like the current Singha Durbar area, representing a distinct part of the Kathmandu Valley, as confirmed by various references. Historically, the Bag Durbar precinct extended from the present Tripureshwar to the road leading towards Bir Hospital in the east, from the Dharahara road southwards to the road leading to Bhote Bahal in the north, from Bhote Bahal towards the present Central Jail complex in the west, and from the north of the Central Jail connecting to the Tripureshwar-Bir Hospital road in the south. This four-fort area encompasses approximately 130 ropanis and constitutes the broad Bag Durbar area. To corroborate this fact, on 2032/09/15 (corresponding to 30 December, 1975), Commander Arun Shamsher J.B.R. and Brigadier General Sushil Shamsher J.B.R. sons of the then landowner Hari Shamsher transferred the land with His Majesty's Government represented by the Ministry of Finance as the grantee, wherein a parcel of land as recorded in the land transfer deed No. 2736 issued by the Kathmandu Land Revenue Office. Out of a total area of 129 ropanis 3 aana 1 paisa, a central portion measuring 16 ropanis 2 aana was specifically identified as Bag Durbar (Hari Bawan), which clearly indicates that this Hari

Bhawan lies within the Bag Durbar area. A copy of the deed has been submitted herewith. After Hari Bhawan was purchased by the Government of Nepal in 2032 B.S., the remaining land on which the original Bag Durbar building stood was transferred on 2049/07/17 (corresponding to 2 November, 1002), through registration no. 1997 and plot no. 515, from the then landowners Commander Arun Shamsher J.B.R. and Brigadier General Sushil Shamsher J.B.R. to Anand Prakash Rajbhandari and Sabina Rajbhandari. The deed specifies that although plot no. 515 was described as 'residential land with house,' as observed, the building had already been demolished and reduced to its foundations, and only the land was transferred. This official record clearly establishes that Bag Durbar remained at the same location and had been reduced to its foundations at that time. Therefore, the assertion in the writ petition claiming that Bag Durbar no longer exists has been effectively refuted by this official document. As Bag Durbar and Hari Bhawan have distinct existences, Hari Bhawan was acquired from the private land of Hari Shamsher by the then His Majesty's Government and, pursuant to the decision of the Council of Ministers dated 2060/09/28 (corresponding to 12 January, 2004), the Kathmandu Metropolitan City obtained usufruct rights over the building. Consequently, offices have been operating in that building and utilizing it. However, due to the severe earthquake of 2072, the building was damaged and, as a result, continuing daily operations at the original location in accordance with historical practice became unsuitable, inconvenient, and unsafe. For some time thereafter, daily operations were conducted from the premises of National City Hall, and various departments and branches were housed at different locations including Sundhara, Teku, City Hall, Tahachal, Babermahal, the south gate of Singha Durbar, Thapathali, and Baneshwor, occupying various private buildings on lease for operational purposes. By taking houses on lease in this manner, the Metropolitan City is currently expending approximately NPR 1,700,000 (one million seven hundred thousand) from funds collected from the public, as monthly lease payments. Taking into account the broader public interest and the delivery of services, the Municipal Assembly has approved a policy and programme for the purpose of constructing a new building, and the necessary budget has also been allocated for this purpose. The petitioner's request to restrain the commencement of the construction, which has been proposed within the framework of the policy, plan, programme, and budget passed by the locally elected government on the basis of popular mandate, adversely affects the constitutional and legal rights as well as the sovereign authority of the local government. The Department of Archaeology was approached for permission to demolish the dilapidated Hari Bhawan, and pursuant to the Department's decision dated 2075/02/14 (corresponding to 28 May, 2018), permission was granted. Acting under the conditions specified in the approval, the demolition of the dilapidated building has commenced for the purpose of constructing a new building. The writ petition filed by the respondents is therefore baseless, illegal, devoid of public concern, and founded on incorrect facts and misconceptions, being registered in order to prevent the Metropolitan City from constructing the building. The matters set forth in the writ petition do not fall within extraordinary jurisdiction. The proposed construction of the building does not violate any fundamental or legal rights of the petitioner. Moreover, delaying the construction would cause irreparable harm to the provision of services and facilities to the residents of the Metropolitan City. Contrary to the petitioner's assertions, Hari Bhawan is not Bag Durbar, and national luminary Bhimsen Thapa never resided in the building. There exists no authentic basis for such a claim. As noted in the study report commissioned by the Metropolitan City from independent consultants, the structure identified by the petitioner as Bag Durbar (in reality Hari Bhawan) was constructed after 1990 B.S., and Bhimsen Thapa had passed away before that time. By willfully misrepresenting such verified historical facts and distorting history to allege that Hari Bhawan was the residence of Bhimsen Thapa, the writ petition is misleading, factually incorrect, unsubstantiated, and subjective and therefore, the writ petition should be quashed.

The rejoinder submitted by Prem Kumar Rai, Secretary of the Ministry of Home Affairs of the Government of Nepal is as follows: The Ancient Monuments Preservation Act, 2013 is currently in force to regulate the preservation of ancient monuments, control the trade of archaeological objects, and oversee excavations in areas containing ancient monuments, as well as to ensure the acquisition and safeguarding of antiquities and other historically or artistically significant objects. For the matters raised by the petitioner, the prevailing law provides for the processes, responsibilities, and designated authorities for the preservation and promotion. Since, under the prevailing legal framework, preservation work is to be carried out by the designated authorities, the writ petition filed by the respondents solely on the apprehension that the State intends to demolish the structure without preserving or promoting it is liable to be dismissed. The respondents have failed to provide any objective basis or reason in their petition to demonstrate that any action by the Ministry of Home Affairs of the Government of Nepal has in fact altered the existing form of Bag Durbar, an archaeological and historically significant palace of Nepal. Consequently, the writ petition, having been filed against this Ministry without foundation, is liable to be dismissed, and the respondent therefore, requests the writ petition to be quashed.

The contents of the rejoinder submitted by Arjun Kumar Karki, Secretary of National Reconstruction Authority of the Government of Nepal is as follows: The Authority has always remained vigilant regarding the preservation of archaeological heritage, and no decision has been taken by the Authority to demolish Bag Durbar. Further, a team deployed by the Kathmandu Metropolitan City submitted an expert opinion stating that the said Bag Durbar can be strengthened and reconstructed. Accordingly, the Authority is of the view that the reconstruction work should be carried out in accordance with that recommendation. Following the catastrophic earthquake of 2072/01/12 (corresponding to 25 April, 2015), the National Reconstruction Authority decided that Rana-era palaces of historical and archaeological significance, which were damaged, shall not be demolished without the approval of the Department of Archaeology. Further, pursuant to the decision of the Executive Committee of the National Reconstruction Authority dated 2073/12/04 (corresponding to 17 March, 2017), damaged palaces and other heritage of archaeological significance must be studied by architects, structural engineers, and archaeologists, and preserved against external elements such as wind and water to prevent further damage until implementation of reconstruction or restoration work. The Authority also decided to direct the concerned Ministry's Central Project Implementation Unit to make necessary arrangements for preservation and to request the Ministry of Finance to allocate the required budget. This decision was communicated to the Kathmandu Metropolitan City vide letter No. 1005 dated 2074/07/05 (corresponding to 22 October, 2017) and therefore, the writ petition filed against this Authority is liable to be dismissed, and the respondent requests that the said writ petition be quashed.

The rejoinder submitted by Ramesh Dhakal, Secretary of Prime Minister and Office of the Council of Ministers of the Government of Nepal is as follows: The Government of Nepal is committed to the protection and promotion of archaeological cultural heritage, historical and religious sites, and their surrounding areas. Necessary legal and institutional arrangements have been made for the preservation of archaeological cultural properties. With the objective of maintaining peace and order by safeguarding ancient monuments, regulating the trade in archaeological objects, controlling excavations in areas containing ancient monuments, and ensuring the preservation and availability of ancient monuments and objects of archaeological, historical, or artistic value, the Ancient Monument Preservation Act, 2013, was enacted and brought into implementation. The said Act contains various legal provisions relating to the preservation of ancient monuments. Under Schedule 5, Serial No. 34 of the Constitution of Nepal, the protection of archaeological sites and ancient monuments is included within the

exclusive powers of the Federation. Likewise, Schedule 8, Serial No. 22 places the protection and development of language, culture, and fine arts within the jurisdiction of local levels. In addition, to give effect to these constitutional provisions, Section 11 (2) (v) of the Local Government Operation Act, 2074 grants rural municipalities and municipalities the duties, responsibilities, and authority relating to the protection, preservation, promotion, and development of archaeology, ancient monuments, and museums. As the reconstruction and strengthening of historical and archaeological heritage are technical in nature and are matters to be carried out by the competent authorities, the issue of what procedure or method should be adopted for such works does not fall within the scope of determination in a writ petition. Furthermore, the petitioner has not been able to establish any justification for invoking the jurisdiction of this honorable court on this matter. The devastating earthquake of 2072 Baisakh 12, and the subsequent aftershocks, caused irreparable damage to cultural, historical, and archaeological heritage located in various parts of the country. With the objective of reconstructing the structures damaged by the earthquake in a prompt and sustainable manner, the Earthquake-Affected Infrastructures Reconstruction Act, 2072, was enacted and reconstruction works have since been underway. There is no doubt that expediting the reconstruction of cultural, historical, and archaeological heritage damaged by the earthquake, while preserving their authenticity, is indispensable and essential for the nation and its people. Likewise cannot be deemed otherwise, that such ancient heritage must be reconstructed and developed in a manner that safeguards their historical authenticity. Given that legal and institutional mechanisms for the protection of monuments of historical and archaeological significance have been established and corresponding actions have been undertaken in accordance therewith, no circumstance exists in warranting the issuance of an order of mandamus by this honorable court in this regard. As for the petitioner's claim concerning the alleged invitation of tenders for demolishing and reconstructing Bag Durbar, the facts relating to actions taken by the competent authorities will be clarified through the rejoinders to be submitted by the respective agencies. The respondent further requests that the deliberations and arguments to be presented by the government attorney during the course of hearing of the case be deemed to be an integral part of this rejoinder.

The rejoinder submitted by Secretary Dr. Biswanath Oli, of the Ministry of Forest and Environment of the Government of Nepal is as follows: Although the petitioner has mentioned in the writ petition that Section 9 (1) of the Environment Protection Act, 2053, provides that it shall be the duty of the concerned authority to protect the national heritage, no allegation has been made against this Ministry. Furthermore, the said provision merely stipulates a duty to protect national heritage, and such a duty constitutes only a moral and ethical obligation and does not create a legal liability. Hence, as this Ministry has no authority to take any action in this regard. Where the writ petition has unnecessarily made this Ministry a respondent, the writ petition ought to be dismissed.

The rejoinder submitted by Bhesh Narayan Dahal, Director of the Ministry of Culture, Tourism and Civil Aviation Department of Archaeology of the Government of Nepal is as follows: The respondent would like to inform that the Department of Archaeology has been carrying out the necessary conservation works, within the scope of the Act and Regulations, not only for structures over 100 years old but also for buildings, palaces, and other heritage assets that are 70–80 years old and contain unique artworks (which are at risk of being lost if not preserved). Bagh Durbar has for many years been used by Kathmandu Metropolitan City as an official office building for public administrative functions. Since the said office building was damaged by the 2072 B.S., earthquake, the Department of Archaeology initially communicated to Kathmandu Metropolitan City that it may carry out general maintenance and use the building for office purposes. Thereafter, considering the structural vulnerability of the building, the

pressure of service-seekers, office requirements, and possible natural disasters, and on the basis of the report prepared by the Department's structural engineer, Ram Krishna Shrestha, as well as the report prepared by Digicon Engineering Consult Pvt. Ltd., a consultant authorized by the Kathmandu Metropolitan City Office, it was decided that the reconstruction of the Durbar would maintain its original authenticity, style, architectural techniques, and form, using traditional construction materials. It was further decided that such reconstruction would not be contrary to the intent and spirit of the Ancient Monument Preservation Act, 2013 (with the Fifth Amendment), and that materials salvageable during demolition would be documented and reused during the reconstruction of Bagh Durbar. Accordingly, while granting Kathmandu Metropolitan City approval to reconstruct Bagh Durbar in this manner, the allegation made by the writ petitioner that the Department acted arbitrarily, capriciously, and in violation of its legal duties is wholly false and unfounded. The Department acts in accordance with the consent it provides; disregarding this and proceeding contrary to the principle of "wait and see," the petitioner's false allegations against the Department are wholly incorrect and baseless. The Department further wishes to inform that, should any work be carried out contrary to the consent granted by it, such work may be restrained in accordance with the Ancient Monument Preservation Act, 2013 (with the Fifth Amendment). The respondent further requests that all arguments, deliberations and documentary evidence presented before this honorable court through the Office of the Attorney General, Kathmandu, be deemed to be an integral part of this rejoinder.

The contents of the rejoinder submitted by Krishna Prasad Devkota, Secretary of the Ministry of Culture, Tourism and Civil Aviation of the Government of Nepal is as follows: The writ petitioner through the various paragraphs of the writ petition has raised that the historical and archaeological properties constitute a national heritage. The Department would like to request the honorable court that the Department remains vigilant to the fact that it is the duty of the present generation to preserve these ancestral properties and transmit them in its natural form to future generations and is always committed and proactive in the protection, preservation, and promotion of archaeological cultural heritage, historical and religious sites, and their surrounding areas. As regards the petitioner's claim that a decision was made to demolish the building of historical and archaeological significance, it is submitted that, in relation thereto, the preservation of the originality of cultural, historical, and archaeological properties damaged by the past earthquake, and the need to reconstruct and develop ancient monuments while safeguarding their historical authenticity cannot be disputed. Matters relating to retrofitting, reconstruction, or repair and maintenance of historical and archaeological properties are purely technical in nature, and therefore, the work has been carried out by following the relevant technical procedures and based on expert advice. Accordingly, in view of the above submissions and evidence, the Department requests that the present writ petition be dismissed.

The rejoinder submitted by Khagraj Paudel, Deputy Attorney General on behalf of the Office of the Attorney General is as follows: The writ petition fails to clearly specify or establish a lawful basis for claiming that the Office of the Attorney General has acted in contravention of any law, infringed the petitioner's fundamental rights, or refused to discharge any duty assigned under the Constitution of Nepal or prevailing laws, thereby necessitating issuance of an order of certiorari including an order of mandamus. Therefore, the writ petition, having made this office a respondent without any reason or purpose, is prima facie frivolous and liable to be dismissed. Under the Constitution of Nepal, the Attorney General is the chief legal advisor to the Government. As provided therein, the Attorney General provides legal opinions and advice to the Government of Nepal and other officials on constitutional and legal matters, represents the Government in matters concerning its rights and interests, and, except as otherwise provided by the Constitution, has the authority to determine the institution or non-institution

of cases on behalf of the Government before any court or judicial authority. The Attorney General or officers under their supervision also monitor whether the legal principles interpreted or laid down by the Supreme Court in various cases are being implemented, investigate complaints or information alleging inhuman treatment of persons in custody or denial of access to relatives or legal counsel, and issue necessary directives to prevent such occurrences. All these responsibilities are discharged efficiently by the Attorney General and the government attorneys under their supervision, within the bounds of professional conduct. The Office of the Attorney General respectfully submits before this honorable court that it has always remained committed and proactive in discharging the responsibilities entrusted to it under the Constitution and other prevailing laws. It is noted that, on pages 16–17, Section (n) of the writ petition, the petitioner has alleged that **“the Attorney General remained silent and failed to discharge its constitutional duties while acts contrary to the legal principles laid down by this honorable Supreme Court in cases concerning the protection of sites of historical and archaeological significance filed by the petitioner institution and other petitioners were being carried out by the respondent Metropolitan Municipality and other agencies of the Government of Nepal.”** It is not sufficient merely to make accusations, such accusations must also be objectively and reliably substantiated. In the writ petition, there is no assertion that the Attorney General failed to monitor as to whether or not the legal principles laid down in a particular case, of which the office had knowledge were being implemented. This demonstrates that the writ petition is not a factual account regarding this office but is superficial and motivated by cheap popularity. Accordingly, as evident from the discussions highlighted, it is clear that the writ petition has unnecessarily made the Office of the Attorney General, a professional body of government attorneys tasked with representing and defending the Government of Nepal, which is the chief legal advisor to the Government and has a stake in the matters concerning the rights and interests of the Government a respondent. This is further evident from the fact that when the Single Bench of this honorable court issued the Show Cause Order on 2075/6/17 (corresponding to 3 October, 2018), there was no order issued in the name of the Office of the Attorney General listed as respondent no. 11 to submit a rejoinder. Therefore, the writ petition, having included the Office of the Attorney General as a respondent, should be dismissed in respect of this office.

The contents of the rejoinder submitted by Ved Prasad Bhattarai, Secretary of National Human Rights Commission is as follows: As mentioned in the writ petition, the petitioner had submitted an application to this Commission on 2975/3/18 (corresponding to 2 July, 2018), seeking immediate and clear directions to halt any actions that would undermine the Constitution of Nepal and the Ancient Monument Preservation Act, 2013. On the basis of the application, the Commission, vide letter dated 2075/3/29 (corresponding to 13 July, 2018), directed the Office of the Prime Minister and Council of Ministers, the Department of Archaeology, and the Office of Kathmandu Metropolitan City to submit at the earliest, evidence along with copies confirming that no actions contrary to the spirit and provisions of Articles 32 and 51 of the Constitution of Nepal, 2072, and the Ancient Monument Preservation Act, 2013, have been taken, along with a statement of grounds and reasons. In response to the above-mentioned letter, a reply has been received from the Department of Archaeology, while responses from the other agencies are still pending. The Commission is entrusted with the duty to protect the cultural rights of citizens, and has been continuously performing such protective functions. Since the application submitted by the petitioner before the Commission is currently under process, and the other respondent agencies will submit their rejoinders with regards to their own responsibilities, there is no need to issue an order of certiorari and mandamus against this Commission and therefore, the writ petition with respect to this Commission should be dismissed.

An order had been issued by this court on 2075/8/4 (corresponding to 20 November, 218) which reads as follows: Since the consultant had advised that the disputed building/palace could be retrofitted and its current form preserved, the Department of Archaeology, vide letter Dispatch No. 716 dated 2074/7/15 (corresponding to 1 November, 2017), had communicated that the building should not be demolished immediately. However, contrary to this correspondence, the Kathmandu Metropolitan City, based on the study report it submitted, led the Department of Archaeology to reconsider and on 2075/2/14 (corresponding to 28 May, 2018) decided to demolish and reconstruct the building. This indicates that the issue of whether the building could be retrofitted or not remains disputed. Therefore, an order is hereby issued to the Department of Archaeology directing the Department to deploy a team of independent experts to determine whether the disputed building could indeed be retrofitted or whether it must be demolished and reconstructed, and to submit a report with a clear opinion to this court within 15 days. Upon receipt of the report and response, it is hereby ordered to submit the case file wherein a hearing pursuant to the rules will be held would be conducted to decide whether the interim order should be vacated.

An order had been issued by this court on 2075/9/15 (corresponding to 30 December, 2018) which is as follows: Since rejoinders have been submitted by all the respondents and, considering the nature of the dispute, it is deemed appropriate to conduct a full hearing and promptly resolve the disputed issue, and therefore, this court pursuant to Rule 73 of the Supreme Court Regulation, 2074, grants priority to the present case and has scheduled a hearing for 2075/9/22 (corresponding to 6 January, 219)

An order had been set aside by this court on 2075/9/22 (corresponding to 6 January, 2019) which reads as follows: The report submitted by the team of experts constituted pursuant to the order of this court dated 2075/8/4, contains opinions, the Department of Archaeology is hereby directed to obtain and submit the full report, including the grounds for the opinions and the on-site inspection report in advance of the hearing date. Additionally, through the Office of the Attorney General, the Department of Archaeology is directed to obtain the file containing the report of the Department's Structural Engineer Ram Krishna Shrestha, as referred to in paragraph 2(e) of the Department's rejoinder along with the decisions of the Department dated 2074/7/15 and 2075/2/14

An order had been set aside by this court on 2075/11/1 (corresponding to 13 February, 2019) which reads as follows: It appears that the land at Bag Durbar, Ward No. 11, Kathmandu Metropolitan City, plot no.1752, currently under the office of Kathmandu Metropolitan City, was granted usufruct rights to Kathmandu Metropolitan City by the decision of the then His Majesty's Government (Council of Ministers) on 2060/9/28. In view of this, it is hereby directed that a certified copy of that decision, and subsequent actions or decisions if any were taken in relation thereto, should be submitted through the Office of the Attorney General to the Court on the date of hearing. Accordingly, a continuous hearing of the case has been scheduled for 2075/11/13 (corresponding to 25 February, 2019).

The present writ petition, having entered on the cause list and pursuant to the rules was presented before the Bench. in accordance with the rules, was argued on behalf of the petitioner by the Learned senior advocates, Mr. Prakashmani Sharma and Mr. Dinesh Tripathi, along with the learned advocates, Mr. Pankaj Kumar Karn and Mr. Kishor Kumar Bisht, and the petitioner, Mr. Sanjay Adhikari on behalf of the petitioner argued that under the Public Trust Doctrine, all the Rana-era palaces are public property. Since these palaces were acquired by the Government for the people, their preservation is the duty of the Government, all its agencies, and conscientious citizens. Bag Durbar serves as a mirror reflecting us and our ancestors. Bag

Durbar is a heritage of our wealth. While it may be easy to demolish, its recreation is impossible. The preservation of such archaeological properties and their transmission to future generations is the duty of all of us. Religion and culture form the identity of individuals and society. Human beings have embraced religion and culture from birth. History is reflected through the cultural and religious communities. It was also argued that our civilization is intertwined with Bag Durbar; therefore, the palace rather than being destroyed should be reconstructed. Similarly, learned Joint Government Attorney Mr. Sanjiv Raj Regmi on behalf of the respondents, the Office of the Prime Minister and Council of Ministers, Ministry of Home Affairs, Ministry of Culture, Tourism and Civil Aviation, Ministry of Forests and Environment, National Human Rights Commission, National Reconstruction Authority, Department of Archaeology, and the Office of the Attorney General, Mayor Bidya Sundar Shakya self and on behalf of Kathmandu Metropolitan City and learned senior advocates Mr. Harihar Dahal, Mr. Shambhu Thapa, Mr. Lok Bhakta Rana, Mr. Damodar Khadka, and Mr. Ram Prasad Bhandari, along with learned advocates Mr. Basant Acharya, Mr. Tikaram Bhattarai, Mr. Tara Bahadur Sitoula, and Mr. Basant Acharya argued that Bag Durbar and Hari Bhavan are two distinct Rana-era palaces. It was argued that the palace in which the Metropolitan City operates is Hari Bhavan, not Bag Durbar. “Bag Durbar” is not the name of a single palace but the name of the area. The original Bag Durbar has been demolished and its land parcels sold off by previous owners. Hari Bhavan, which Kathmandu Metropolitan City holds usufruct rights from the Government of Nepal, was severely damaged by the earthquake, making daily operations from the building impossible. Consequently, the Metropolitan City had to conduct its routine functions from various locations, causing considerable inconvenience to service recipients. In this context, irrespective of the building’s name, there was no alternative but to reconstruct the building for the Metropolitan City, in accordance with the Department of Archaeology’s consent, ensuring that the building’s original form is preserved and the land is utilized to the maximum. The learned advocates further argued that the writ petition should be dismissed and an order should be issued permitting the reconstruction of the building.

Upon studying the petition and the rejoinders, and upon hearing the learned arguments of both parties, it is apparent that decisions are to be rendered on the following issues:

- i. As to whether or not the palace/building and area, over which Kathmandu Metropolitan City holds usufruct rights obtained from the Ministry of Finance, Government of Nepal, constitute historical, archaeological, or cultural heritage? As to whether not such palace/building and area falls within the scope of the Ancient Monument Preservation Act, 2013? As to whether or not it must be preserved or may be demolished and replaced with a new structure.
- ii. Which party holds the duty to preserve the palace/building referred to by the petitioner as Bag Durbar and claimed by the respondent Metropolitan City as Hari Bhavan and what is the current condition of that palace/building?
- iii. As to whether or not an order of certiorari, mandamus and any other appropriate orders as sought by petitioner need to be issued?

With regard to the above-mentioned issues, the following points have been observed:

2. Regarding Issue No. i, it has been observed that the petitioner has contended that Bag Durbar is included among Nepal’s various historical palaces containing unique artworks (ancient monuments). The petitioner further submits that this palace and the area it encompasses serve as a living museum reflecting history. While Bag Durbar sustained

some damage during the major earthquakes of 2072/1/12 and 26, the petitioner's primary argument is that it is not necessary to demolish it completely, thereby erasing its status as a property of ancient and archaeological significance. In its rejoinder, Kathmandu Metropolitan City submitted that historical records confirm that Bag Durbar, including the historic building, was part of a large area constructed during the tenure of then Prime Minister General Bhimsen Thapa in 1805 B.S. Currently, Bag Durbar does not refer to any existing building but to the surrounding extensive area. On 2032/9/15B.S., the then landowners, Commander Arun Shamsher J.B.R. and Brigadier General Sushil Shamsher J.B.R., sons of Hari Shamsher transferred the land, while the His Majesty's Government acquired it through the Ministry of Finance, and the deed registered with the Kathmandu Land Revenue Office under registration no. 2736 which recorded that out of a total area of 129 ropani 3 aana 1 paisa, 16 ropani 2 aana was referred to as Bag Durbar (Hari Bhavan). This indicates that Hari Bhavan formed part of the Bag Durbar area. However, Hari Bhavan does not fall within the definition of an ancient monument, and after the original Bag Durbar was destroyed and the land sold by the previous owners to third parties, and it is evident that Bag Durbar and Hari Bhavan exists as separate entities. Hari Bhavan was constructed in the name of Hari Shamsher, son of Arun Shamsher and Shusil Shamsher, who were grandsons of Shree 3 Juddha Shamsher. Therefore, there is no confusion regarding their separate existence. The Hari Bhavan utilized by the Metropolitan City was purchased from Hari Shamsher's private land by the then His Majesty's Government, and the Metropolitan City obtained usufruct rights over it pursuant to the Council of Ministers' decision dated 2060/9/28, and has been operating its offices. After the 2072 earthquake, offices have been operating on a rental basis from various locations, including the National City Hall, Sundhara, and Teku. It is observed that, in accordance with the decision of the Department of Archaeology dated 2075/2/14, permission was granted, and under the conditions specified therein, the process to demolish the dilapidated building and construct a new building has now been initiated.

3. Heritage that can reflect the intrinsic identity of a country is referred to as cultural heritage. Cultural heritage is primarily historical, religious, and archaeological in nature, and is distinctive. Such heritage constitutes the property of the nation and helps to introduce the country to the world. This includes our buildings, paintings, sculptures, festivals, and traditional fairs. The preservation of these ensures that society and the nation remain vibrant while safeguarding their originality and identity. Act of destroying such identity in the name of development or modernization cannot be justified under any circumstances. It is indisputable that it is the responsibility of the current generation to protect and transmit their traditional cultures to future generations.
4. Although the parties did not reach a consensus on whether the disputed palace/building is Bag Durbar or Hari Bhavan, there appears to be no dispute regarding the fact that the existing building was constructed during the Rana period. On 2072/9/19, Kathmandu Metropolitan City, under ref. no. 072/73, dispatch no. 542, requested the Department of Archaeology's consent for the reconstruction of the palace/building along with an architectural design. Following an on-site inspection, the Department of Archaeology, vide letter dated 2073/1/20 ref. no. 072/73, dispatch no. 2162, granted consent with conditions to preserve the originality of Rana-era architectural style, technique, and form; to avoid constructing any additional structures in the internal or external open spaces of the building; and to strengthen the structure as necessary after assessing its condition. It is unanimously observed from all the rejoinders submitted that the preservation of monuments of archaeological significance, regulation of the trade in archaeological objects, and control over excavations at sites containing ancient monuments, as well as the safeguarding and

protection of archaeological, historical, or artistic objects, including not only buildings and palaces over 100 years old but also unique structures aged 70–80 years must be carried out within the framework of the law and regulations. Furthermore, the preservation and promotion of cultural heritage of archaeological importance, historical and religious sites, and the safeguarding of the originality of ancient heritage constitute an indispensable necessity for the nation and its people.

5. Section 2 (a) of the Ancient Monument Preservation Act, 2013, defines “**ancient monument**” as **temple, monument, house, abbey, cupola, monastery, stupa, vihar etc. which have their importance above one hundred year, from the point of view of history, arts, science, architectonics or art of masonry, and this word shall also mean the site of the monument as well as the human settlement or place, and remnant of ancient human settlement, relics of ancient monument, cave etc. having specific value from the national or international point of view irrespective of the fact that such settlements or places are adjoining with each other or are separate in the same area**”. Likewise, Section 2 (b) of the same Act, defines “**archaeological object**” as **object made and used by human being in pre-historical period or handwritten genealogy, handwritten manuscript, golden inscription. copper inscription, petrography, wooden inscription, bhojapatra (document written on the bark of brick tree). tadapatra (document written on the leaf or bark of palmyra tree), paper, coin, house where historical event has occurred or where historically special personality has resided and things such as stone, wood, soil, ivory, bone, glass, cloth, paper or metal used by such person or some important portion of the house in which attractively scribed things are used, scribed or inscribed idol, temple of god or goddess, Buddhist cenotaph. statue, tanks, things used in royal palace, replica of animal, birds and any movable or immovable objects, which depict the history of any country, and objects as prescribed by His Majesty's Government by a notification in the Nepal Gazette from time to time**”. Similarly, Section 2 (f) defines “**preservation**” as “**work such as sweeping, covering, repairing, cleaning etc. done to keep the monument in its original form**”. Likewise, Section 3 (b) of the same Act prescribes that “**Ownership of the public ancient monuments shall be vested in the Department of Archaeology. The Department of Archaeology shall conserve, maintain and renovate such public ancient monuments**”. Section 3 (d) prescribes that “**The Department of Archaeology shall conserve the ancient monuments and archaeological sites which are important from national and international point of view**”. In this context, since the Department of Archaeology, empowered by the law itself, has already communicated that the palace is of archaeological significance and must be preserved, it follows that the preservation of this structure is the duty and responsibility of all state agencies as well as the citizens. Accordingly, it appears that the petitioner has the locus-standi to file a writ petition for the protection of the structure under the Ancient Monument Preservation Act, 2013.
6. It is also noted that the National Reconstruction Authority has taken significant initiatives for the preservation of the structure. By letter dated 2074/7/5, ref. no. 074/75/Shā.Ch.Ni.19, dispatch no. 1005, and citing its decision of 2073/12/4, the Authority directed Kathmandu Metropolitan City to protect and prevent further damage to heritage structures of archaeological importance, including old palaces damaged by the earthquake, until such time as studies and implementation are carried out by architects, structural engineers, and archaeologists for their reconstruction and restoration. In accordance with this, the Department of Archaeology, vide letter 2074/7/8, Smārak 074/75/24, dispatch no. 685, also communicated to assist in the preservation of Rana-era palaces. Subsequently, by letter dated 2074/7/15 ref. no. 074/75/, dispatch no. 716, the Department of Archaeology pursuant

to Section 16 (a) of the Ancient Monument Preservation Act, 2013 repeatedly directed to preserve the palace/building and to immediately halt any demolition, thereby emphasizing its protection as a monument reflecting historical significance. Photographs taken during those times and various publications have alternatively identified the structure as Bag Durbar in some instances and Hari Bhavan in others. Considering these differing reports, it appears that the question of whether the existing structure can be recognized as Bag Durbar or as part of a protected ancient monument can only be conclusively determined through archaeological investigation by the relevant experts. However, the correspondence from the Department of Archaeology dated 2073/1/20 ref. no. 072/73, dispatch no. 2162, and 2074/7/15 ref. no. 074/75 Yo5/199, dispatch no. 716, indicates that, in accordance with Section 16 (a) of the Act, the Department directed that **“unique artworks less than one hundred years old, as well as monuments reflecting historical significance, shall be preserved under the supervision of the Department of Archaeology.”**

7. Article 32 (3) of the Constitution of Nepal provides that **“every Nepali community residing in Nepal shall have the right to preserve and promote its language, script, culture , cultural civilization, and heritage.”** Similarly, under Article 51 (c), Social and Cultural Transformation Policy (6) provides that **“While maintaining the country’s cultural diversity and on the basis of equality and coexistence, the languages, scripts, cultures, literature, arts, cinema, and heritage of various castes and communities shall be protected and developed.”** Further, under Article 51(l), the policies relating to tourism provides the following: **“To develop eco-friendly tourism industries as an important base of national economy by way of identification, protection, promotion and publicity of the ancient, cultural, religious, archaeological and natural heritages of Nepal, to make environment and policy required for the development of tourism culture, and to accord priority to local people in the distribution of benefits of tourism industries.”** Similarly, it is noted that under Article 52, as part of the state’s obligations, the Constitution provides that **“it shall be the obligation of the State to make Nepal prosperous and affluent country by pursuing the directive principles of the State and gradually implementing the policies of the State”**.
8. Every agency must act within the framework of the Constitution and the law in a manner that serves the interests of society and the nation. Protecting the fundamental rights of individuals and citizens, and advancing the objectives set out in the State’s policies and directive principles, constitutes the duty of every organ of the State and it is for these reasons that the Constitution provides for the directive principles of the State. It has previously been held by this court in various cases that the directive principles of the State are not merely ornamental. In the case of *Yogi Naraharinath v. Honorable Prime Minister*, the following principle was laid down: **“although the court may not directly enforce the directive principles and policies provided by the Constitution, it is not beyond the court’s purview to point out instances where the government acts contrary to the directive principles and policies laid down by the Constitution. The duty to preserve places of worship and pilgrimage sites of archaeological importance, including temples and sculptures that are hundreds of millions of years old, lies with the Department of Archaeology under the His Majesty’s Government. The primary responsibility to maintain and protect objects and heritage of archaeological significance rests with the Government. If ancient artifacts are not preserved, our country may lose its connection with its own ancient civilization and culture”** (Nepal Law Magazine, 2053, Unit 1, Decision No. 6127). Similarly, in the case of *Swami Sambuddha vs. Government of Nepal*, this court laid down that: **“religion and culture constitute the identity of the individual and society. The society is guided and**

regulated through religion and culture. From birth, human beings integrate religion and culture as an inseparable part of life. Religious sites and religious trusts exist as heritage of religion and culture. The preservation of these assets and civilization is absolutely necessary. Practices, heritage, and civilization transmitted through tradition become an intrinsic part of an individual's right to life. Cultural and religious heritage also speaks of history. Through this, individuals and society cultivate a sense of belonging, responsibility, accountability, morality, and humanity. The preservation of religion, heritage, and civilization refines society further, helping it to become disciplined and dignified" (Nepal Law Magazine 2074, Unit 6, Decision No. 9825). Similarly, in *Amita Gautam Paudel vs. Office of the Prime Minister and Council of Ministers*, the Court observed the following: "development and construction are essential to make human life prosperous and convenient. However, if development and construction activities are carried out in a manner that endangers human life such development cannot be considered balanced. Development that causes serious adverse impacts on the environment may even threaten human existence, and such development could turn into a curse. This, instead of facilitating human life, makes it more difficult. At present, it is a shared responsibility of all to maintain an appropriate environmental standard to ensure quality living, safeguard our future, and protect the lives of coming generations. It is indisputable that the primary responsibility to enforce this duty rests with the government and its subordinate agencies. This also reflects a part of the commitments expressed by the Government of Nepal in various international forums concerning the environment. Demonstrating environmental diligence, the government has also enacted various laws. However, the mere enactment of laws cannot be considered as fulfillment of the State's duty to protect the environment. The devastating earthquake of 2072/1/12 B.S. remains an indelible and bitter memory for the present generation. The loss of life and property it caused is still irreparable. Yet, this catastrophic act of nature has also imparted a lesson to human society on the necessity of unity and collective progress in the face of adversity. Ancient monuments of cultural and archaeological significance, damaged by the earthquake, are considered equally important for providing future generations with knowledge of centuries-old traditions, techniques, and indigenous knowledge, as well as for the study of history. Their reconstruction retains its significance only when carried out in their original form using the same techniques. In the reconstruction of such important monuments, all concerned State authorities must act in a coordinated and unified manner; it is unacceptable for one authority to shift responsibility onto another" (Nepal Law Magazine 2074, Unit 5, Decision No. 9829). It is expected that, in light of the interpretations provided by this court, the Government of Nepal and the concerned authorities will take the lead in adhering to the precedents set by this court regarding the preservation of ancient or archaeological objects.

9. It is indisputable that the Kathmandu Metropolitan City as a local government has the authority to make and implement laws pursuant to the Constitution. However, as an elected body, while carrying out its regular functions, no entity should act in a manner that contravenes the Constitution or its spirit, or prevailing laws. Decisions concerning matters such as art, literature, environment, or natural heritage must be made in a way that safeguards the broader interests of society, preserves social values, and protects customary practices. This is precisely the essence of a welfare-oriented state system envisioned under a democratic Constitution that upholds the concept of a state for public welfare.

10. Nepal is a member state of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and is also a State Party to the international conventions issued

by UNESCO, namely the *Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972* and the *Convention for the Safeguarding of the Intangible Cultural Heritage, 2003*. Under Article 3 of the *Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972*, the obligations of State Parties are prescribed as follows: It is for each State Party to this Convention to identify and delineate the different properties situated on its territory mentioned in Articles 1 and 2 above. Article 4 provides that each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular financial, artistic, scientific, and technical, which it may be able to obtain. The significance of this Convention has also been elaborately explained by this court in the same petitioner advocate *Mr. Prakashmani Sharma vs. His Majesty's Government, Office of the Council of Ministers* (Nepal Law Magazine 2054, Unit 6, Decision No. 6391). Furthermore, in the case involving the Society of Nepalese Architects, the authorized Chairperson of the said society, *Mr. Machchandra Lal Kayastha, vs. Honorable Minister of Health, His Majesty's Government, Ministry of Health et.al.*, the court laid down that **“the essential construction or repair work undertaken in a structure or building that is recognized or distinguished primarily for its architectural and design significance should be carried out in a manner that does not materially alter the physical form of the existing structure. As described in the present writ petition, the design of the said building is not merely of a novel type but also represents a unique example from an architectural perspective, indicating that the building may qualify as a national heritage asset. The main point highlighted in the rejoinder is that in order to ensure the building's safety and preservation, corrugated roof was installed to prevent water leakage which was interfering with office work. It is not unusual for any constructed building to experience water seepage over time. Even in such cases, it would be preferable, under the guidance of relevant experts or architects, to adopt suitable measures to prevent water leakage without covering or altering the original form or design of the building. In a building constructed with an ordinary design, making necessary modifications such as replacing the roof is relatively straightforward and unlikely to draw much reaction. However, if a building's design is unique and distinctly original or recognizable; any alteration that diminishes or destroys the originality of that design naturally provokes concern. It affects not only the architect who created the design and their fellow architects, but also any members of the public who take pride in such skillful architectural works as a part of the national heritage. For this reason, it is noted that the petitioners have also demonstrated their public interest in relation to the aforementioned building by filing this writ petition. It cannot be said that the petitioners have no locus-standi in this matter. Moreover, any construction work on buildings of such special importance must be carried out in a proper and appropriate manner. The sensitivity of this court regarding construction works related to such significant structures is also evident from the decision reported in Nepal Law Magazine 2054, Decision No. 6391, pg. 312. Therefore, in relation to the reliefs sought in the present writ petition as well, it would be appropriate that the building in question be preserved in its original design and form as it was initially constructed, without altering its inherent character, and that necessary measures for its protection be undertaken accordingly. Hence, in order to ensure that effective and appropriate action is carried out in this regard, a directive order pursuant to Article 88 (2) of the Constitution of the Kingdom of Nepal, 2047 is**

hereby issued in the name of His Majesty's Government.” (Nepal Law Magazine 2057, Unit 4, Decision No. 6886).

11. From the principles enunciated by this court, as discussed above, and from the provisions of the international conventions to which Nepal is a State Party, it becomes evident that the responsibility to safeguard and preserve all cultural heritage including historically significant palaces, buildings, monasteries, temples, and other cultural monuments possessing unique art and culture and recognized as national heritage within Nepal lies mandatorily upon the Government of Nepal and all bodies subordinate to it. This is, in essence, a national responsibility of the State of Nepal. Since heritage reflects national identity, Article 32 of the Constitution guarantees the right to protect and promote such heritage. Consequently, this court, on various occasions, has held that matters relating to art, literature, natural and cultural heritage, environment, and similar subjects are of public concern to ordinary citizens as well as stakeholders working in those fields. Decisions concerning such matters must therefore be made by the concerned authorities with due respect for the rights, interests, concerns, and sentiments of the general public, taking them into confidence. In this regard, the court has also adopted the principle of the Public Trust Doctrine.

12. In *Advocate Kamlesh Dwiwedi v. Government of Nepal*, this Court has held that: **"The State organs, which bear the responsibility of acting as guardians, must not abuse their protective jurisdiction so as to undertake or permit any act that affects or may potentially affect the existence of historical monuments, sacred sites, and scenic heritage constructed by our ancestors for the benefit of present and future generations. Any form of mismanagement in monuments of archaeological or historical significance under the care of the Government of Nepal must not be tolerated; rather, the Government is obliged to ensure the protection, preservation and promotion of such national heritage. Furthermore, the preservation of heritage and civilization is of paramount necessity. The protection of cultural heritage and civilization refines society and contributes to maintaining social discipline and decorum."** (Nepal Law Magazine 2072, Unit 9, Decision No. 9465). In *Arun Shrestha vs. Office of the Council of Ministers*, it has been held that **"the State itself bears the duty to protect archaeological, religious, historical, and cultural heritage existing within the nation, as clearly stipulated by law. The Government must therefore fulfill the responsibility of preserving and promoting such properties. These protective and promotional provisions have been enacted with the objective of safeguarding ancient heritage and transmitting it safely to future generations. Likewise, to guarantee the citizens' fundamental right to freely practice and uphold their religion and culture without obstruction, it is necessary to protect such religious and cultural heritage."** (Nepal Law Magazine 2064, Unit 11, Decision No. 7903). In India as well, in *M.I. Builders v. Radhey Shyam Saha* (AIR 1999 SC 2468), when the construction of an underground parking facility, approved by the Lucknow Municipal Corporation, endangered the very existence of the historically significant Jhandewala Park, the Supreme Court held that such an action was contrary to the Public Trust Doctrine and ordered that the park be restored to its original condition. Likewise, in the globally renowned Taj Mahal area, in the matter concerning the establishment of an industrial zone under the name "Taj Corridor," *M.C. Mehta (Taj Trapezium Matter) v. Union of India*, and *Drs. 30.12.1996*, the Supreme Court, stated that it has been observed that the preliminary studies regarding the establishment of such an industrial corridor in the vicinity of Agra and Mathura where the Taj Mahal is located had not been properly conducted. Since the air pollution, dust, and smoke emitted from industries would destroy the environment of that region and could adversely affect

the beauty of the Taj Mahal, the court ordered that Agra be declared a Heritage City and that the Taj Corridor project should not be taken forward.

13. Historical and archaeological heritage is viewed as inherently connected with the nation's past, and such heritage must be passed down from one generation to the next and they are also intertwined with the emotional sentiments of the people. Since such heritage is not related merely to an individual or a particular entity, but to groups, communities, regions, and the State itself, and therefore, it is indisputable that every nation must ensure that its future generations are informed about its historical, archaeological, and cultural treasures.
14. The opponents, on behalf of Kathmandu Metropolitan City, have emphatically asserted that Bag Durbar no longer exists at present, that the existing structure is in a dilapidated condition, and that the structure known as Hari Bhavan is not an ancient monument. However, the opponents have not claimed that no structure named Bag Durbar ever existed. Among the various palaces of Nepal adorned with unique historical and artistic features, Bag Durbar is also one, and because this palace and its surrounding area reflect history, Kathmandu Metropolitan City, through its letter dated 2072/09/19 ref. no. 072/73, dispatch no. 542, corresponded with the Department of Archaeology for its reconstruction along with an architectural design. Upon conducting a field inspection, the Department of Archaeology, through its letter dated 2073/01/20, issued directives to preserve the originality of the Rana-era architectural techniques, form, and appearance; to refrain from constructing any additional structures in the external or internal open spaces of the structure; and based on the condition of the structure to undertake necessary strengthening. Furthermore, the letter dated 2074/07/05 from the National Reconstruction Authority shows that Kathmandu Metropolitan City was instructed to arrange for the protection of old palaces and other heritage sites of archaeological importance that had been damaged by the earthquake, by safeguarding them from external factors such as weather and preventing further damage, until studies by architects, structural engineers, and archaeologists could be conducted and the reconstruction and restoration works could be implemented. Considering the above correspondence and the letter from the Department of Archaeology dated 2074/7/15, which directed protection under Section 16 (a) of the Ancient Monument Preservation Act, 2013, and an immediate halt to demolition, it is evident that the Department of Archaeology is responsible for safeguarding unique works of art less than a hundred years old and monuments reflecting historical significance. Therefore, this court does not need to enter into the question of whether the current structure is the ancient monument Bag Durbar or Hari Bhawan as claimed by Kathmandu Metropolitan City.
15. Considering the claim that it is impossible to strengthen the existing building and that the daily operations of the Metropolitan City can only be conducted by completely demolishing it and constructing a new building, it is understandable that buildings/palaces of historical and archaeological significance were originally constructed according to the needs of their time. Therefore, they naturally lack structures suitable for current operational requirements, may be cramped, or may not have sufficient workspaces. However, the value of such cultural heritage should not be assessed in that manner. The preservation of cultural heritage with historical and archaeological significance and the work load of the Metropolitan City are two distinct matters. The fact that the Metropolitan City pursuant to its work load needs a modern office building to carry out its functions, the Metropolitan City may make arrangements elsewhere and demolishing a building of archaeological importance; do not establish an unavoidable necessity. To advance untenable arguments, such as claiming that monuments of archaeological or cultural significance have become

narrow or inadequate and, under the pretext of new construction, to refrain from their preservation, leaving them abandoned to collapse on their own or causing their demolition for the purpose of new structures, cannot be regarded as justifiable from any perspective. No one can evade the obligation to safeguard the heritage of the ancestors for future generations. This constitutes a matter of collective national responsibility.

16. In consideration of Question No. ii, it is evident that, in accordance with the letters issued by the National Reconstruction Authority dated 2074/7/5 and the Department of Archaeology dated 2074/7/5, arrangements must be made to protect the earthquake-damaged structures from external factors, including weather conditions, so as to prevent any further deterioration. On the basis of the Public Trust Doctrine, Preventive and Precautionary Principles, as well as the principle of ownership, the Government of Nepal bears such duties and obligations. However, from the reports, photographs, and documents submitted before this court, it has come to the Court's serious attention that no such arrangements appear to have been made to prevent further damage and to ensure the protection of those structures. After the on-site inspection conducted by the Department of Archaeology, the conditional approval granted through its letter dated 2073/1/20, Ref. No. 072/73, Reg. No. 2162, as well as the correspondence of the National Reconstruction Authority dated 2074/7/5, Ref. No. 074/75/Sha.Cha.Ni19, Reg. No. 1005, and the Department of Archaeology's letters dated 2074/7/8, Ref. No. Smarak 074/75/24, Reg. No. 685, and 2074/7/15, Ref. No. 074/75/Yo5/199, Reg. No. 716, together with Section 16(a) of the Ancient Monument Preservation Act, 2013, indicate that the Department of Archaeology had drawn the attention of the concerned authorities to the necessity of preserving the said structure and had directed that the demolition work be halted immediately. There appears to be no reason to conclude otherwise. Although it is stated that Kathmandu Metropolitan City had prepared an Architectural Design and submitted it on 2072/9/19, the case records do not show that any archaeological study or research had been conducted prior to such submission. During this period, although there had been exchanges of correspondence from the National Reconstruction Authority and the Department of Archaeology, Kathmandu Metropolitan City appointed Digicon Engineering Consult Pvt. Ltd., Kuponhole, to carry out a technical study and submit recommendations regarding the structure that remained under its possession. Based on the report of that company, Kathmandu Metropolitan City again sought approval through its letter dated 2075/1/26, Reg. No. 967. However, prior to issuing its letter dated 2075/2/15, Ref. No. Smarak 074/75/127, Reg. No. 2701, the Department of Archaeology does not appear to have conducted any objective study necessitating a change in its earlier opinion, nor does it appear that expert opinion, as required under the National Reconstruction Authority's letter dated 2074/7/5, had been obtained.
17. In its rejoinder, the National Reconstruction Authority stated that it has always remained vigilant regarding the need to protect archaeological heritage; that no decision had been taken by the Authority concerning the demolition of the palace; that the team deployed by Kathmandu Metropolitan City had provided an opinion that Bag Durbar could be strengthened and reconstructed; and that historical and archaeologically significant Rana-era palaces shall not be demolished without the approval of the Department of Archaeology of the Government of Nepal. It further stated that, with respect to old palaces and other heritage structures requiring reconstruction or restoration, directions had been issued through the concerned ministry to ensure, until the required studies by architects, structural engineers, and archaeologists were conducted and implemented, that such structures be protected from weather and other external factors so as to prevent further damage. From

this clear position expressed by the Authority regarding palaces of historical significance, the importance of the matter becomes evident.

18. Even after receiving the letters from the National Reconstruction Authority and the Department of Archaeology, no measures or actions appear to have been taken to prevent further damage to the earthquake-affected structure, even during the monsoon season. This naturally gives rise to the suspicion that the opposing party, Kathmandu Metropolitan City, is inclined towards allowing the structure to deteriorate naturally. Pursuant to this Court's order dated 2075/8/4, an independent team of experts was deployed by the Department of Archaeology, and on the basis of the conclusions contained in the report submitted by that team, it is incumbent upon the National Reconstruction Authority and the Department of Archaeology to make appropriate arrangements for the preservation of monuments that signify historical periods, in accordance with Section 16 (a) of the aforementioned Act, and to take necessary decisions and implement them and therefore, nothing further remains to be stated. However, it is observed that serious attention has been drawn to the Ministry of Finance of the Government of Nepal, as the owner of the property, as well as to the National Reconstruction Authority, the Department of Archaeology, and Kathmandu Metropolitan City, to immediately undertake and cause to undertake measures necessary to prevent further damage to the said structure. It is hereby directed to submit before this court by the end of Chaitra 2075, an illustrated concise report on the progress made in that regard.
19. It appears that the Ministry of Finance had been situated at the said location until the year 2060. Pursuant to the decision of the then His Majesty's Government dated 2060/9/28, Kathmandu Metropolitan City had obtained possession of the property on the conditions that it shall not mortgage or sell it, nor alter the original form of the building, and that it shall conduct only necessary maintenance. Kathmandu Metropolitan City had been providing services from the same premises up until the earthquake of 2072. Viewed thus, although the present possession of the said building and land lies with Kathmandu Metropolitan City, the actual ownership of the land and building must be deemed to rest with the Government of Nepal. Once Kathmandu Metropolitan City obtained possession of the said building and land, the responsibility of preserving the building and the premises, as well as safeguarding the artistic and archaeological objects therein and preventing any damage or loss, vested in Kathmandu Metropolitan City. Merely shifting the responsibility of preserving archaeological objects to the contractor while awarding a contract for demolition of the structure does not guarantee their protection; such preservation is possible only through the direct presence and supervision of qualified conservation experts. After the said building sustained damage from the devastating earthquake, attention ought to have been directed towards determining how the artistic objects of archaeological significance and the building itself could be preserved, and efforts should have been made to safeguard the artworks and heritage located therein. Appropriate arrangements should have been put in place, and protective measures adopted to shield the building from sun, rain, and cold, thereby ensuring its preservation. Contrary to this, advancing the process of demolishing the structure of that historically and archaeologically significant building and proceeding towards the construction of a new building in a manner inconsistent with the conditions set out in the Department of Archaeology's letter dated 2073/1/20 cannot by any standard be regarded as justified.
20. Now, with regard to the ownership of the disputed land and building, it appears that the plot No. 1752, measuring 17-7-2-3, located in Ward No. 11 of Kathmandu Metropolitan City, together with the palace/building, was granted to Kathmandu Metropolitan City for possession pursuant to the decision of the Council of Ministers of the Government of Nepal

dated 2060/9/28. The aforementioned decision of the Council of Ministers of the Government of Nepal contains certain conditions, which are also reflected in the written document conferring possession, which are as follows:

- (a) The property shall not be mortgaged.
- (b) The property shall not be sold.
- (c) Maintenance shall be carried out in a manner that does not alter the original form of the building.

21. From the document conferring possession, it is evident that the said land and the structure thereon are still registered in the name of the Government of Nepal, and that the responsibility for the maintenance of the same rests with Kathmandu Metropolitan City in accordance with the above-mentioned document of the Council of Ministers of the Government of Nepal. This shows that, in the present circumstances, while the maintenance and preservation of the palace/building in other respects fall within the responsibility of Kathmandu Metropolitan City, no permission or consent has been granted by the Government of Nepal, as the owner of the property, to undertake actions such as demolition or reconstruction, as is evident from the records or documents produced before this Court. Even on a cursory examination, it is apparent that, as the possessor of the property had not acquired ownership of the palace/building and the associated assets, Kathmandu Metropolitan City took a decision to demolish the said building and, further, issued a notice of intent to award the contract for such demolition on 2075/6/12.
22. It appears that the said land is registered as government property. However, the rejoinder does not indicate that the procedure prescribed in the “**Policy on Registration and Lease of Government Land, 2071**,” published in the Nepal Gazette dated 2071/9/7, Part 64, No. 30, in accordance with the purpose of Section 24 (1) of the Land Revenue Act, 2034, was followed. This policy was first amended on 2072/2/18 (corresponding to 1 June, 2015) and subsequently amended a second time on 2073/1/13 (corresponding to 25 April, 2016) to modify the arrangements for leasing government land or registering it in the name of a government entity. Prior to the commencement of the said policy, the procedure provided therein allowed for the land granted on the basis of possession to be registered in the name of the government entity that had received such possession, upon completion of the prescribed process. Accordingly, no proceedings appear to have been undertaken to transfer ownership in respect of the house and land comprised in plot No. 1752. In such circumstances, the calling of bids by the respondent Metropolitan City with the objective of demolishing a palace/building over which it has not acquired ownership cannot be regarded as reasonable. Where the Department of Archaeology, in accordance with Section 16 (a) of the Ancient Monument Preservation Act, 2013, has also deemed it necessary to preserve the structure, premeditated actions, such as making preparations for a new building, demolishing the palace that ought to be preserved, and selling its materials cannot be regarded as lawful.
23. Now, in relation to Question No. 3, it is observed that the structure of the above-mentioned palace/building, located on plot No. 1752, measuring 17-7-2-3, in Ward No. 11 of Kathmandu Metropolitan City, was granted to Kathmandu Metropolitan City only for possession pursuant to the decision of the Council of Ministers of the Government of Nepal dated 2060/9/28. The conditions of such possession explicitly provided that the property shall not be mortgaged, shall not be sold or transferred, and maintenance shall be carried out without altering the original form of the building. It has neither been stated in the

rejoinder nor during the course of arguments, nor has any evidence been produced, to show that these conditions were lawfully modified, or that the land was converted into a leasehold or ownership was transferred under the “Policy on Registration and Lease of Government Land, 2071” issued by the Government of Nepal pursuant to Section 24 (1) of the Land Revenue Act, 2034. Accordingly, it is confirmed that the possession granted to Kathmandu Metropolitan City under the decision of the Council of Ministers dated 2060/9/28 remains in its original form. While the responsibility for maintenance and preservation of the palace/building in other respects may rest with Kathmandu Metropolitan City on the basis of possession, the right to decide on reconstruction in a manner that alters the original form, design, authenticity, or area of the existing structure does not vest in Kathmandu Metropolitan City. Consequently, the decision of Kathmandu Metropolitan City to demolish the palace/building, prepare plans for a new building claimed to be based on modern, Licchavi, and Rana-era architectural styles, the issuance of the permit by the Department of Archaeology dated 2075/2/15, and the award of the contract for demolition and all such actions cannot be executed and are hereby deemed null and void through an order of certiorari.

24. Thus, while there is no dispute that the earthquake-damaged contested palace/building must be preserved, the question arises as to how such preservation is to be carried out. It also becomes necessary to consider whether the preservation of the contested palace/building should be effected through strengthening/retrofitting/strengthening or through reconstruction. In this regard, upon examining the study reports prepared at different times by various authorities, as well as the report submitted by the team constituted under this court’s order dated 2075/8/4, it is observed that there is no uniformity in the opinions of the experts. Upon examining the correspondence between the Department of Archaeology and Kathmandu Metropolitan City, it is observed that the decision dated 2073/1/20 required that the Rana-era architectural techniques, style, and originality be preserved, that no additional structures be erected in the internal or external open spaces of the building, and that the structure be strengthened as necessary after assessing its condition. However, the decision of the Department of Archaeology dated 2075/2/14 indicates that the earthquake-damaged palace/building may be reconstructed without altering its original form, using traditional construction materials, within the framework of the Ancient Monument Preservation Act, 2013 (as amended), and in accordance with the Rules, Procedures, and Directives, 2073, under the direct coordination and supervision of the Department of Archaeology. It also provides that a detailed inventory of materials recovered from the demolition, which can be reused, shall be prepared and such materials reused in the reconstruction of Bag Durbar. Thus, even within the Department of Archaeology, there exist differing decisions. Considering the question raised in the writ petition regarding whether the contested building should be preserved through reconstruction or retrofitting, it is evident that the matter is of a highly technical nature and must be based entirely on expert technical reports. Given that the expert reports and decisions of the Department of Archaeology vary, it is not appropriate for the court to intervene in such a technical matter through the writ jurisdiction. In this context, by this order, it is directed that, within 15 (fifteen) days from the date of this order, a group shall be constituted under the coordination of the Director General of the Department of Archaeology, comprising representatives of Kathmandu Metropolitan City, the National Reconstruction Authority, the Kathmandu Valley Development Authority, and experts including archaeologists, historians, structural engineers, architects, and other relevant specialists. This group shall conduct an in-depth study and analysis of the following aspects: the nature of the disputed structure; the purpose of the structure and the qualitative aspects required to fulfill such purpose; the necessity of

preservation; structural capacity required for future disaster risk management; human safety considerations; assurance of effective preservation; long-term usability of the building; and compliance with the Ancient Monument Preservation Act, 2013, the Procedures relating to Ancient Monument Preservation, 2064, the Manual for Preservation and Reconstruction of Earthquake-Damaged Monuments, 2073, and other relevant laws and regulations. The said group is to submit its report before the court within three months, and an order of mandamus is hereby issued in the name of the Government of Nepal to carry out necessary actions and monitoring.

- a) The nature of the disputed structure;
- b) The purpose of the structure and the qualitative aspects of the structure necessary to achieve such purpose;
- c) Identification of the structural capacity required for future disaster risk management, in the analysis of the need for preservation;
- d) Issues relating to human safety;
- e) Assurance of effective preservation;
- f) Assurance of the long-term usability of the building;
- g) Other works to be carried out within the framework of the Ancient Monument Preservation Act, 2013, the Procedures relating to Ancient Monument Preservation, 2064, the Manual for Preservation and Reconstruction of Earthquake-Damaged Monuments, 2073, and other relevant laws and procedures.

25. Further, in order to preserve the structures damaged by the earthquake of 2072/1/12, letters from the National Reconstruction Authority dated 2074/7/5 and the Department of Archaeology dated 2074/7/8 required that arrangements be made to protect them from external factors, including weather, so as to prevent further damage. On the basis of the Public Trust Doctrine, Preventive and Precautionary Principles, and ownership, such duty and responsibility rests with the Government of Nepal. However, even after receiving the letters from the National Reconstruction Authority and the Department of Archaeology, no measures appear to have been undertaken by any party to prevent further damage. This naturally gives rise to the suspicion that the structure was left to deteriorate naturally. Accordingly, in order to ensure that immediate measures are undertaken to prevent further damage to the contested structure, a directive order is hereby issued in the name of the Ministry of Finance of the Government of Nepal, the National Reconstruction Authority, the Department of Archaeology, and Kathmandu Metropolitan City to adopt or cause to adopt immediate measures to prevent the disputed structure from being further damaged.

26. It is hereby ordered to service this notice of the order to respondents' nos. 2, 3, 4, 5, 6, and 7 through the Office of the Attorney General, and to the other respondents through this Court. It is further ordered to send the case file along with the evidence to the concerned authorities and to remove the writ petition from the case diary and pursuant to the rules submit the case file to the Record Section.

Concurring with the above Opinion

Honorable Justice Sapana Pradhan Malla

Bench Officer: Deependra Nath Yogi/Anjan Bhattarai

Dated: Year 2075 of the Month of Chaitra Date 5 Day 3

(Corresponding to Year 2019 of the Month of March Date 19 Day 3)