

Decision No: 9849 - Certiorari/ Mandamus Vol. 59, Year 2074/7 No of Issue 7

Supreme Court, Division Bench

Honorable Justice Dr. Ananda Mohan Bhattarai

Honorable Justice Anil Kumar Sinha

Date of Order: 2073/09/06

072-WO-0140

Case: Certiorari/Mandamus

Petitioner: Advocate Tulsi Simkhada, resident of Dhading District, Salyankot VDC currently residing at KMC-16, Nayabazar, Kathmandu

vs.

Respondent: Government of Nepal, Office of the Prime-Minister and the Council of Ministers, Singh Durbar, Kathmandu and Others

As a matter of fact, the scope of writ jurisdiction is very much extensive. For the reason that the Constitution has provided this court with powers of hearing disputes of public interests or concern, in exercise of the said power, this court, can review the acts of executive and the agencies established under the law; look into the negligence and disobedience, non-action regarding legal duties and issue order requiring compliance of constitutional and legal duties as well as transparently discharge the functions. Since the role of the petitioner in cases concerning public rights and interest litigation is just of an informant or a facilitator for deliberation of the case, the court can very much enter into other matters related with the case and finalize it judicially. The matter raised here which involves the protection of heritage, is undoubtedly a matter involving the history, culture, civilization, dignity and faith of the whole nation. Hence, unless the matter is viewed in the light of historical, cultural and religious importance of the Pashupatinath Area, it will be difficult to exactly calculate the degree of the impact of the said encroachment. (Para – 3)

Given that the Constitution has declared the state as a secular state a question naturally arises here as to its role in the protection of religion, religious heritage

and culture. Religious secularism obviously means that the state has no religion; it does not discriminate person on that ground; it favors no religion as a state religion, nor does it tolerate the act of subjugation, condemnation, disrespect, contempt, and unequal treatment as well as racial discrimination under guise of religion, nor does it tolerate untouchability as well as injustices on the acts of forceful conversion of religion. However, it does not construe that the state would not protect the religious practices observed by people from time immemorial. It becomes clear from the reading of Article 4 of the Constitution that the duty of the state as per the Constitution, is to protect religion and culture. In a country where more than 80 percent people are Hindus, whose culture and civilization is attached with Hindu-religion and the way of life from time immemorial, the state cannot remain indifferent to the protection of such religion and culture. As the state by law is provided with the power of developing provisions of religious sites, religious trust as well as heritages under Article 26 of the Constitution, it is the duty of the state to curb such activities which are found to be in violation of law. In no case secularism should be construed as requiring the state to have a totally blind eye in religious matters. In this sense, it is the national and international obligation of state to protect religious properties of Shree Pashupatinath which is of prehistoric and archaeological importance enlisted in the World Heritage list. (Para-4)

History is a witness to the fact that the act of renovating Pashupatinath temple, its courtyard and premises was taken as a pious deed by the then Maharajas, their kinsmen and courtiers. However, the initiation of the process of sustainable development and promotion of this area is found to have started only after the establishment of Pashupati Area Reforms and Development Board in the year 2032 BS through a Comprehensive Master Plan which took into account the historical significance of the heritage properties and also taking note of the need to prevent encroachment done or made in various turning point of time. After the creation of legal framework and establishment of the Pashupati Area Development Fund, the activities under Master Plan took momentum. And the preparation and execution of the Master Plan thus opened the door for renovation and restoration of the Pashupati area that was long neglected. At the least, it has determined the boundary of Pashupatinath area which can stop fragmentation and encroachment and decimation of this area. (Para – 15).

On behalf of the petitioner: Learned Advocate Tulsi Simkhada

On behalf of respondent: Learned Joint Attorney Kiran Poudel, Learned Advocate Umesh Kumar Kuinkel.

Precedent cited:

Relevant laws

Environmental Protection Act, 2033 BS, Ancient Monument Protection Act, 2073 BS

Order

Honorable Justice Dr. Ananda Mohan Bhattarai: The brief fact of this writ petition falling under the jurisdiction of this court pursuant to Article 32 and 107 (2) of the Interim Constitution of Nepal, 2063 is as under:

I, the petitioner, have long since been practicing law in capital city Kathmandu. Nepal is a member country of the United Nations. After acquiring membership of UN and after endorsing international treaties and agreements, those treaties and agreements are mandatory to Government of Nepal, pursuant to Section (9) of the Nepal Treaty Act, 2047 BS. This is the reality. United Nations Education Science and Cultural Organization (UNESCO), a specialized agency of UN, has listed various heritages of Nepal in World Heritage list according to which the entire Pashupati Area, that means, Pashupat Vankali along with Guiheshwori area have been included in the list of a high agencies like the United Nations. The above mentioned facts suggest that Pashupati Vankali area have been the property not only of Nepal but also of the whole World. Millions of local people and foreigners visit and enjoy sight-seeing throughout the year. Till a couple of years before, this area was covered with rich vegetation with greeneries, naturally attractive water holes (spouts), springs and the brooding sites. Today, these natural water springs, spouts, forest, trees as well as wildlife are on the verge of extinction. Basically, two things are responsible for such a situation this area listed in UNESCO; one, the decision of respondent agency to construct heavy motorable road towards the north from Tilganga reaching nearby Guiheshwori to link Gothatar; and the next is to carry out such activities in and around such heritage sites; and to let loose digging graveyards and construct cemetery in Vankali, Mrigasthali-Sleshmantak forest area. All these activities are in contravention to the Interim Constitution of Nepal 2063, Environmental Protection Act, 2053, Rules 2054, Ancient Monument Protection Act, 2013 BS and UN Convention 1972 AD. Therefore, a decision which the respondent agency reached to open a wide road headed directly towards north from Tilganga Eye Hospital Chowk passing through military area to reach Guiheshwori and then connect Gothatar VDC for plying heavy transports have come to witness physically in practice before the eyes which is an act of inviting environmental and ecological imbalance leading to destruction of Pashupat area enlisted in World Heritage list.

What the above-mentioned situation reveals that the burial of corpse and operation of motorable road here and there in Pashupati Vankali, Sleshmantak area is to destruct the beauty of that area and cause environmental as well as ecological degradation of Pashupat area which is in itself an unlawful act. The Honorable Court can declare such act null and void by issuing and order of certiorari and since the respondent also is equally responsible in preserving the beauty of the area and protect the listed heritage renown in the world platform, therefore, an order requiring to stop illicit activities be issued in the name of respondents pursuant to Section 2(a) of Ancient Monument Protection Act 2013, Pashupati Area Development Fund Act, 2014, Environment Protection Act, 2053

Section 2(k), 7 and, the order of certiorari and prohibitory mandamus be issued in the name of respondent as per the spirit of Section 17.2 and 17.8 of the Act to instantly abandon operating such an unnecessary through fare in that area and, if just one and half KM long motorable road was so urgent coordinate for that with the army to operate such road from eastern side of military barracks and, issue an order of Mandamus in the name of respondent in accordance with United Nations Convention for the Protection of the World Cultural and Natural Heritage as well as the provision contained in Section 4 and 9 of Nepal Treaty Act, 2047 BS, Section 6.1.4, 6.1.5 and 10.1.13 of Pashupati Area Development Fund Act, 2044 BS to make necessary arrangement for the protection and development of special zone enlisted in the World Heritage list as per the objective of that convention and, to abandon activities of digging graveyards and erect concrete tombs as well as notto operate road from that area and, act for scientific tree plantation in that wide unpitched road. Since the present writ petition involves most prominent issue of public importance, an interim order is requested to be issued in the name of respondent to stay under Rule 41 (1) of Supreme Court Rules, 2049 BS exercising extraordinary jurisdiction of the Supreme Court not to construct the permanent road until the writ petition is finally disposed of. There is an application in the case file requesting swift action proceeding in the case since it is an issue of public importance.

This court on 14th of Bhadra 2072 B.S. issued an order whereby it asked what is the fact in issue, and why an order as demanded by the petitioner should not be issued; let a notice thereof along with a copy of this order and writ petition be sent [asking respondents to] to submit reply in writing with reasons thereof if any, within 15 days exclusive of the time period to be taken for journey from the date of receipt of this order in the case of respondents No. 1, 2, 3 and 4 through the Office of the Attorney General and, in the case of respondent No. 5, the respondent himself or his representative and, let a notice accompanied with copies of this order and writ petition be sent for the knowledge of the office of Attorney General, and then present the case in hearing after expiry of the time limit.

In its written response dated 2072/5/24, the Ministry of Science and Technology has submitted that the petition which is filed mentioning this Ministry in the principal respondent does not fall under the scope of this Ministry in view of subject matter and, the petitioner have failed to present any clear fact, reason and justification against which act of this Ministry should the order of writ be issued. Taking into account the fact that the sustainable development is possible only through establishment of interchangeable relation between development and protection of environment by mitigating as far as possible the adverse impact likely to have on mankind, animals, vegetation, nature and material object and to bring about clean and healthy environment as well as to protect environment through the proper use and management of natural resources and, to that end the Environment Protection Act, 2053 BS and corresponding Regulations, 2054 BS is in force. Since this Ministry is committed to protect environment through

effective implementation of this Act and the Regulation and no action or decision is reached by this Ministry as claimed in the petition, therefore, the claim made in the petition in regard to this Ministry lacks reasonability and rationality.

The Legislature-Parliament Secretariat has responded in writing to this Court that the petitioner could not clearly mention the facts and reasons why this Secretariat is made a respondent. The Secretariat which is established to cooperate the Legislature-Parliament in its administrative functions in the context of responding its regular legislative business. So, it is quite inappropriate to make this Secretariat a respondent putting various types of claim and asking orders to be issued accordingly. On matters purely related with the affairs of Government of Nepal and under its scope while paying attention to the claim of the petitioner without making adverse impact on the above plea that the petitioner claims for the search of an alternative road in place of the present wide road operated from the Pashupati area enlisted in World Heritage list by UNESCO and, stop burial of corpse in the said area and to make necessary arrangement for the protection and development of that area is not consistent with law. Since the Government has authority to acquire private land of an individual and construct road depending on the need of the people and country, it is the duty of the Government to operate road from public land for the benefit of the common citizenry as per need. The Government while so operating the road, pays special attention towards the likely effect on the environment of the given place. So far as concerned with question of burial of corpse or construction of graveyards, it is natural to bury corpse, building graveyard and tombs or cemetery as a legal right in places where it was traditionally being done for those purposes unless the state by enacting law, prohibits such acts. But if such an act is found being carried in place prohibited under law there is a provision of penalty under the relevant law. Whereas such a course of legal remedy is already available, the petitioner has invoked the writ jurisdiction. Therefore, the present writ petition is in contravention to sub-Article (2) of Article 107 of the Interim Constitution of Nepal. The petition against this Secretariat should be quashed because it lacks its reasonability.

The Office of the Prime Minister and the Council of Ministers have submitted a written reply stating the matter that Government of Nepal have been taking uninterrupted initiative for the protection and promotion of the heritages of that area taking into account the religious traditional importance of Pashupati Vankali area. The statutory and institutional efforts are being made for natural and ecological safeguard of this area having been enlisted in the World Heritage list in the initiation of Nepal Government for the protection of religious and ancient heritage to give publicity even at international level by preserving historicity and originality of this area. Sub-section (1) of Section 3 of the Ancient Monument Protection Act, 2013 BS provides that the Government of Nepal can prescribe a place or such area as protected areas where the ancient movement is situated, Sub-section (5) of the same requires to have obtained prior approval of the Department of Archaeology for extending electric transmission line or telephone line, digging land for drinking

water pipelining or drainage, construction or maintenance of road ways, film shooting, conduct fair, singing and dancing activities, parking motors or posting pamphlets etc. within the area covered by such ancient monument or the like. Sub-section (7) of the same section contains a legal provision that a prior approval of Department of Archaeology is required to be obtained for constructing any house or building, maintenance or reconstruction thereof and the Government of Nepal is working actively with the commitment of implementing these provisions of the Act pertaining to the protection of ancient monument. Pashupati Area Development Fund Act, 2044 BS, as a special Act for preservation and development of Pashupati Vankali area has been enacted and enforced. Sub-section (1) of Section 3 of the Act provides that there shall be established a Fund named by Pashupati Area Development Fund and sub-section 4.1 of Section 4 provides for a corporate body having perpetual succession. This Act provides Pashupati Development Fund with power of protection, management and operation of the monuments having archaeological importance within Pashupati area, Board of Directors of Pashupati Development Fund has designed a master plan and brought into implementation and the Government of Nepal and the concerned agencies are working as far as their means and resources allowed in the matter of protecting ancient monuments, overall development as well as the protection of environment including ecology of that area. Therefore, the claim of the petitioner that Government of Nepal has not taken any initiative in the protection of the property of the said World Heritage list has no meaning.

Written response submitted by the Ministry of Culture, Tourism and Civil Aviation had a mention that the petitioner's claim of operating a motorable road to link Gothatar from northern side of Tilganga Chowk of Pashupati area enlisted in World Heritage list. In this relation, the Ministry had no plan of constructing road in the destruction of historical forest of that area and no act of such a type have been carried out by the Ministry. Hence to state this Ministry in the respondent's column without any reason lacks and reasonability of the petition, therefore, it is requested to quash the petition.

Petitioner, Tulsi Simkhada seems to have raised the issue of preserving the beauty of the Pashupat, Vankali, Gyuiheshwori, Mrigasthali, Sleshmantak areas included in the World Heritage list and, especially asked for an alternative provision for digging graveyard and conducting motorable road in such area. Since the World Heritage site belongs to Land Tax Office, Dillibazar it is up to that office to present its written reply. As the Nepal Government and Pashupati Area Development Fund are the authorized bodies to play vital role in taking decision on such matters, in such a situation, it is needless to make this office a respondent, submits revenue office, Chabahil its written reply in this court.

This court, in 2073/3/15 BS, issued order in the name of Ministry of Transportation, Department of Road as well as District Road Office, Kathmandu pursuant to Rule 49 of the Supreme Court Rules sending a copy of the writ petition to appear within

15 days along with written response since it could not be clear from the written reply of the respondents about who and for what purpose this road started from Tilganga Chowk headed directly northward passing through military area reaches near Guiheshwori and links Gothatar as stated by the petitioner and, in the name of Department of Revenue and Land Tax Office, Chabahil to clear about who is the owner of those land and who are using it by sending a copy of writ petition to the above respondents to this effect. After the written reply as above is submitted or expired the time limit, depute a gazette first class level employee from this court to inspect the location of road and graveyard in dispute and report the actual objective situation and then present the case as per rule after the submission of report.

Department of Land Reforms and Management responded in writing to this court that while inquiring with Land Tax Office, Dillibazar through correspondence of letters in regard to the registration of the land of a road headed directly northward from Tilganga Chowk to reach near Guiheshwori, passing via military area as stated in the order issued by the Honorable Supreme Court in 2073/3/15 BS, the above mentioned land falling under Pashupat VDC ward No. 9, Plot No. 36, area 15-6-0-0 in Ropani measurement is found registered previously in the name of His Majesty's Government of Nepal and the same is now in the name of Government of Nepal, and the land ownership registration certificate of the said land is received from the office of Land Tax Office, Dillibazar, a copy of which is enclosed herewith. Therefore, it is requested that the land registered in the name of Nepal Government lies in the heart of the forest of Pashupati area. Government of Nepal, Department of Road, Division Road Office, Kathmandu responds in writing that focusing on the hardships faced by the (passersby) travelers because of excessive traffic jam in Sankhu-Chabahil-Gaushala Airport route—that a decision was reached in a meeting held in 2066/9/26 in coordination of the Secretary of Physical Planning and Works Ministry and had reached an agreement initiating the task of designing the tunnel and enter into contract finalizing the estimate by the Department in 2067/12/17, called a tender of Chabahil-bypass-road (Tilganga Tamraganga Road Sector, Road and Tunnel Construction) with contact no. 182/066/067/503 and, Sri Lumbini P. S Golden Good J V, Dillibazar selected as a contractor and reached agreement and has taken away also NRs 65,00,000 as mobilization advance; at the meantime, a letter received from UNESCO necessitating study again by an independent committee since the assessment was found done inadequately in regard to likely impact to have on Outstanding Universal Value (OUV). As per a letter received from Department of Archaeology in 2067/8/28 the said construction work was not started because a letter was received from UNESCO so as to conduct further study and forward the task by obtaining approval of the World Heritage Center.

A letter from Department of Archaeology reached to Road Department in 2068/2/5 in writing to stay the tunnel construction work pursuant to point No. 2 of the Report of UNESCO World Heritage Expert team so as to construct the road outside World Heritage Property by not constructing at the site now proposed or, search

for other alternative measures. Likewise, a letter dated 2069/9/18 received from Defense Ministry stating the matter that the survey for the proposed alternative road should be discouraged since that will have the long term effect on the Nepali Army barracks, Tribhuvan International Airport, as well as to the religious and historical sites; hence the construction work is accordingly discontinued for now. Therefore, nothing is done as complained in the writ petition. Writ petition invalidated.

Pashupati Area Development Fund, in its written response, mentioned that the claim of the petitioner that the Fund constructed motorable road from the northward side of Tilganga at Pashupatinath to connect Gothatar is untrue because it is not the objective of the Fund to construct that road by destroying historical jungle of that area listed in World Heritage. As the Fund consulted with Archaeology Department and formed also a committee presided by the Director General of Department of Archaeology denying construction of road in that area because a track road was there opened from Tilganga to Guiheshwori using dozer in the initiatives of then Physical Planning and Work Ministry. On the other hand, the Fund in a meeting of the Board of Directors had decided in 2068/7/16 that until the Department of Archives concretely decides the said track should be closed for now because the construction of road could not progress in such a situation. No road is allowed to operate till now in that area. A tender invited by the Fund in 2071/12/7 in newspaper for erecting retention wall in both the entrance of the road for the safeguard of Archaeologic forest and, therefore, the act of selecting the contractor by opening the bid submitted for that work is now on. Except what was existed from time immemorial, there is no plan to construct any road inside the jungle of Pashupati area comprised in World Heritage list nor can be so constructed. It is untrue that the said road would be black-topped. The claim of defendant against the Fund is false therefore the writ should be quashed. A rough road of about 675-meter length, 7-meter-wide is visible running from the center of Sleshmantak forest of Pashupati area stretched from Tilganga to Gothatar (Tamraganga). It came to know from the locals that this road was opened in the year 2064 BS. In course of the field visit, the means of transportation like motors and motorcycles were seen plying over there though the road now is in unrefined condition and there are potholes here and there. After the vehicle is operated, the forests is depleted, caused soil erosion and landslides and developed as a dumping site of throwing garbage by the locals and others. Because of the easy access afforded by the road, the graveyards are found digging and burying corpses unscientifically, here and there. Industrial activities created pollutant effluents, garment disposals as well as carcasses of cattle dead bodies are seen thrown in either sides of that road. Even if the track was opened for the ease of locals however, security challenges are found increased and pedestrians felt discomfort from pollution and bad odor created because cattle dead bodies were found thrown here and there and are in decaying condition. Though the written responses claim that the road construction work is halted but the public thoroughfare is not found showered. If the said road was blocked, the open spaces available there could be utilized for tree plantation and

protected also the heritages by a wire fence. In otherwise case, there is the possibility of converting that area in horrible condition due to road operation and other human activities such as digging graveyards, not initiating new tree plantation, pay no heed on protecting the archaeological artefacts. In north western side, there is Sleshmantak forest area inside which Dashnami sects of Sanyasis bury dead bodies and the signs of such acts are visible in neglected situation there now. Whereas Pashupati Thakur, engineer of the Fund informs that the corpse in the past were kept in a cemented structure but after regular inspection of the Pashupati Area Development Fund the use of cement is prohibited but permitted bury by digging earth. From Vishworupa as we moved downhill through that jungle towards that newly opened road, human graves were seen covered by mud digging holes here and there however, the recently made concrete structure were not visible there over. Nripadhoj Niroula and his team has submitted a report to this court depicting the physical situation witnessed as above.

Decision of the Court

The case file of this writ petition duly presented in the hearing is studied. In this petition registered pursuant to Article 107 (2) of the Interim Constitution of Nepal, 2063 as a petition of public interest litigation, the petitioner Learned Advocate Shree Tulsi Simkhada argued/submitted that Lord Pashupatinath, a center of faith of all Hindu, Boudha, Shaiva, Shakta and such others all over the world was enlisted in the World Heritage List by UNESCO taking into account religious and cultural importance of surrounding environment of its premises. Encroachment on this site is on the rise due to unplanned urbanization and negligence of the agencies responsible for the protection of this heritage site. Mrigasthali and Sleshmantak forest situated in the east of Pashupatinath is an inseparable part of Pashupat heritage. So, its protection is urgent. But the construction of road so as to cause forest and environmental degradation in Tilganga to Tamraganga section, and unsystematic burials of corpse in the same jungle and construction of concrete structures over has ruined the integrity and holiness of the heritage. So, it is necessary to control such acts. Therefore, the act of constructing road and burying corpse be immediately halted and the writ of certiorari plus mandamus be issued for the heritage and its protection. The Learned Joint-Attorney Kiran Poudel, who appeared on behalf of respondents the Government of Nepal, Office of the Prime Minister and the Council of Ministers defended that since the construction work initiated after completing study for construction of alternative tunnel road from Tilganga – Tamraganga area considering the traffic pressure of Gaushala-Chabahil section has stopped after a report of UNESCO mission is received, no such situation exists warranting the issuance of order. So, the writ petition should be quashed. The Learned Advocate Umesh Kumar Kuikel, representing Pashupati Area Development Fund, argued that Mrigasthali and Sleshmantak forest is the integral part of the Pashupati area. So there is no dispute on the matter that its protection is essential. Tilganga-Tamraganga road would fragment the Sleshmantak forest causing adverse impact on the environment. So the Fund is never in favor of such construction. A decision has been reached on

2068/7/16 for fencing the area, for abandon of road extension work and prohibit the act of burying the corpse and construct structure over the graveyard in Mrigasthali area also abandoned by a decision of the Fund dated 2067/9/14. So, no order is required to be issued against the Fund.

While considering the decision to be reached after hearing arguments of the learned counsels from both sides in the present writ petition registered pursuant to Article 107 (2) of Interim Constitution of Nepal, 2063 showing concern and interest along with worries over the state of environmental degradation of the entire area including Pashupati, Vankali and Gyuiheshwori which belongs to the World Heritage list. The petition mainly emphasizes on the closure of about one and a half kilometer long motorable road being constructed to connect Gothatar from north eastern side of Tilganga via Guiheshwori and also halting of unsystematic construction of graveyards in and around south-eastern part of Sleshmantak forest enlisted in World Heritage list. The question that emerges here pertains as to whether to address these things in narrower sense or see them in the light of prevailing legal system and constitutional provisions, keeping in view with the much extensive scope of writ jurisdiction available to this court as well as in the context of constitutional duty of protection of culture and heritage.

As a matter of fact, the scope of writ jurisdiction is very much extensive. For the reason that the Constitution has provided this court with powers of hearing disputes of public interests or concern, in exercise of the said power, this Court, can review the acts of executive and the agencies established under the law; look into the negligence and disobedience, non-action regarding legal duties and issue order requiring compliance of constitutional and legal duties as well as transparently discharge the functions. Since the role of the petitioner in cases concerning public rights and interest litigation is just of an informant or a facilitator for deliberation of the case, the court can very much enter into other matters related with the case and finalize it judicially. The matter raised here which involves the protection of heritage, is undoubtedly a matter involving the history, culture, civilization, dignity and faith of the whole nation. Hence, unless the matter is viewed in the light of historical, cultural and religious importance of the Pashupatinath Area, it will be difficult to exactly calculate the degree of the impact of the said encroachment.

There is also another aspect associated with this subject matter which needs to be clarified at the outset. Given that the Constitution has declared the state as a secular state a question naturally arises here as to its role in the protection of religion, religious heritages and culture. Religious secularism obviously means that the state has no religion; it does not discriminate person on that ground; it favors no religion as a state religion, nor does it tolerate the act of subjugation, condemnation, disrespect, contempt, and unequal treatment as well as racial discrimination under guise of religion, nor does it tolerate untouchability as well as injustices on the acts of forceful conversion of religion. However, it does not construe that the state would not protect the religious practices observed by people from time immemorial. It

becomes clear from the reading of Article 4 of the Constitution that the duty of the state as per the Constitution, is to protect religion and culture. In a country where more than 80 percent people are Hindus, whose culture and civilization is attached with Hindu-religion and the way of life from time immemorial, the state cannot remain indifferent to the protection of such religion and culture. As the state by law is provided with the power of developing provisions of religious sites, religious trust as well as heritages under Article 26 of the Constitution, it is the duty of the state to curb such activities which are found to be in violation of law. In no case secularism should be construed as requiring the state to have a totally blind eye in religious matters¹. In this sense, it is the national and international obligation of state to protect religious properties of Shree Pashupatinath which is of prehistoric and archaeological importance enlisted in the World Heritage list.

In the present dispute the question has been raised on the use of land for the construction of road and graveyards which falls inside Mrigasthali-Sleshmantak forest area. The submission made by respondent Pashupati Development Fund, states that the Fund takes firm stand against the construction of road in that area and as decided by a meeting of Board of Directors the Fund rejects the construction of the said road, that it has prohibited the operation of the road by putting barbed wire fence, that the Fund has no plan to operate road in that area and, that the proposed road is not opened by the Fund, and that the Fund has prohibited the operation of the road in that area to date. During deliberation of the case, it is also claimed that a decision has already been reached so as to stop construction of permanent structure in the areas of burying the dead bodies.

Likewise, in its written submission, one of the respondents, namely the Road Division Office, Kathmandu – 1 mentions that following the receipt of the letter from the Department of Archaeology dated 2068/2/25 citing the recommendation No 2 of the Expert team of UNESCO World Heritage Center for abandoning the construction of Tilganga-Tamraganga road section and the tunnel construction, no construction work is being carried out up to now and accordingly and no such activities is being currently undertaken as claimed in the writ petition. However, as we study the report submitted by a team headed by Joint Registrar of this court, the particulars mentioned above seem untrue. Therefore, the recklessness and negligence displayed by the concerned authorities towards the protection require to be taken seriously. The matter needs to be examined from a broader perspective in view of the historicity and expanse of Lord Pashupatinath and its linkage with Hindu civilization, way of life and philosophy, and also in view of the obligation of the state to conserve the heritage sustainably and handover such an invaluable treasure to the posterity. From this perspective, therefore, the following questions are found to be relevant for resolving the present dispute:

¹ Bharatmani Jangam v PM and Council of Ministers and Ors, NKP 2073 DN 9733 p. 2323.

1. What are the issues associated with historical, religious and cultural aspects of Pashupatinath area and its conservation dimension?
2. Given the continuously growing popularity of Shree Pashupatinath area, its physical accessibility and burgeoning urbanization, what adverse impacts are being witnessed in heritage conservation?
3. Whether or not the current initiatives in the protection of heritages sufficient?
4. What type of impact on the environment of the said area would witness if the Sleshmantak forest is used in the construction of road and building cemetery?
5. Whether or not it is necessary to issue order as demanded by the petitioner whether or not there exists any situation so as to issue directive for the protection of heritage and environment of Pashupati area.

First of all, while looking into the first question, it should be clarified at the outset that in order to perceive the uniqueness of Mrigasthali or Sleshmantak forest as well as its historic, religious, cultural and environmental affinity and importance, the discussion and analysis of historical, religious and cultural significance of Pashupatinath and entire Pashupat area including Deopatan is required. In this course, the ancientness of Pashupatinath temple, and the geographical as well as cultural history of the city where Pashupatinath is situated, are made the subject matter of discussion here.

The imminence and glory of the Lord Pashupatinath is spread all over the World as the most venerable God who has power to liberate individual soul from the chain of worldly delusion-fastened like a beast. Although the authentic history of Nepal based on inscriptions begins from Lichchhavi period however, the history of Lord Pashupatinath is several thousand years older than that. In other words, the origin of Pashupatinath is prehistoric. Shruti, Smriti, Puranas are witness this fact. The words such as Rudra, Shiva, Shanker, Mahadev, Pashupatietc are used synonymously in Vedas. Hymns signifying Pashupati are found in several places in the Vedas. As for instance, the 40th hymn on Chapter 16, on Sukla Yajurveda, reads: “नम शङ्खवेच पशुपतये च नमः” (meaning - [!] salute Lord Pashupati residing in benedictory words). Likewise, in another place it is said “नमः शर्वाय च पशुपतये च नमो”. Atharva Veda says य इसे पशुपति पशुनां चतुसपदाभूत यो द्वीपद्वाम (भूतपति पशुपति नमोवाम् (Satapath Brhamana) which is one among 18th Upanishads says “अथ रुद्राय पशुपतये” Here, Rudra and Pashupati are mentioned synonymously². In Smriti and Puranic era, Shivalinga and Pashupati are much talked of and praised. In one place of the Mahabharat it is said:

² Govinda Tandon, **Cultural Study of Pashupatinath** (2053 BS) pp. 66-68 (Nepali text)

स्थापितत्रिषुलोकेशुशिवलिङ्गमयामम ।
 नमस्कारेणवातस्यमुच्यतेसर्वकिल्बिषैः ।
 इष्टदत्तमधितंचयज्ञाश्चवहुदक्षिणाः ।
 शिवलिङ्गप्रणामस्यकलानाहन्तिषोडशिम ॥

Meaning [thereby that]- I have installed Shivalingas in all three universes, even a single salute to whom eradicates bad habits such as, wickedness, malice and deviances in the devotee and makes him pure and flawless; as a result the soul receives virtues and good inspiration. It has been said that since the Shivalinga itself is my heavenly form I take satisfaction to the worship of Shivalinga with great faith and devotion³. It is mentioned in Shiva Purana Rupa Sangraha about Shivalinga consecrated in Pashupatinath, Nepal as:

नयपालाख्यापुर्या तु प्रशिद्धायां महितले ।
 लिङ्ग पशुपतिशाख्यं सर्वकामफलप्रदम ।
 शिरोभागस्वरुरूपेण शिवलिङ्गं तदस्ति हि ।

This means- there is Shivalinga named Pashupatishowr in a city called Nepal (Nayapala) renowned in the whole World. Pashupatinath is believed to be the crest of Kedarnath⁴. About Shivalinga at Pashupatinath, Skanda Purana, Himavatkhanda states:

मध्ये पशुपति देवो ज्योतिर्लिङ्गो विराजते ।
 गुप्ताख्यया समं देव्या प्रमथै योगिनीगणै ॥⁵

Meaning- At the center resides Lord Pashupatinath in the form of Jyotirlinga accompanied by a goddess named Gupta and attended by Pramathas (self-instigating) and Yoginis. Here, the mention of Shivalinga at Lord Pashupatinath as Jyotirlinga, illustrates its all-embracing prestige and omnipresence. In like manner, comparing Kashi (Varanasi) and Pashupati, Himavatkhanda says:

जम्बुद्विपे पुरी द्वे च रुद्रेनाधिष्ठते ऽ निशं ।
 काशी पाशुपति साक्षात्ममासते शुरालये ॥३॥
 काश्याश्चतुर्गणं मान्या पुरी पाशुपति यतः ।
 धर्मार्थकाममोक्षाणि यस्यं प्रलभ्यते किल ॥४॥
 मोक्षमेकं तु काश्यां वै लभ्यन्ते जन्तुभिः सदा ।
 उमामहेश्वरीपुर्या चतुर्वर्गं घटोद्भव ॥५॥

³ Cited from p. 93 id.

⁴ Shiva Purana Shangraha 13/13 as cited in Id (by Khemraj Keshavasharana in the preface)

⁵ Himabat Khanda 71/8 (this is a Sanskrit treaties of 6th century)

Meaning [thereby that]- in Jambudweep [of the Indian sub-continent], the Lord Shanker has taken abode in Kashipuri and Pashupatipuri. Death in Kashi offers salvation. Pashupati secures all the four great valors (dharma, artha, kaama, mokshya). Pashupati is believed four times superior to Kashi since it provides all the four valors⁶.

Inscriptions concurrent to the latter stages of Puranas such as Skanda Purana are found to have begun depicting the glory of Pashupati. For example, in Dhruva Sangha's inscription, located at Bhasmeshwor [near Pashupatinath] dated back Shaka era 455 (590 BS) states - "भगवतः पशुपतिः क्षेत्रे"; implying thereby that the dignity of Lord Pashupatinath is not confined not only in the form of temple but also disseminated in the form of sacred region of pilgrimage even in far off places and countries.

Another issue associated with the glory of Pashupatinath is the encomium of the kings. During the Lichchhavi era, not only king Amsuvarma but also the kings after him such as Udayadev, Dharmadev, Narendradev Shivadev – II have used expressions such as "भगवद पशुपतिभट्टारकपदानुगृहित" in their encomium trying to imply thereby that have received special blessings from Lord Pashupatinath. Obviously when the kings themselves seek blessings of Lord Pashupatinath, it is natural for the common laity of those times to seek similar blessings and favor. The availability of 36 inscriptions of Lichchhavi period around Pashupatinath area indicates that by then the glory of Pashupatinath had reached its climax as a place of pilgrimage.⁷ This Lord Pashupatinath continues through Malla and Shaha Period and even today. The devotion to Lord Pashupatinath during the Shah period has been depicted by the installation of Shivalinga and construction of Lord Shiva's temple as well as the creation of trust property (Guthi) for different purposes.

Another aspect of the discussion on Lord Pashupatinath relates with "Pashupat Kshetra". A question may naturally arise as to what the term "Pashupat Kshetra" actually imply. In a wider sense, entire Kathmandu valley may be termed as "Pashupat Kshetra". But in essence "Pashupat Kshetra" is actually an area where Lord Pashupatinath is really situated which is known also as Devgram, Devpatana, Devpattana or Deopatan. More so, if we borrowed a term from genealogy this area is known as "ग्वल" (Gwala)⁸. Mention of the term "ग्वल" and the location of Kirateshowr Mahadev both unitedly acknowledge the ancientness of Pashupat area. The bound of Deopatan which is up to now in practice is not only Pashupati, it encompasses also areas like Chabahil, Kutubahil, Bhagavansthan, Maijubahal, Kumarigaal, Dhandyo Chaitya, lying east of Dhobikhola including Boudhanath. As Chaityas like Charubihar and places of religious faith for Shaiva, Shakta,

⁶ Cited in Tandon, supra note 2 at p 22.

⁷ Tandon, supra note 2 at pp. 49-50.

⁸ Gwala refers to a place where the cow gives milk. See id at p. 51.

Vaishnavites etc within Hindu religion are known to have existed within Deopatan area. Therefore, the entire Deopatan area is believed to fall under Pashupat area. This being so, the center of all these heritages the most venerated through ages is clearly the temple of Pashupatinath, its courtyard and the premises. It is not that Pashupatinath did not face obstacles and intervention in the course of development of society together with the rise and fall of the state from time to time. Nevertheless, the temple has been getting renovated owing to continuous faith and conviction of the devotees.⁹ We can see successes in the prosperity of Pashupatinath area due to the establishment of various temples, Gods, Shivalayas and Shiva's temple in the courtyard and premises of the temple by kings, king of kings, local inhabitants as well as the devotees from abroad.

While talking about Pashupat Kshetra it is necessary to discuss about Mrigasthali and Sleshmantak forest falling east of river Bagmati, and areas lying further east. The existence of temples like Kirateshwor Mahadev, Guiheshwori Devi, Gorakhnath, Vishworupa, Ram Mandir and like located in this area and numerous Shivalingas and Shivalayas lying therein have made this area an integral part of the premises of Lord Pashupatinath. Mrigasthali area, Sleshmantak forest is also known as a forest fort. History is a witness to the facts that out of 86 water holes (ponds) located at Pashupati area, many of them were located in Mrigasthali-Sleshmantak forest east of Pashupatinath, across Bagmati river basins and even beyond them. For instance, Brhamodaya Kunda (cave of Gyuiheshwori temple), Skanda Kunda (a little south from Vishworupa temple), Saraswati Kunda (south east of Vishworupa temple), Jogkunda (east of Gyuiheshwori), Sleshmantak Kunda (the first tributary east of Gyuiheshwori), Haridwar Kunda (uphill track to reach Gaucharan from the bank of Bagmati river in Gyuiheshwori), Tamra Kunda (a water resource in left hand side of Bagmati, in Gyuiheshwori), Saptarishi Kunda (near Tribhuwan International Airport), Suvarna Kunda (origin of Tilganga), Kokhodaka Kunda (a little south from Suvarna Kunda), Vyas Kunda (east from golf court), Kak Kunda (Kandaghari). By this, it comes to establish that Mrigasthali Sleshmantak forest is an inseparable part of Pashupat area.

While talking about the temple of Lord Pashupatinath, its courtyard and premises, it becomes necessary to talk also about tradition of creating trust properties for the performance of rituals and worships, Mahasnan (the grand holy bath), sanitation and repair works, Jatra (carnivals), charity, Sadavrata (alms distributed to the poor daily), and maintenance of gardens. History suggests that such acts were performed in different periods of time. For example, during the reign of Lichchhabi King Mandev, a merchant named Ratnasangha who constructed the

⁹ Gopal Vansavali mentions about the reconstruction of the temple of Pashupatinath between 1156 and 1183 BS. Again the Shivalanga which destroyed by the Samasuddin Iliyas, the Nawab of Bengal on 22 Mangshir 1406 BS was reconstructed and reestablished after 10 years in 1417 BS by King Jayasingh. According to Vamshavalis (chronicles) the present shape of Lord Pashupatinath was given by Queen Ganga Rani, the spouse of King Shivasingh Malla through renovation works, while the present structure of the Temple owes to the works undertaken by King Bhupalendra Malla in 1754 BS. See Tandon Supra note 2 at pp 106, 121, 123.

temple of Ratneshwor near Pashupatinath had allocated 2570 Bhoomi land¹⁰ in Trust to manage worships thereof¹¹. The creation of trust properties of big and small size for religious and other worldly purposes were continuously observed during the periods of Malla and Shaha kings. During the Shaha period, queen Kantiwati, the spouse of King Rana Bahadur Shaha had allocated 1633-12-0-0 Ropani land in Gokarna and Deopatan, and 566-4-0-0 Ropani land in Fatakshila of Sindhupalchowk totaling 2200 land in Ropani measurement as trust properties in the year 1856 BS for Mahasnan (grand bath) and Mahabali (grand sacrifice) [at Lord Pashupatinath]. Similarly it is found that King Rana Bahadur Shaha had allocated 1000 Ropani of land for grazing oxen (he calf) offered to Lord Pashupatinath. Again, there is a most-talked Guthi of 375-4-0-0 land in Ropani offered by King Girvana Yuddha Bikram in 1870 BS for the worship of Lord Pashupatinath which was allocated by the Rana Bahadur Shaha himself in Bhandarkhal garden. The practice of raising Trusts properties aiming at Lord Pashupatinath is found being carried not only by kings, their queens and kinsmen, but also by ordinary people; not only by countrymen but also by the devotees from abroad¹². Of them, Som Sharma Bhatta, resident of Kashiis found to have raised a Trust in 1711 to have Lord Pashupatinath showered by the milk of cow. Likewise, there is a mention also of a Trust maintained by Damodar Bhatta Maharastri in 1721, in the month of Magha to have the Shivalinga of Pashupatinath bathed with Panchamrita (a mixture consisting of milk, curd, sugar, honey, and clarified butter)¹³. In what form and to which extent these Trusts are being maintained and continued is a separate subject matter of research and analysis. Suffice here to state that the Trust were continuously created in different places within and also in the periphery of Pashupat area by the government and the people, by local and foreign devotees as well for the worship and for conducting fair, and raising gardens etc. This fact indicates the glory, dignity and reputation of Pashupatinath temple, its courtyard and premises uninterruptedly from ancient period. Also, all these activities illustrate that the Lord Pashupatinath has been an invaluable treasure of our history, culture and civilization. Therefore, the questions now attached with the protection of Pashupatinath are not only of temple, courtyard and premises but also all physical properties like monasteries, temples, Chaityas, Dharmashala their remnants, inscriptions, archives etc. located at Deopatan area and cultural heritage and culture associated to them and also the Trust properties created for their protection and longevity. Since it is a matter related with nation's culture and civilization there is no reason to dispute that the protection and preservation of the integrity of all heritages of Pashupat Kshetra and its sustainable development is the need of the hour.

¹⁰ A unit of land measurement in Lichchhabi Period.

¹¹ Dhanabajra Bajracharya, **The Inscriptions of Lichchhavi Period** (Kirtipur, the Institute of Nepal and Asan Studies 2030) at pp 50-54.

¹² Among them, the Trust created by a civil servant named Subba Kulananda Jha who on 10th of Baishakh 1963 BS had allocated 769 Ropani of land for the purpose of Mahasnan (grand holy bath) at Lord Pashupatinath among the big Trusts created by ordinary people. See Tandon supra note 2 at p. 269.

¹³ Tandon id at pp. 273-297.

Now, let's consider upon the second question that concerns about what adverse impact is likely to have on the protection of heritages owing to continuously growing popularity of Pashupat area, easy access of transportation and increasing urbanization. History reveals that the Lord Pashupatinath is a center of faith not only of Hindus but also of Buddhism and Jain sects equally. Since the temples and monasteries of those sects are found present inside Pashupatinath premises and in Deopatan, one can easily guess the popularity and centrality of the lord Pashupatinath. Hindus all over the world would like to visit the Lord Pashupatinath once in their life time. Millions of local as well as foreign devotees pay homage to Pashupatinath at different auspicious dates and occasions such as Mahashivaratri, Balachaturdashi, Teej, Thulo Ekadashi, Navaratri, Janai Purnima, Vaikuntha Chaturdashi, Guru Purnima, Dhanurmas, Pabitrarohan, Damanarohan, Sheetalaxmi, Ram Nawami, every Monday in the month of Shrawan, Krishna Janmasthami, Ganga Dashahara etc. Although no fresh data of all visitors has been made available to this bench, however, as we observe from the data collected by Pashupatinath Area Development Fund in 2052 BS, the number of visitors who paid homage to Lord Pashupatinath on the occasion of Mahashivaratri was recorded 65,000 which is highest among such major occasion¹⁴. One can easily guess that owing to mammoth growth of population in Kathmandu, development of air and land transport as well as information connectivity, this figure might have significantly increased during last 22 years.

But sadly, all these factors are contributing to adverse impact in heritage conservation. Heritages have their own carrying capacity each and it is natural to deteriorate life span of heritage when they have to carry more burden than what it can shoulder. An astonishing situation comes into view while witnessing human encroachment, dumping of garbage (solid waste), sound and air pollution on the temple, heritages, orchards and gardens, forests, Ghats (the bathing place on the bank of a river). A number of Mathas, temples and stone inscriptions are in turmoil due to lack of knowledge and negligence whereas many others are not getting renovated due to the lack of means and resources. Several ancient and invaluable artefacts and related documents have been stolen, and the provisions in regard to the management of Guthis are deteriorated because of greediness and selfish nature of the concerned authorities, and [as a result] the heritages have reached a sorry state. Besides, the construction of buildings resulting in adverse impact on the environment and growing urbanization have added challenges to heritage conservation. This being so, the earthquake of Baisakh 12, 2072 BS and frequent aftershocks thereafter have led to the collapse or appearance of cracks in the temple of Vishworupa, Shivalayas in Gorakhnath area, Dharmashalas around Gyuilleshwori, Bajraghar and four Shivalayas east of Panchadewal, and many other such temples and Shivalayas.

¹⁴ According to this statistics, it is found that 35760 people in Teej, 20850 people in Balachaturdashi, and in an average 4850 people every day made pilgrimage to Lord Pashupatinath in the year 2052 BS. See Pashupati Development Fund, **A Conceptual Framework of the Master Plan of the Pashupati Area**, 2053, at p. 10.

Once a beautiful, quiet, and peaceful place, the temple of Pashupatinath, its courtyard and premises (if called in the words of Master Plan “core area, consonant area and continuum”) and its surrounding environment have begun to sustain physical encroachment, fragmentation. A process of misappropriation, misuse and destruction of the property of the Lord Pashupatinath has begun. As a result, such a gigantic heritage site is shrinking gradually.

The use of the land of Pashupati in front of International Airport [in Kathmandu] can be cited as an illustrative case. Although one can understand that appropriation was invited by national need, however, [it is also a fact that] the land currently being occupied by the airport was once allocated by King Rana Bahadur Shaha for grazing cows and bulls offered to Lord Pashupatinath. It is found that an agreement had been reached between the Department of Civil Aviation and Pashupati Amalkot Kachahari (revenue collector and administrator of lands belonging to Pashupatinath) on 2039/9/23 BS regarding the use of the said land belonging to Lord Pashupatinath by the airport. [The agreement] states the following:

1. That Tribhuvan International Airport, for its expansion purpose shall utilize a land with area of 607 in Ropani and the revenue of which is being collected by Pashupati Bhandar Tahabil since a long time together with an area of land amounting of 554-14-3-0 Ropani now acquired, both totaling 1161-14-3-0 in Ropani whose revenue, at the rate of 23 Pathi rice per Ropani annually reckoning from a highest price prevailed during 15th to the last day of the month of Magh. The ownership of the land to permanently remain with Lord Pashupatinath.
2. That, apart from what is mentioned in sub-section (1) above, a land area of 29-12-0-0 in Ropani apportioned for wages to the employ of Pashupati Bhandar Tahabil (Treasury), the civil aviation development project shall pay to the office of Pashupati Bhandar Tahabil at the rate of Rs. 9,000 per Ropani amounting to Rs. 2,67,750 in total, the registration of which land shall be made in the name of Civil Aviation Department as tenant and the lord Pashupatinath as the owner, and the Department of Civil Aviation shall pay to the office of Pashupati Bhandar Tahabil per annum a tax equivalent to that of a leasehold (raikar) land.
3. No one can deny the inevitability of national need of Tribhuvan International Airport. But what impact did it have to the protection of the property of the Lord Pashupatinath is obviously a matter of grave concern. The reason for citing this deal here is that the language of these two provisions which mention that, “the land shall be permanently used by the airport while the ownership shall remain with Lord Pashupatinath” similarly that “the land shall be converted into leasehold (raikar land”, and that “Pashupatinath will be paid land revenue equivalent to the revenue of leasehold (raikar) land” [is destructive]. If the same language is used by the Amalkot Kachahari or the Bhandar Tahabil, [the two

offices] involved in the administration of other Guthi lands, a situation will arise whereby no property of Lord Pashupatinath will remain safe. It cannot be denied that such incidences are not also taking place in other land deals. Tilganga to Tamraganga road project should be perceived as another dimension of such encroachment. Issuing a warning regarding Guthi and destruction of heritage property, this court has observed many years back that "Any damage to the heritage belonging to Guthi, the culture associated with Guthi, and the value system based on Guthi is a serious loss to the nation. If national treasures are gradually lost in such fashion, the original identity of the nation may be lost one day and Guthi will be an example"¹⁵ Having said this, it is never true that what has been taking place in Pashupati area now is all erroneous. Now also some positive activities in the protection of heritages are being carried out. This aspect needs to be examined while resolving the third question raised at the outset. History is a witness to the fact that the act of renovating Pashupatinath temple, its courtyard and premises was taken as a pious deed by the then Maharajas, their kinsmen and courtiers. However, the initiation of the process of sustainable development and promotion of this area is found to have started only after the establishment of Pashupati Area Reforms and Development Board in the year 2032 BS through a Comprehensive Master Plan which took into account the historical significance of the heritage properties and also taking note of the need to prevent encroachment done or made in various turning point of time. After the creation of legal framework and establishment of the Pashupati Area Development Fund, the activities under Master Plan took momentum. And the preparation and execution of the Master Plan thus opened the door for renovation and restoration of the Pashupati area that was long neglected. At least, it has determined the boundary of Pashupatinath area which can stop fragmentation and encroachment and decimation of this area. As per the Master Plan the boundary of Pashupatinath area is as follows:

4. East: eastern most boundary of the old runway of Tribhuwan International Airport.
5. West: Ratopul, Kalopul Bridge over Dhobikhola and the Dhobikhola bridge lying between Handigaon - Chabahil Ganesthan route, and from this bridge, along the road that leads to Dhumbarahi and reaches to meet Dhobikhola bridge lying in ring road.
6. North: From Dhobikhola bridge in ring road at Dhumbarahi which leads to Chabahil junction and, a track road from Bhagavansthan that leads to Gaurighat; from behind an inn north of Gaurighat there is a road to go Bouddha running by the side of Bagmati river which meets north

¹⁵ Prakashmani Sharma v PM and Council of Ministers, NKP 2064, DN, 7885 at p. 1275.

of Guiheshwori and, then passes through the northern border of Kali Prasad Battalion to reach the old runway of TIA (except now added)

7. South: From the corner of old runway of TIA directly to International Terminal building of TIA and 260-meter south-west from TIA motor parking area and then 400-meter west, that meets the ring road and then ring road green belt, Gaushala junction to Ratopul bridge Dhobikhola.

The Master Plan, besides fixing the boundary line as above, has declared 264-hectare land area as Pashupati area and is thus found to have initiated protection activities in Pashupati area though in a slow pace. Since the work was commenced classifying the entire Pashupati area into core area, consonant area and continuum area, currently [a number of activities such as] the act of removing the houses and insecure structures of core area, construction of an open space in the northern side of the west facade of the temple area and an entry point from the southern side, repair and maintenance as well as renovation and maintenance of houses used for for mourning, electrical funeral house, construction of conference hall, landscaping activities in Vankali area etc. are now visible; management of drainage that leads to Bagmati, cleansings of Bagmati etc. are the other efforts of improvements. Likewise, some progress has been achieved in regulating the gift and donation offered to the God. This gives one a feeling that some positive developments are taking place in the Pashupatinath area. Hence, if works could be undertaken in a planned way with necessary reforms modifications in the Master Plan, the religion, culture, art, nature etc. of this place could be preserved and the dignity of Lord Pashupatinath area could be enhanced as a holy pilgrimage of Hindus.

After stating this about the works currently being undertaken on heritage protection, let's move now towards the fourth question which pertains to what type of impact would lay in the environment of that area by the construction of road in Tilganga and Tamraganga area and, the use of Sleshmantak forest area as human cemetery. For this also, we are required to proceed through the Master Plan itself. The Master Plan has included Mrigasthali and Sleshmantak forest in core and consonant area. While the premises of Guiheshwori temple premises falls in the core area the other areas of Mrigasthali and Sleshmantak forest fall in consonant area¹⁶. The Master Plan has pointed out that **“the jungle of this area should be provided full-fledged protection and; no encroachment should be allowed with strict monitoring to keep up the natural environment intact”**¹⁷. Analyzing the geographical and environmental situation of this area, the Master Plan further states- **“the geo-morphological structure of Mrigasthali and Sleshmantak forest area is very weak and is aggravated by active soil erosion of more than 20**

¹⁶ Consonant areas is an area outside the core area. The protection of this area makes the core area meaningful, strong and vivid. Given that the falls in the periphery of the core area, The Master Plan views that protection of this area saves the environmental pressure and pollution to the core area. See the Master Plan at p. 18.

¹⁷ See Id at p. 14.

incidences of landslides from 3 sides. Moreover, there is a practice of burying corpse in its south-western slope. Uncontrolled erection of tombs/cemetery using materials like cement, concrete against archaeological standard is on the rise now in this area. Owing to increasing pressure of the community burying the corpse and the narrowness of the area together with the tendency of creating permanent structure against archaeological code, the Selshmantak forest will be filled with graveyard upon graveyards, and natural environment will fully be aggravated by negative impact.” Citing Tilganga area as the most sensitive area from archaeological point of view where idol of Tri-Bikram belonging to the Mandev era has been found, the report has pointed out the need of research and excavation of that area. These matters mentioned in the Master Plan seem to be the most valuable reference in the context of resolution of the the present writ petition.

While examining the written submission of respondent Pashupati Development Fund, it is found that the Fund takes the position that no road should be opened in that area; given that the track road construction in the section between Tilganga to Gyuiheshwori has started at the initiative of Ministry of Works and Physical Planning, the Fund has requested to Department of Archaeology stating its view on the matter; and that the Fund called a meeting of Board of Directors in 2068/7/16 and decided not to allow the operation of the road till the Department of Archeology decided on the matter and encircle the road by having in place a wire fence. Since construction work cannot be carried out until the Department of Archaeology finally decides upon, till date operation of road in that area has been halted accordingly. The Fund also mentions that the task of selection of contractor by the Fund is now in progress following a tender notice in the newspaper on 7th of Chaitra 2071, for the construction of retaining wall on both entry points of the motorable road for blocking the movement of the traffic and protection of the forest; that except what existed there from ancient times, to open other roads inside the Pashupati jungle area is inappropriate; that the Fund does not have any plan to open road there; and that from its side the Fund has prevented the operation of the road, and so therefore, the writ should be quashed.

Although nothing has been mentioned in the written submission about tombs however, the learned counsel representing the Fund has argued that the Fund has reached a decision in that regard too. In the written submission of respondent Kathmandu Road Division Office – I, that a tender has already been opened for the construction of Tilganga - Tamaraganga road section and tunnel construction and the Division Office has entered into a contact agreement on 29th of Ashad, 2067 to that effect and the contractor has taken away mobilization advance amount. However, by virtue of a letter dated 25th of Jestha 2068 as the Department of Archaeology by referring to the recommendation No. 2 of the report of its expert team of the UNESCO World Heritage Center, which has asked the government to abandon the construction work in the proposed site and suggested the search for alternatives beyond World Heritage property, has written [to us to abide by the

request], accordingly the construction work has been stopped till date; and that as nothing has been done as claimed in the writ petition, so, therefore, the writ petition should be quashed. In a situation when Pashupati Development Fund, who is entrusted with the responsibility of protection of the area and the Road Division Office responsible for the construction of the road [in dispute] have given such a reply mentioned above, it should be generally presumed that the road construction work is not being carried out in the said area. However, as the report of a team assigned to conduct field study led by the Joint Registrar of this Court has stated that a graveled track road is in operation and that vehicles are plying in that area, also that human graves are visible here and there, it is found that the respondents have not presented the real picture to this Court.

The field study report submitted on 3rd of Bhadra 2073 to this Court by the team led by Joint Registrar Mr Nripadhoj Niroula has been found to state the following:

- a. A graveled motorable road with 675-meter length and 7-meter-wide from Tilganga to Gothatar (Tamraganga) is seen passing through the heart of the Sleshmantak forest of Pashupati area. According to the locals, the road was opened in 2064 BS. During the field visit a muddy road in poor condition was found to be in existence and means of transportation such as motorcycles and vehicles were found to be plying.
- b. After the opening of road in that section a gradual degradation of forest resulting to soil erosion and landslides is found, and the area has been converted into a dumping site for locals and others. Due to easy access of road, the human graveyards are found dug and corpses buried everywhere. Pollutant industrial effluents, garment disposals as well as carcasses of cattle dead bodies piled in either sides of the road were visible.
- c. Though it is said that the road was opened for the ease of the locals however, the locals are facing increasing security threat because of the road, pedestrians were found suffered from rampant pollution and bad odor spread because of throwing dead cattle bodies over there.
- d. It was found that Sleshmantak forest, situated at the North West side above the road is being used for graveyards by Dashnami sects of Sanyasis, and visible are the human tombs there about. In the past, concrete structure were created for keeping the corpse inside. However after regular inspection by the Pashupati Area Development Fund such cemented structure are prohibited. Now as reported by Mr Pashupati Thakur, sub-engineer of the Fund, corpses are buried by digging the earth. As one steps down from Vishworupa temple towards the newly opened disputed road, passes through the jungle human graves dug and covered with mud are found everywhere on the road sides, though no recently made new concrete structures were found.

Through the above mentioned particulars of the field report, it is revealed clearly that the claim of Pashupati Development Fund in its written submission that the road is not permitted to operate in that area was not true. In like manner, it is also found that the decision taken by the Fund on 16th of Kartik 2068 stating that “as it is inappropriate to run vehicle in the area and for preventing commutation for the present moment, put wire fence and close up the road” is found limited only on the paper. Such a deceptive reply from an agency responsible for the protection of Pashupati, an agency under obligation to check all kinds of encroachments to the contrary of the field inspection report is not befitting. Such an inaction, indifference or irresponsibility cannot be tolerated at any cost. This reply indicates a situation whereby Pashupati Development Fund has not discharged the responsibility entrusted to it by Section 10 of Pashupati Area Development Fund Act, 2044. This being the situation regarding the said road, in regard to the matter pertaining to rampant burying of corpses and construction of concrete structure over them- a matter not spelt out in the written submission - the decision of the Fund dated 2067-09-14 which in section 1 mentioned that “the construction of permanent structure over the grave and burying corpse in Mrigasthali area is prevented”, in the absence of implementation also found limited only on paper.

It is the duty of all Nepali people to bring about improvement in the situation prevailing in the Pashupati area-one of the seven heritage sites of Kathmandu Valley declared by UNESCO in 1979. Attention of UNESCO has naturally been drawn on the matter relating to construction of road that may threaten the integrity of Mrigasthali and Sleshmantak forest which has remained an integral part of Pashupati area. After a track road was opened in the disputed area by mobilizing dozer in the lead of Department of Road, UNESCO at the request of Department of Archaeology, conducted on-field observation by Expert Advisory Mission of the disputed area from 12 March to 17, 2011 and prepared a report. The Mission, in its report suggested for the adjournment of road construction in the proposed site which may incur loss to the property of Pashupati area listed in World Heritage and, stop the felling of trees of Mrigasthali – Sleshmantak forest, and avoid further deterioration of integrity and tranquility of that area, restoration of natural water spring, preparation of a map that ascertains the heritages of Pashupati area and search for possible alternatives of road construction from outside the monumental area. Section 2 of the suggestion provided by the Mission reads:

“Abandon the project to construct a tunnel road in its concurrent alignment and current form because of its significant negative impacts on the (property of) outstanding universal values, authenticity and integrity of the World Heritage Property”.

Mission in its detailed report gives a brief account of key decisions in regard to heritage protection made from 1979 to 2008. Recalling that Heritages of Nepal were enlisted as heritage in danger from 2003 to 2007, [the report] suggests member state that it formulate an Integrated Management Plan that avoids harm to

the integrity and authenticity of monument sites. Basically, the Expert Mission is found to have considered it wrongful to construct road without conducting Environmental Impact Assessment (EIA) and Heritage Impact Assessment (HIA). Upon examination of the report of the mission, it is found that the policy of the UNESCO is not to halt any kind of work in areas where properties of outstanding universal values are located, but to stop those constructions that may cause harm the integrity and authenticity of the property. In a situation where an underground tunnel road is inevitable the report does not seem to have closed the possibility of choosing appropriate route in consultation with UNESCO Experts Mission and without incurring any damage to the property over the land and on the integrity and authenticity of the property.

In the perspective of what is happening in Mrigasthali and Sleshmantak forest area is now, it is found that from ancient times Pashupati Kshetra has been respected as a center of faith and a holy pilgrimage site of different sects of Hindus such as Boudhha, Jain, Sikha etc. spread throughout the World. The fact that in the Pashupati area, which is spreaded in an area of 264 hector comprising Deopatan, Jayabageshowri, Gaurighat, Chabahil, Kutumbahal, Sifal, Gaushala, Pingalasthan and Sleshmantak forest, there exist about 518 temples, public inns (Sattals) stone tap, Chaitya, Bihar, Stupa, Devalaya, religious and historical monuments of various patterns big and small, and about 1000 Shivalingas reflect the speciality of the area.

The letter sent by Department of Archaeology to the Department of Road on 22 of Paush, 2068 BS also affirms that Pashupati area, including Mrigasthali and Sleshmantak forest, is a protected monument site enlisted in the World Heritage list. It is an area to be governed by Ancient Monument Protection Act, 2013 BS which is also conformed from the written submission of Council of Ministers' Secretariat. Therefore, government is obligated to implement the provisions contained in sub-Sections (1) (5) (7) of Section 3 of that Act. It does not appear from the case file that the Department of Road or the Project Office had coordinated with Pashupati Development Fund, or obtained approval of Department of Archaeology prior to mobilizing dozer to construct road through the forest of the heritage site. Nor does it to appear that prior to the construction of such a huge road having significant impact on the environment, the EIA had been carried out fulfilling the procedures laid down in sections 3, 4, 5, 6 of Environment Protection Act, 2053. From the above, it is clearly seen that the activities undertaken in the said area have clearly contravened UN Convention on World Natural and Cultural Heritage 1972 to which Nepal is a party, and provisions of Ancient Monument Act, 2073 and Environment Protection Act, 2053 BS.

Now turning to the last question as to whether or not an order as demanded by the petitioner should be issued, in different paragraph above, we examined the adverse impact being sustained on the property of the Lord Pashupatinath and on the protection efforts of historical religious and cultural property of Pashupat Kshetra. Despite being a center of faith of all Hindus all over the World, attack has been made to the property, culture and civilization of Pashupat Kshetra, knowingly or

unknowingly or due to shortsightedness or greed at in different points of time. In this context, taking note of the possible adverse impact to be caused by disintegration, it is imperative to safeguard its integrated form as per the key objectives and spirit of the Master Plan of Pashupati area. Due to the lack of foresight over environmental sensitivity of Mrigasthali-Sleshmantak forest, this area has been in the midst of soil erosion and landslides, and the proposed road together with the practice of unscientific and rampant burial of corpses has made the situation further devastating, now therefore, such a situation needs to be stopped immediately. Besides, since the protection of the entire Pashupat area appears so urgent, therefore, the issues raised in different paragraphs above need to be studied and understood and addressed appropriately. It is observed from written submission of respondent Road Division Office, Kathmandu – 1 to the effect that although a decision was reached to construct tunnel road in Mrigasthali – Sleshmantak forest area from Tilganga to Tamraganga and a contract agreement signed on 29th of Ashad, 2067 the construction work has been discontinued after a letter on 28th of Mangsir 2067 of Department of Archaeology along with a letter from UNESCO calling for the study of the impact likely to have on OUV of that area and, since point No. 2 of the Report of the Experts Mission of UNESCO World Heritage Center called for abandoning the construction of tunnel road in the proposed site and conduct detailed study outside the heritage property and look for other alternative measures no construction work has been carried out; and as the Pashupat Area Development Fund as well as Department of Archaeology are found against the construction of the road. Therefore, no situation arises where the order of certiorari would be required to be issued in this case. However, as the report of the field inspection conducted by the Supreme Court has stated that even today vehicles are operating in the track road so opened, therefore, it is decided to issue an order of mandamus in the name of the respondents to construct necessary barriers as it may deem appropriate including the construction of retaining wall in both the opening of Tilganga – Tamraganga road; also, to immediately implement the decision of Pashupati Development Fund reached on 14th of Paush 2067 in regard to burial of corpses in Sleshmantak forest area.

Now, so far as whether or not there exists a situation for issuing directives for the protection of heritage or the protection of environment of Pashupati area is concerned, all the concerned stakeholders are required to move forward by internalizing the concept of sustainable environmental development in the sphere of heritage and environment protection. The Constitution takes the view that there should be a proper balance between environment and development while undertaking development initiatives of the nation. This also cannot be ignored. On the basis of analysis made in different places above it comes to appear that the property of Lord Pashupatinath, particularly, the Guthi property is heading towards a situation whereby it is getting fragmented and destroyed. This bench has a firm view that such practices should be stopped. Studies reveal that in the past, there were many gardens in different places of Pashupati area. But they also are found to be in the verge of either deterioration or fragmentation. Today because of the road between Chabahil and Gaushala hardly anyone feels that the

Bhandarkhal garden was an integral part of the property of Pashupatinath. Similar situation exists regarding the Guthi land belonging to Pashupatinath lying around Guiheshwori, Gaurighat, Gothatar. A daunting question in front of us is about how to stop fragmentation of property and how to integrate the properties already torn apart, and how to provide the entire area a wholesome ambiance and form.

The temple of Lord Pashupatinath, its courtyard and premises, the heritage of the whole Pashupat Kshetra are the invaluable treasures bestowed on us by our ancestors. It is the duty of the present generation to handover this property in condition far better secured, protected and well managed than today to the posterity. Looking from this perspective, while there is a need to protect the heritage and property of the Pashupati area from natural, environmental and human encroachment, it is also necessary keep it well managed and preserve it in a planned way taking into account the population increase, population density, growing popularity enhanced by easy transport access and communication resulting in the increasing pressure of the pilgrims. It is never the view of this Bench that no new structure should be built at all in the Pashupati area. We do not have expertise so to claim either. If one visited Pashupatinath area, one can easily imagine that from ancient period, structures therein were built without any plan at hand. Due to this, the entire area looks disorganized which needs to be changed. As a Master Plan for the protection of the Pashupati area already exists now therefore, it seems necessary to carry forward the conservation work by expanding the scope and improving the Master Plan in consultation of local and international stakeholders. Tunnel road may be required indifferent places to avoid the fragmentation, but the property should not be made subject of encroachment at the request of limited interest group and in the absence of any plan. Therefore in case of Pashupatinath area, as soil erosion and landslides has been occurring since a long time in the Mrigasthali and Sleshmantak forest area, resulting to disfigurement of the area where track road has been opened therefore, this directive order is issued in the name of the respondents to carry out at least to the following tasks for the sustainable development, protection and management of the said area and also the entire Pashupati area:

- a. For the prevention of environmental degradation and reinvigoration of the forest property, reinstate the forest property, carryout the functions of filling up mud in necessary places, construct support wall, carry plantation to avoid soil-erosion in Mrigasthali – Sleshmantak forest area to reinstate the area as before where motorable road has been opened now, and the areas east and west to that, demolish concrete structure so far made.
- b. Rejuvenate and reinstate the historical Kunda (ponds) of Mrigasthali-Sleshmantak forest area.
- c. Construct and improve foot trails for the comfort of devotees and pilgrims who would like to enjoy on foot travel and, for those religious travelers who come to observe Balachaturdashi and Shivaratri occasions and, for pedestrians who would like to wander into the jungle.

- d. Do not to construct any new permanent structure contrary to the objective and spirit of the Master Plan in Mrigasthali area and keep the open space and jungle area intact; repair and maintain only those archaeologically important structures which are urgent through the historical and current point of view of utility. If any new construction work is deemed necessary carry out the construction in the Guthi land outside the core and consonant area.
- e. Make arrangements for the protection and cleanliness of the entire area of the Mrigasthali and Sleshmantak forest.
- f. In view of the growing population and density of the Kathmandu Valley there is a need to stop the burial of corpse within Mrigasthali and Sleshmantak forest and as the writ of mandamus to this effect has been issued above, make arrangements for an alternative space without harming the spiritual sentiment of the concerned sect.
- g. Draw clearly visible demarcation line in areas not clearly marked as pointed out by Experts Mission of UNESCO.
- h. For the purpose of evolving an integrated conservation and development the Pashupat Kshetra, and for the protection and proper management of Guthi land, heritage, orchards and gardens, expand and improve the scope of Master Plan to ensure sustainable management and development of properties situated in Deopatan and other areas.
- i. Act in a planned manner towards developing the entire Pashupati area as a spot for holy pilgrimage and as a center for religious tourism of all devotees throughout the world.
- j. For the above purpose cause the arrangement of necessary budget and technical cooperation from the government.

Let a copy of decision be sent to the respondents for information and necessary action and about the order and implementation thereof and forward the file of the case in archives as per rule.

S/d

Justice Dr. Ananda Mohan Bhattarai

I concur with above.

S/d

Justice Anil Kumar Sinha

Bench Officer: Jeevan Kumar Bhandari

Translated by: Advocate Bhimnath Ghimire

Done on 6th Poush, 2073 BS (Corresponding to 21st December 2016)