

**Suray Prasad Sharma Dhungel v. Godavari Marble Industries and Others**

Supreme Court, Full Bench

31 October 1995

Writ No. 35 of the year 2049 B.S (1992)

**Judges:** Hon`ble Trilok Pratap Rana, Hon`ble Laxman Prasad Arya, Hon`ble Gobinda  
Bahadur Shrestha

**Order**

As per the judgment dated 049-5-8 (Aug. 24, 1992) of the Division Bench of this Court, the facts of this writ petition presented before this Bench, pursuant to Rule 3 (a) of the Supreme Court Rules, 2049 (1991) are as follows:

1. Legal and Environmental Analysis for Development and Research Services (Pvt.) Ltd. which is called as LEADERS Inc., is an institution, registered under the Companies Act 2021, with the objective of conducting research, study, analysis in the area of environment and law as well as promoting environment conservation. This institute, in accordance with its objectives, has been conducting the business of research, analysis and study on the subjects of environmental condition, environmental pollution, degradation of environment and negative effects of the same, root causes of the degradation of environment, necessary measures and attempts for protection of life, property, prosperity, peace and healthy life of the people by maintaining healthy and clean environment etc., including within the environmental and legal matters of the various sectors of Nepal.
2. It has been found that the Respondents activities have caused and have been causing, in violation of the Constitution and law, very serious environmental degradation in the Godawari forest and its surroundings, which are rich in natural grandeur and have historical and religious significance. It has an area of 15 sq. miles within Godawari Adarsha Village Panchayat situated North West to Phulchowki Hill of South East Lalitpur District lying within Kathmandu valley. Such deeds of the Respondents have failed to conserve appropriate natural heritage and protect it from danger caused to the property, life and health of the people. Since the Respondents have also prohibited the Petitioner from studying and researching in the said area and they have infringed the rights of the Petitioner, this writ petition is hereby submitted for protection of public interest and enforcement of the rights of the Petitioner. Since the aforesaid deeds of the

Respondents violate the responsibility enshrined in the Articles 9 (b), (c) and (d) of the Constitution, and undermined the constitutional rights guaranteed under Articles 2, Article 10, Article 11 (1) (2) and Article 15 of the Constitution, the Petitioner has submitted this writ petition under Section 10 of Court Proceedings of the Country Code, Section 5 of the Forest Conservation (Special Provision) Act 2024 and in accordance with principles propagated by the Supreme Court. The following unconstitutional and illegal activities of the Respondent, Godawari Marble Industries have caused a huge public loss. Good environment is one of the prerequisites for a personal life. But the dust, minerals, smoke and sands emitted by the said factory have excessively polluted the spring's water and nearby water bodies, land and atmosphere of the said area. Thus it is continuously deteriorating the health, life, education and profession of the research experts of the Petitioner institute, the students of St. Xaviers school, the laborers working in the industry and their family members and ultimately the local inhabitants. While blasting dynamites, crushing stones and transporting boulders and marble, even the minimum security measures have not been adopted or granted neither by the industry nor the government. No measure has been adopted to halt the negative impact and loss on the environment. The Respondent industry has no constitutional and legal right to endanger others' life. The local Panchayat including all the Respondents are equally responsible for remaining silent and not implementing any legal measure to thwart this type of unauthorized activity of the industry. The 11th and 12th Village Assembly of the Local Village Assembly had requested the Department of National Parks and Wildlife Conservation, Department of Forest and the Royal Palace to declare the Godawari area a National Park and to halt the deforestation and environment pollution created by the said industry. Since the villagers' committee has appealed to the Prime Minister and the Forest Minister to this end, it has been proved that the Respondents have shown no interest in ensuring public welfare, security of life and halting the activities degrading the environment. From the above-mentioned facts, it is clear that the subject is of public interest and concern. Hence the petition has been filed seeking mandamus or any appropriate order in the name of the Respondents, to enforce the right of the people to live in healthy environment, security of life and property and live a peaceful life.

3. An order has issued by the single bench of this Supreme Court for a show cause notice to the Respondents and to present the affidavit of the same before the bench. The written statement submitted by Mr. Mukti Prasad Kafle, the Secretary of the Ministry of Works and Transport contended that the Ministry is not engaged in any sort of works and proceedings which have caused any negative effect or destruction to nature. The Ministry has not thwarted the legitimate rights of concerned people as provided by the Constitution. The petition filed in the respected Court by making this Ministry a Respondent is baseless and ill-motivated. In that view of the matter I request the respected Court to dismiss the petition.
4. The written statement submitted by Mr. Ashok Kumar Todi, the chairman of the Board of Directors, an authorised person on behalf of the Godawari Marble Industry contended that while studying the writ petition, it is clear that this petition is filled with ill motive and vested interest. The petition aims to create a negative impact on the goodwill of this company gained in the industrial area and operating under prevailing laws and Regulations. This company has obtained the license on 2034/7/24 (Nov. 9, 1977) from the HMG Department of Industry, for expansion and modernisation of the marble industry. The question of the legality of its activity does not arise since it has been conducting its works under the existing rules and regulations after obtaining the incorporation certificate and certificate of mining from the Department of Mines. The Petitioner has filed this petition on the ground of public interest in accordance with extra ordinary jurisdiction without obtaining permission from HMG or the Court, thus violating Section 10 of Court Proceedings of the Country Code. Therefore, there is no situation requiring action to be taken. The company enjoys no special facilities from HMG Nepal and has obtained facilities similar to that given to other companies. It has also been provided with a license to operate mining. Therefore the allegation that other persons have been deprived of the business and profession related to natural resources is completely misleading and is without any grounds. Hence, I request the respected Court to dismiss the petition.
5. The written statement submitted by Mr. Birendra Nath Khujeli, Secretary of the Ministry of Forest and Soil Conservation has contended that it has not granted permission to the Respondent industry for encroachment outside the area except in accordance with the

license obtained from the Department of Mines and Geology. This Ministry has been keeping vigilance on the same and has been conserving the area, but the Petitioner couldn't produce any evidence indicating that this Ministry has not conserved the area. This writ petition is not true as it is filed against the license issued in accordance with law by the Department of Mines and Geology of HMG and making the Ministry of Forest and Soil Conservation, His Majesty's Government the Respondents. Therefore, I request the respected Court to dismiss the writ petition.

6. The written statement submitted by Mr. Yogendra Nath Ojha, Acting Secretary of the Home Ministry states that the writ petition filed by the Petitioner, Mr. Surya Prasad Sharma Dhungel, has nowhere mentioned the order of this Ministry that could endanger public interest. This Ministry has issued no such order and also the Petitioner hasn't been able to produce any evidence of the misdeed of this Ministry to this end. I duly request the respected Court to dismiss the writ petition filed against this Ministry.
7. The written statement submitted by Mr. Ananda Bilash Upadhyaya, Deputy Director General of the Royal Botanical Garden, Godawari, Lalitpur states that it has not permitted illegal land acquisition in the outside area except through a license obtained from Department of Mines and Geology. This Garden has been keeping vigilance on the same and conserving the area. Since this garden is committed to conservation and preservation of its natural resources, the Petitioner hasn't been able to produce any evidence in support of its allegation that this Botanical Garden has failed to carry out its responsibility. Moreover, the writ petition filed against this Botanical Garden and Ministry of Forest and Soil Conservation in relation to the license duly issued by the Department of Mines and Geology of His Majesty's Government is itself contradictory and thus appears void. I therefore, hereby duly request the respected Court to dismiss the writ petition.
8. The written statement submitted by Mr. Lok Bahadur Shrestha, Chief Secretary of the Cabinet Secretariat states that the Petitioner, in his writ petition, hasn't been able to produce any evidence as to which decision of the Cabinet Secretariat has violated the Petitioner's rights. On top of that, the Cabinet hasn't taken any decision so far to undermine public interest. Hence, I duly request the respected Court to dismiss the writ petition filed without having any basis, against this Secretariat.

- 9.** The written statement submitted by Mr. Sushil Bhattarai, Acting Director General of the Department of Soil and Watershed Conservation has contended that it is the responsibility of everybody to preserve and conserve the greenery and natural flora and fauna in Godawari, Phulchowki area and this Department is committed to protect the overall environment, including that of Godawari, Phulchowki and its surroundings. Hence I duly request the respected Court not to issue order as asked by the Petitioner against this Department.
- 10.** The written statement submitted by Mr. Bhuwaneshwor Khatri, the Secretary of the Ministry of Industries states that while thoroughly reading out the writ petition the writ Petitioner hasn't been able to provide any evidence as to which decision of this Ministry and on what ground has this Ministry violated the legitimate rights of the Petitioner. Moreover the Petitioner hasn't been able to elicit any proceedings of this Ministry that make it liable. On top of that, the Ministry has undertaken no decision as to undermine the public interest so far. In view of that matter, I duly request the respected Court to dismiss the writ petition filed against this Ministry.
- 11.** The written statement submitted by Mr. Santa Bahadur Rai, the Secretary of the Ministry of Housing and Physical Planning states that the license for the establishment of the Godawari Marble Industries wasn't issued by this Ministry as this Ministry was created after the establishment of the said industry. Hence I duly request the respected Court to dismiss the writ petition filed against this Ministry.
- 12.** The written statement submitted by Mr. Purushottam Silwal, the Chairman of Godawari Village Panchayat, Lalitpur states that Marble Factory has contributed to local development which has created more employment opportunities to the local people. Local people have not faced any inconvenience and insecurity because of the factory. This Village Panchayat through its decision dated 2045/5/18 B.S. (Sept 3, 1989) had replied to the letter sent on 2045/4/32 B.S. (Aug. 16, 1988) by the Lalitpur District Forest Office; Godawari Area, deciding to allow the said industry to continue its operation. This also substantiates that the allegation put forward by the Petitioner is insubstantial and baseless. Hence I request the writ petition be dismissed.
- 13.** The written statement submitted by Mr. Mahendra Narashingh Rana, the Director General of the Department of Mines and Geology states that Section 3 of the Nepal

Mines Act, 2032 B.S., stipulates that all the minerals lying under or found in any part of the territory of the Kingdom of Nepal are the assets of HMG. The Mine Act and Rules were promulgated with the objective of timely mobilisation, and development of minerals which are the property of HMG by managing mines, and appropriate management of minerals. The Godawari Marble Industries has obtained a license on 2021-1-30 (May 12, 1964) from the Department of Industries to operate the industry. This Department on 2021/3/18 B.S. (July 1, 1964) has provided a lease of mining marble around the area extending 1760 ft, 4790 ft, 174 ft and 625 ft to the East, West, North and South, respectively, of the bridge situated in Godawari Road in front of the mine lying in Godawari, located at Ward No. 5, Kitni Village Panchayat. This was done on the basis of the power entrusted to it by Rule 15 of the Minerals Rules of 2013 B.S. and Section 7 of Nepal Mines Act 2032 B.S. Since mineral resources are the economic backbone of the country, and the decision undertaken by this department was targeted for the overall national upliftment, I hereby request that the writ order shouldn't be issued to the Respondents on the baseless allegation of environmental pollution.

- 14.** The written statement submitted by Mr. Shambhu Silwai, on behalf of Lalitpur District Panchayat, Lalitpur states that due to the Marble Industry and other industries operating in this area, local people have secured job opportunities which have resulted in local development as well as national economic development. On consideration of this matter, the village Panchayat has also recommended the renewal of the certificate of the Godawari Marble Industry to the respective authority. The said area has been developed with the help of the industries operating in that area. Establishment of governmental and non-governmental offices and religious institutions is generating employment among the local people and they are utilizing such facilities. The 13th session of the village panchayat meeting also proposed to declare all the forest areas except the area in which industries, government and non-government offices and religious institutions are currently operating, as the National Park. Thus, I duly request the respected Court to dismiss this writ petition, which is insubstantial and motivated by misleading and false rumors.
- 15.** As there has been no clear legal provision for the subject matter of environment, it might not be wise enough to incorporate some of the principles of foreign countries in our

country. It is most important for the concerned authority to undertake appropriate measures in order to safeguard environment. But the mere interest and concern of an organization is still inadequate for the establishment of environmental rights by law. The Respondent, Godawari Marble Industries, seems to be a licensed industry, registered under law by the concerned Department. Hence there is no doubt on the Hon`ble Judge Mr. Gajendra Keshari Bastola`s decree of rejecting the writ petition. The constitutional obligation of this Court to ensure public interest through the use of its extraordinary jurisdiction is unquestionable.

**16.** Thus at the instance of the facts present in the writ petition including those present in the report of Mr. Bhairab Risal`s team; the writ of Mandamus is to be issued calling upon the Respondents Ministry and Mining Department to carry out necessary investigations before renewal of the license of the industry, for the sake of safeguarding the environment in and around Godawari area. If the environment isn`t maintained despite these measures and the environment pollution worsens due to the lease given to the Respondent industry, the contract has to be cancelled in the view of public welfare. The latter shall be done after providing adequate compensation to the Respondent industry as provided for by Rule 25 (1) of the Minerals Rules (Amendment and Renewal) 2018 B.S. If the amendment in the contract is feasible, then appropriate amendments shall be made to control the environmental degradation. Further, it has been viewed by Hon`ble Justice Kedar Nath Upadhyaya in his dissenting judgment delivered on 2049-5 8(Aug. 24, 1992) that the writ of mandamus should be issued to the Respondents Department of Mines and Geology and Ministry of Forest and Soil Conservation stating that all appropriate measures must be taken to maintain environmental balance in the Godawari area.

**17.** Mr. Prakash Mani Sharma and Mr. Upendra Dev Acharya, the learned Advocates, appearing on behalf of the Petitioner have put forward Article 11 (1) of the Constitution of Nepal, 2019 B.S. which provides that no person shall be deprived of his life and personal liberty save in accordance with law. The works carried out by the Respondent Godawari Marble Industries have caused imbalance in the environment. The dust and sand produced during the explosions which is being undertaken in the mining process has polluted the atmosphere and water of the area, and caused deforestation. Due to the continuing environmental degradation and pollution created by the said industry, right to

life of the people has been violated. The absence of appropriate environment caused diminution of human life. There are plenty of examples of various types of animals and birds which have disappeared from the earth due to a harmful environment. Human beings may also become extinct if there is no conducive environment. Environmental issue is not a matter related to a specific person, it is the matter of all and in public interest. Environmental degradation imparts its untoward effects not only to a limited area but encroaches upon the surroundings and the entire nation. The Petitioner, LEADERS Inc., does have locus standi, as protection and conservation of the environment is the objective of the Petitioner and environmental problems in Godawari area has an adverse impact on the Petitioner as well. The Supreme Court of India, while delivering its judgment in various environmental cases, has interpreted the constitutional provision that no person shall be deprived of his life except in accordance with law, liberally, and established various precedents that where polluted environment is likely to damage life of individuals, any person can file writ petition.

**18.** Substantially an environmental issue is a matter of public interest and the term public rights used in the Article 88 (2) of the Constitution of the Kingdom of Nepal, 2047 (1990) B.S. implies the common right provided by any law or Constitution in any community or people of the Kingdom of Nepal. This fact has been established in the writ petition of *Radheshyam Adhikari v. Kalyan Bikram Adhikari*. As the present writ petition represents both the public interest and public right, it cannot be said that the Petitioner does not have locus standi. Since the Petitioners` locus standi in case of public interest is very broad, the question of locus standi in the present case can`t be limited. In *Ajit Kumar v. Krishna Narayan Shrestha* [Writ petition No. 3092], the Supreme Court has formulated the principle that if public property is not preserved properly, anybody concerned with the public property can approach the Court with the aim of preserving that property. Similarly, the present issue is also a matter of public interest, therefore any concerned person can file a writ petition. Under the Directive Principles and policies of the Constitution of the Kingdom of Nepal, 2047 (1990) B.S there has been a constitutional provision which states that the State shall give priority to the protection of the environment and prevent its further damage from various physical development activities, by creating awareness among the people on clean environment. Since the



Indian Supreme Court in *Shree Sachidananda Pandey v. State of West Bengal* [AIR 1987 1109], has propagated a principle based on the Directive Principles of the State. As the Directive Principles of our Constitution also talks of environmental preservation, the existence of locus standi of the Petitioner in the present case can not be ruled out.

- 19.** So far as the environment is concerned, the frequent explosions during the mining operation of the Respondent have created an environmental hazard in that area. Due to the pollution of sound and the overall atmosphere, rare species of birds and butterflies are disappearing at an alarming rate. There are plenty of species of bird and butterflies in the Godawari area which are rare. This is an area which is famous for flora and fauna. But flora and fauna have been badly affected by the explosions of dynamite. Due to continuing deforestation, the fertility of land has decreased a lot. Huge stones that have been pelted during the frequent explosions have created a panic amongst the local inhabitants and the students of St. Xaviers School. There is also a Godawari Pond in this Godawari area. Godawari area is a religious place and it has cultural, archaeological and biological importance. There are 600 species of butterflies and 259 species of birds in Godawari area. However, the activities of the Respondent have created an overall deterioration in the natural flora and fauna of that marvellous area. Some taps of the Tsfau Dhara (Nine taps) are on the verge of drying and the water in the Godawari Pond has been affected by the said industry.
- 20.** Even from the economic point of view, the activities of the Respondent are against the economic welfare of the nation. It has caused unbearable loss of natural flora and fauna, decreased fertility of soil by erosion, caused pollution of the rivers and air, and it is a gross economic loss which is many times greater than the royalty it pays to HMG of Nepal. Neither new technology nor any equipment has been installed to minimize the air, water and sound pollution. There has been no security measure undertaken for the workers of the said industry. Since the Respondent industry is capital intensive rather than labour intensive, it has not been able to make any contribution in providing employment opportunity. The negative impact caused by the Respondent on the environmental, natural and cultural heritage is much greater than the royalty of Rs. 20,000/- it pays annually to HMG of Nepal. During mining of marble, 1400 hectares of land have been contaminated with soil, sand and lime thus reducing the fertility of said

land. Also, because of the presence of marbles and boulders, the drinking water and irrigation source of the Phulchowki hill has been drying up. Moreover, the quality of the drinking water has declined due to the mining operation.

- 21.** Different reports about the effects of the Respondent industry on the environment of the Godawari area have been published. A review of the environment of Godawari area undertaken during Shrawan 2045 (1988) B.S. by the Environmental Impact Study Project, Thapathali, the report put forward by a research group led by Mr. Bhairab Risal, and the investigation report projected by a research group led by Dr. Narasingh Narayan Singh have been published. Sufficient discussions on the environmental hazards poised by the Marble Industry along with their appropriate solutions can be obtained from those reports. The United Nations Conference on Environment Development, Rio de Janeiro, has treated the environmental problem as a serious threat to mankind and HMG has expressed its commitment in environment conservation by ratifying the aforesaid Convention passed in Rio de Janeiro. In this context, conservation of environment has become an important obligation of the government. When an industry, targeted at a specific economic benefit, has more adverse effects than the services it provides, has a negative effect on rare species of birds, insects, flora and fauna and ultimately the whole mankind, it is inappropriate to operate such industry. It may be mentioned herein that the Indian Supreme Court in an environmental case between *R.L.E. Kendra, Dehradun v. State of UP and others* [1989 SCC Supl. (1) 537], had put a halt to the mining operation. Since the Respondent industry is the cause of environmental degradation in the aforesaid area, the learned Advocates on behalf of the Petitioner demanded that the writ of Mandamus be issued for immediate closure of the Respondent industry.
- 22.** Mr. Akbar Ali Mikrani, the Learned Government Advocate clarified on behalf of the Respondents including Ministry of Forest and Soil Conservation and others, that HMG is well aware of its duty to maintain environmental balance in the Godawari area. The writ of Mandamus is issued if HMG has not undertaken any of its responsibilities. But the HMG, in the context of Godawari Marble Industry, has issued various directives to safeguard the environment of Godawari area and those directives have been implemented. In case there has been environmental pollution due to the Godawari Marble Industry, the measures to safeguard environment should be implemented rather than

closing the industry. If the latter is done, the country will have no industries in the future. The Petitioner is an organization registered under the Companies Act. As only the affected party can file a writ petition, the aforesaid organization bears no locus standi at all. The Petitioner has not been able to show the right that has been violated as alleged in the petition. In such a situation no writ can be issued. Hence Mr. Akbar Ali Mikrani, the learned government Advocate, demanded that the petition be dismissed. Mr. Shambhu Prasad Gyawali, the learned senior Advocate, on behalf of the Respondent industry, mentioned that there is no difference of opinion between the Hon'ble Judges as to the locus standi of the Petitioner before the Division Bench. It is important to see the legislation, which Hon'ble Judge Mr. Kedar Nath Upadhyaya has cited, while establishing locus standi.

- 23.** After repealing of the Nepal Mines Act B.S. 2013, Nepal Mines Act B.S. 2023 has been promulgated. Section 9 of Nepal Mines Act 2023 empowers HMG to direct the mine owner or issue necessary orders or instructions in accordance with the Rules Formulated under the Act. But the Rules have not been formulated under the Nepal Mines Act B.S. 2023. The Minerals (Amendment and Consolidation) Rules B.S. 2018 were formulated under the Nepal Mines Act B.S. 2013. Rule 6 of the said Rules provides the contents of license and Rule 23 stipulates the conditions which the mining contractor must abide by. The Nepal Mines Act 2042 B.S. which has not come into force yet, should not be considered as the authority. It is not clearly mentioned in the petition the exact provision of an Act that the Respondent has violated. If a section of law is violated, then the writ of Mandamus is issued. But such condition has not arisen in the current writ petition. Nepal Mines Act 2023 B.S. has no provision for environment. Though Rule 23 of the Minerals (Amendment and Consolidation) Rules 2018 B.S. provides for preconditions, it does not stipulate any condition relating to the environment. Similarly, Rule 25 of the said Rules has vested in HMG, the discretionary power to cancel any mining contract. The power to use such discretion is vested with the government. To prevent or stop anything, one needs law. This is the principle of the Rule of Law and hence the writ of Mandamus cannot be issued to the Respondents.
- 24.** The learned senior Advocate Mr. Ratan Lai Kanaudiya on behalf of the Respondents stated before the bench that if person does not perform any duty as specified by law, it is

the matter of public interest. In *Decision No 4895* it was propounded as to what matter is of public interest. The Hon`ble Judge Mr. Gajendra Keshari Bastola has expressed in his opinion that there is absence of environmental law and therefore the Mandamus cannot be issued as contended by writ Petitioner. The opinion of Hon`ble Judge Mr. Kedar Nath Upadhyaya appears be based on Minerals Act 2042 B.S. But this Act is yet to come into effect and the provision of the Act cannot be enforced. Even though HMG has shown its consent by signing the United Nation`s Conference on Environment and Development, Rio de Janeiro, nothing can be done in the absence of the environmental law. Environmental law should be enacted. If a norm, as directed by the law, is violated, only then can the writ of Mandamus be issued. The Mining Act 2023 B.S. has no any provision for safeguarding the environment and the Minerals Act 2042 B.S. has not come into force yet. Thus the writ of Mandamus issued on the basis of such Act by Hon`ble Judge Mr. K.N. Upadhyaya is not harmonious with the existing laws. The Respondent has not violated any kind of Act or Rule.

**25.** Though HMG may cancel the contract under Rule 25 of Minerals (Amendment and Consolidated) Rule 2018 B.S. in public interest, this is not feasible as such. Though the Petitioner enlisted a number of committees who have published reports about the environment of Godawari, those committees were not constituted under any law. HMG is itself well aware of maintaining a clean and good environment in the Godawari area. There is no question of limiting itself to the opinion and contention of the Hon`ble Judges who have dissenting opinions in the division bench. If and only if HMG couldn`t perform its duty under the law, then in order to make HMG perform that duty, the writ of Mandamus can be issued. In the present writ petition, such relevance is not found. The contention of the Petitioner is not based on reality. The Petitioner alleged that boulders fall on St. Xaviers School and villages in the vicinity because of dynamite explosions. But the Petitioner himself has made the said St. Xaviers` School and the local inhabitants as Respondents. The Petitioner has not been able to demonstrate the level of environmental pollution, as alleged in the writ. The Respondent industry has been abiding by all the rules and guidelines issued by HMG for protection of ecology of the Godawari area. In such a situation the decision of Hon`ble Justice Gajendra Keshari Banstola who

expressed the view that the writ cannot be issued and therefore it is dismissed, was reasonable.

- 26.** Mr. Kusum Shrestha, learned Senior Advocate representing the Respondent industry, argued that the Respondent industry has been operating its mines as per the laws and regulations. It has been implementing the directions given by the government from time to time. It is not clearly mentioned in the petition the sort of activities undertaken by the industry that have destroyed the environment. No doubt, the environmental issue needs utmost importance but in the current context of Nepalese law, we do not have adequate and appropriate environmental laws. In this sense, the extent of seeking remedies is open to consideration to the Court. The Petitioner has demanded that Godawari area be declared as National Sanctuary, but the absolute power in this context is vested with the HMG of Nepal. If there is a threat to mankind due to environmental degradation, caused by the dust produced from any industry, modern equipment can be used to safeguard the environment and life of the people. If it is possible to protect the environment by using modern equipment, closing down the industry is not a suggestion. The Respondent industry is not responsible for illegal deforestation of the Godawari area. It is the responsibility of the concerned authorities to prevent such situations. To close a particular mining industry is the discretionary power of HMG, vested under Rule 25 of the Minerals Rules 2018 B.S. Moreover, HMG is not obliged to exercise this discretionary power under any circumstances. The Minerals Act 2042 B.S., as used by Hon`ble Judge Mr. Kedar Nath Upadhyaya has not been promulgated yet. Therefore, such Act can not be enforced.
- 27.** The Respondent industry has installed safety tanks to prevent water pollution and has undertaken a tree plantation program in empty spaces to alleviate deforestation. Though our country has accepted the obligations adopted in the international conference on environmental issues, the need for the environmental law is immensely felt. The rationale of any plan or project relevant to the environment is decided by the concerned authority, not by the Court. During initiation of new industries, the expected effects to the environment can be analyzed but for the old industries, standard holding, without causing environmental pollution can be determined. If the standard holding is not maintained, only then the second step towards closure of the industry may be proceeded with. Before

closing the industry, an opportunity should be granted for using various technologies to prevent environmental pollution. The Court can review whether the activities of the industry are being conducted as per the directions of the authority.

- 28.** International laws governing the environment might be imitable but should be rethought in the context of Nepal. There were hints about the formulation of environmental law in our 7th and 8th Plan. On 049/3/27 B.S. in Section 42 of the Nepal Gazette, formation of the Environment Conservation Committee is also found. But the appropriate law regarding this vital aspect is still absent in our country. The Petitioner has mentioned the Mining Act 2023 B.S., Mines Act 2018 B.S., Minerals Rules 2042 B.S. in his statement. But the Mines Act 2042 B.S. is yet to be promulgated and there is no specific Clause regarding environment in the Mining Act 2023 B.S. and the Minerals Rules 2018 B.S. Any act shall be carried out in accordance with law but in the absence of law it cannot be performed. Here the Petitioner has introduced the Right to Life in the writ. Though it is a dynamic concept, one should acknowledge that this should be as regulated by law when approaching the environment. Until and unless the constitutional and legal right has been violated, the writ of mandamus cannot be issued by a Court. Even for issuing the writ, one cannot rule out the principle of Judicial Restraint. Though the Petitioner has demanded that water pollution, sound pollution and air pollution be mitigated, the functioning of the type of technology to be applied for the mitigation of above environmental hazards is yet to be determined. If pollution caused by industry is prevented by using new technology, the situation to close the industry does not arise. The reports published on the issue are not reported under any law and have no legality. The writ petition should be adjusted with meaningful relation to the absence of laws in this regard. Analysis of the direct intervention of the Petitioner so far should be undertaken and the locus standi should then be determined prior to issuing the writ of mandamus. All the allegations brought about by the Petitioner are not related with the Respondent industry and the issuance of the writ of mandamus in absence of the appropriate law by the Hon`ble judge Mr. Kedar Nath Upadhyaya doesn` t appear to be an appropriate step.
- 29.** The Petitioner in his writ petition dated B.S. 2046/2/30 (June 12,1989) under the Articles 2, 10, 11(1) (2), 15 of the then Constitution of Nepal has alleged, inter alia, that environmental degradation is caused due to the presence and the activities of the

Respondents and have violated the public interest including the Petitioner`s constitutional and legal right. Therefore the activities causing environmental degradation and its untoward impact on public life, health and property, shall immediately be abandoned. Incorporation policy as such to maintain the environmental balance after undertaking research of the effects of newly licensed industries shall be implemented. The Petitioner sought for a scientific team from RONAST or the university to be constituted to undertake research about the environmental degradation created so far by the Respondent and an adequate compensation be provided for the loss it has caused. The Petitioner further demanded in the writ petition that the natural and historical resources be maintained as it is, without causing any kind of harm to them, adequate equipment and security measures be provided for the workers; the illegal deforestation of the natural flora and fauna be immediately halted and the freedom of movement of the professionals engaged in the research of the subject area be ensured through order of the Court. The Petitioner also sought for the writ of mandamus to be imposed upon the Respondents to ensure a peaceful and healthy life in a hygienic environment. Further more, the writ Petitioner has sought other remedies from Para 5 (a) to (i) of the writ petition.

- 30.** While summing up the demand of the Petitioner, it appears that the Respondent industry has degraded the environment, the negative effect of which has infringed the right to live in a healthy environment. The government authorities have not prohibited the activities of the Respondent industry and have not made a surveillance of what caused such environmental degradation. Therefore the government authorities abetted the same. The Petitioners have requested that an order be issued that the activity causing environmental degradation, by the Respondent Marble Industry shall be controlled as per the Constitution and other Laws and Regulations. It appears that the Petitioner while lodging the petition on 2046-2-30 B.S. (Jun 12,1989) has taken the grounds of Articles 11(1) (2) and 71 of the then Constitution of Nepal 2019 B.S. and Sections 10 (A), and 83 of chapter on Court Proceedings of the Country Code for the introduction of the element of public interest. Article 11(1) of the Constitution of Nepal 2019 has guaranteed the right to life, save in accordance with law. Life is threatened in a polluted environment. Right to life of a person ceases to exist when there is pollution of the environment. It is the legitimate right of an individual to be free from polluted environment. As the protection

of environment is directly related to the life of a human being, it should be accepted that this matter is included in Article 11(1) of the Constitution of the Kingdom of Nepal 2047 (1990). There is no doubt the Petitioner has a profound interest in the present environmental issue. In fact, an environmental problem is a matter of public interest and concern. As such the Petitioner, involved in the environmental subject which has been proven to be of public interest, has a strong relationship with the subject of the present dispute. The promulgation of the Constitution of the Kingdom of Nepal 2047 (1990) repealed the then Constitution, and Article 88 (2) of the newly promulgated Constitution has protected public interest. There was a situation where the question of whether the Petitioner has locus standi, could be raised under the previous Constitution. However as the present Constitution has established public interest as a protectable fundamental right, there is no question of locus standi. Since clean and healthy environment is an indispensable part of a human life, right to a clean, healthy environment is undoubtedly, embedded within the Right to Life. It is clear that the constitutional perimeter in which the Petitioner had filed the writ petition, has been substantively changed from the commencement of Article 26 (4) of the Constitution of the Kingdom of Nepal 1990, because this Article has taken environmental conservation as one of the basic Directive Principles of the State. Thus, as environmental conservation is one of the objectives of the Petitioner, it needs to be accepted that the Petitioner has the locus standi for the prevention of environmental degradation.

**31.** Since the Industrial Enterprises Act 2049- B.S. requires assessment of the likely untoward effects to the environment before providing the license for the establishment of an industry, not only the government policy but a clear legal provision has been developed to this end. Thus one of the contentions made by the Petitioner that adequate measures regarding protection of the environment should be undertaken before providing the license for the establishment of an industry, has been converted into a legal procedure. The demand for creating an investigative committee of either RONAST or the university seems to be fulfilled to some extent. There have been various committees and task forces in this regard since B.S. 2040 to study whether the Respondent industry has caused a negative impact on the environment of the Godawari area and they have submitted their respective reports as well. Amongst the reports published by these



committees and taskforces, the Petitioner in its verbal and written submission has mentioned one that suggests that the marble industry should be closed to safeguard the environment. The Petitioner has not categorically asked for the closure of the marble industry in the writ petition. Rather it has emphasized on the adoption of regulatory, remedial and effective measures to stop or reduce any negative environmental effect.

- 32.** After the Stockholm Conference of 1972, everyone's attention is on environmental degradation. In developed countries including the United States, separate legislation has been enacted for environment conservation since the seventies. Recently developing and underdeveloped countries have begun the formulation of or are in the process of formulating separate laws for the environment. In our country, there has not yet been a separate environmental law but all the necessary frameworks for this goal have been drafted. These are, to declare environmental conservation as a state policy, under Article 26(4) of the Constitution; to form an environmental conservation commission led by the prime minister on 2049/9/27 B.S. (Jan 11,1993); environmental effect evaluation was prepared on 2050/2/4 B.S.(May 17 1993) by the aforesaid environment Conservation Commission; the Ministry of Environment has been established, matters of environmental reforms are incorporated in the Eighth 5- year plan of the planning commission; among the committees of the Parliament, an environmental committee is in existence in the house of representatives, who participated in the world environmental conference in Rio de Janeiro, 1992 and signed the same. These are some of the instances indicating a deep concern of HMG towards the conservation of the environment. But these are only some of the attempts and are not effective. But still the lack of a specific law has hindered the dynamism needed in this regard. Undoubtedly, nothing can be properly managed without any law and for the systematic provision of environment related crimes and subsequent punishment, an appropriate law is indispensable. Without law it is not possible to issue an order for punishment and closure of the industry. The present laws are currently in scattered forms and also inadequate and ineffective. Thus an appropriate, separate law encompassing all aspects of the environment is deemed necessary to be formulated and promulgated as soon as possible.
- 33.** Though the Minerals Act 2043 B.S. and Clause 11 (a), added by the amendment of 2052/2/5 B.S. (May 19, 1995) are important landmarks in safeguarding the environment,

the government has not yet promulgated the Act. But the Act was amended on 2052-2-5 (May 19,1995). If the Executive does not implement the legislation enacted by the Legislature, it cannot be said that the Executive has been performing its duties in accordance with spirit of the Legislature. Hence it appears that the Executive has shown keen interest in petty things but overlooked the constitutional beckoning and public interest. Hence the time has come to mitigate the uncertainty prevailing presently and to fulfill national and international responsibilities towards the environment by promulgating a separate environmental law. The Respondent industry in the present case got permission on 2024/7/2 B.S. (Oct. 19,1967) with conditions of modernization and expansion. After that, various reports published by different governmental and non-governmental organizations have indicated that complaints about the negative impact to the environment of the Godawari area have surfaced. This controversy has been gradually proceeding towards the explosive stage. But no official scrutiny has ever been undertaken despite so many reports and controversies. As far as the environmental degradation of Godawari area is concerned its extent is yet to be explored in a scientific and official manner. The Respondents in their discussions and submissions have mentioned various remedy measures like forestation, silt satelliting construction and distribution of masks to the workers during their working period, in order to curb the environmental degradation. It appears quite essential to investigate the effectiveness of those regulatory and remedial measures as well as the ratio between the actual pollution rate and the permissible limit

- 34.** As far as the explosion during mining is concerned, permission for the explosion during mining has been mentioned in the conditions of the license but since the frequency and power of explosions have not been clearly defined there arises the likelihood of an unlimited number of explosions. Irregular unlimited explosions not only create sound pollution but also cause geological micro side effects that ultimately lead to geological and botanical disasters. Thus it is important to find out an appropriate and effective/practical alternative to the explosions. The government with its deep commitment must take an appropriate step to this end. As indicated from the various reports that grit production has been overshadowing marble mining, there is a possibility of greater number of explosions and subsequent sound pollution rising at an alarming rate. Hence the environmental degradation can be minimized to some extent provided the

prime objective of marble production be given upper hand. It is beyond doubt that industries are the foundation of development of the country. Both the country and society need development. However, it is essential to maintain environmental balance along with industry motives. It is essential to establish a balance between the need to provide continuity to developmental activities and priority to the protection of the environment. The Stockholm Conference has developed the concept of "Sustainable Development". Along with the report of the United Nations Commission on Environment, this matter has been substantiated. There has always been some adverse impact on the environment from industries. Therefore where there is development activity, there is adverse impact on the environment. First remedial and then regulatory measures need to be adopted to mitigate such negative effects. If these measures are unable to protect the environment, the activity that is causing environmental pollution needs to be closed. Development is for the interest and prosperity of a human being. Therefore, the life of a human being is the end. Development is the means to live happily; a human being cannot live a clean and healthy life without a clean and healthy environment. Therefore, safety of the environment is the means. Environment protection measures should be initiated taking into account this fact.

**35.** In the opinion of Hon`ble Judge Mr. Kedar Nath Upadhyay, alternative remedy measures should be undertaken at first. If this is not possible the renewal of the license should be allowed in such a way that the concerned industry will have to concentrate on environmental conservation. Even if this measure fails, then for the sake of public welfare the contract should be canceled under the Contract Unification and Amended Rule 25(1). It is indicated by this view that remedy measures shall be adopted at first and if it fails then extensive measures like closure of the mines shall be adopted. The opinion of Hon`ble Judge Mr. Gajendra Keshari has also pointed towards remedial measures. He is of the view that the environment is a matter of public interest and therefore there shall be appropriate management of the same. Since the Petitioner in his writ petition has demanded that the activity degrading the environment be abandoned, not that the marble industry be closed, it is mandatory to implement effective remedial measures at first to address the environmental degradation. If the problem still persists, then the second step shall be taken. In the arguments on behalf of the Petitioner, the view that the marble

industry be closed, as mentioned in some reports, has been taken as a basis. and the instance of demanding full judgment of the some ground have been found. As the Petitioner lacked sufficient legal grounds to demand the closure of the industry, the Petitioner appears to aim at mitigating the environmental degradation and receiving other compensations. It is not mandatory herein to stick to the principle of traditional give and take policy in a public interest matter like environment. This fact shall be taken into consideration while discussing the efficiency and degree of Judgment.

**36.** Rule 25(1) is the discretionary power of His Majesty`s Government. In relation to this, the Petitioner submitted that lease can be cancelled on the ground of public interest under Rule 25(1) and accordingly mandamus can be issued for terminating the lease. The lawyers of the Respondents submitted that it is the job of the government to determine public welfare but not the Court. One cannot be compelled to use its discretionary power. The writ of mandamus is issued for the fulfillment of the legal responsibility. The Petitioner has not been able to clearly point out a specific section of the law that has not been obeyed or followed. When a person claims that a legal duty has not been fulfilled, such person needs to specifically indicate that a particular agency or official did not fulfill a particular legal duty. For the purpose of mandamus, legal duty must be definite and fixed. Therefore mandamus cannot be issued on the basis of general claim that public interest has not been fulfilled, in the absence of a clear indication of the Respondent`s legal duty. Taking into account the sensitive, humanitarian issue of national and international importance such as the protection of the environment of Godawari area, we found that effective and satisfactory corrective activity has not taken place. Therefore, it is appropriate to issue these directives in the name of the Respondents to enforce the Minerals Act 2042 (1985), enact necessary legislation for protection of air, water, sound and environment and to take action for protection of the environment of Godawari area. Be pleased to send a copy of the order to the Respondents, His Majesty`s Government, also for implementation of the order.

Justice Laxman Prasad Aryal

We concur with the aforesaid opinion. J. Govinda Bahadur Shrestha, J. Trilok Pratap Rana

Done on the 14th day of the month of Kartik, 2052 (Oct. 31,1995)