

Supreme Court, Division Bench
Hon. Chief Justice Om Prakash Mishra
Hon. Justice Tej Bahadur K.C.

Order

074-WO-0283

Subject: Mandamus

Advocate Padam Bahadur Shrestha, a resident of Kathmandu District, Kathmandu
Metropolitan City, Ward No 10, Baneshwor.....1

Vs.

Petitioner
Plaintiff

Office of the Prime Minister and Council of Ministers, Singhadurbar -----1
Ministry of Forests and Environment, Singhadurbar -----1
Ministry of Health and Population, Singhadurbar -----1
Ministry of Physical Infrastructure and Transport, Singhadurbar-----1
Ministry of Urban Development, Singhadurbar -----1
Ministry of Federal Affairs and Administration, Singhadurbar -----1
Ministry of Agriculture and Livestock Development, Singhadurbar -----1
Ministry of Land Reform and Management, Singhadurbar -----1
Ministry of Industry, Singhadurbar -----1
Ministry of Culture, Tourism and Civil Aviation, Singhadurbar -----1
Ministry of Law, Justice and Parliamentary Affairs, Singhadurbar -----1
Ministry of Home Affairs, Singhadurbar -----1
Ministry of Water Supply, Singhadurbar -----1
Ministry of Science and Technology, Kathmandu-----1
Federal Parliament Secretariat, Singhadurbar-----1
Department of Environment, Lalitpur-----1

Respondent

Summary: Climate change mitigation and adaptation by protecting the environment is the responsibility of the state according to the principle of *parens patriae*.

Lawyer (s) for the Petitioner: Senior Advocate Dr. Amber Prasad Pant and Advocates Padam Bahadur Shreshtha, Shatkon Shrestha, Sulochana Dhital, Binshu Kumar Thokar, Harischandra Subedi, Abhishek Adhikari, Bhuwan Prasad Wagle, Raju Phuyal, Shanta Panta

Lawyer for the Respondents: Government Joint-Attorney Sanjeev Raj Regmi

Relevant Laws:

Climate Change Policy 2011

Convention on Biological Diversity 1992

UN Framework Convention on Climate Change

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1993

Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989

Order

Hon. Chief Justice Om Prakash Mishra: The brief facts of the present petition falling within the jurisdiction of this Court under Article 133 (2) (3) of the Constitution of Nepal are as follow:

Considering that all of humankind including the petitioner has suffered the effects of climate change, the petitioner had filed an application on 2074/7/6 (23/08/2017) before the concerned authority to formulate a separate law dealing with issues of climate change. However, when the authorities failed to respond to the said application, this petition seeking the issuance of the writ of mandamus or any other appropriate order has been filed to protect the interests of all the animals, flora, fauna, and biodiversity. The petitioners have alleged violations of Articles 16, 30, 35, and 36 of the Constitution, provisions of the Environmental Protection Act 1997 and international treaties and conventions to which Nepal is a party.

Countries around the world have been affected by harsh consequences of climate change. Nepal has also been facing the woes of climate change and the citizens are affected, there is a risk of glacial lake outburst flood due to increasing volume of water in glacial lakes. Despite the activities like haphazard industrialization and urbanization, overuse of fossil fuels and deforestation, lack of eco-friendly technology and knowledge, deforestation, lack of sustainable development, among others, is causing the emission of greenhouse gases and leading to increase in atmospheric temperature, the respondents have not been able to effectively manage and mitigate the issue. Due to climate change, melting glaciers, avalanches, have rendered population in the Himalayan region most vulnerable. According to several research and publications done on subject matter, Earth's temperature has been increasing by 0.01°C to 0.3°C on average. Despite the direct impact of climate change on human beings and the ecosystem, the respondents have failed to take any effective action or substantive steps, which has caused the people and wildlife to migrate after being unable to withstand the impacts of climate change. Basically, the usage of carbon-intensive engines result in the rise in concentration of carbon dioxide in atmosphere destabilizing the earth's temperature and has negative impacts on the environment including but not limited to erratic weather patterns, melting glaciers, draught, reduced agricultural produce and landslides. To conserve the environment and Nepal's indigenous agricultural practices in the Himalayan and upper hilly region, the respondents have adopted Nepal Climate Change Policy 2011. Under the policy, measures to combat climate change through sustainable social and economic development activities have been outlined, implementation of national adaptation policy by merging it with development agenda, investment in green energy generation, making the management of natural resources climate friendly, and drafting national strategy for carbon trade within 2012 AD, have been committed. However, those aims are yet to be fulfilled. Although the respondents had formulated the National Adaptation Program of Action 2010, National Framework for Local Adaptation Plan for Action 2011, and Climate Change Policy 2011 to emphasize on forest and biodiversity, agriculture and food security, climate disasters, urban dwelling, infrastructure, water resources and energy and public health, due to the lack of full implementation of such policies, each Nepali continues to be impacted by the effects of climate change. Although respondents have formulated certain policies concerning mitigating the vulnerabilities emerging from climate change and climate adaptation and mitigation, however, a comprehensive law addressing the

impact of climate change has not been implemented. Humans as well as the rest of the ecosystem has been compelled to face its grave impact while Nepal's sustainable development goals and sustainable financial development are impeded. Despite climate change posing an imminent threat to water resources, and bringing changes in drinking water systems and structures, agriculture and forestry, longevity of humans, health and medicines, nature of diseases, and lifecycle, and causing novel problems, and due to the lack of treatment of epidemics and diseases that might be caused, however under the Nepal Climate Change Support Program is implemented in mere 100 local units of 14 districts including Dolpa, Jumla, Mugu, Kalikot, Humla, Dang, Jajarkot, Rukum, Rolpa, Bardiya, Kailali, Accham, Bajura and Dailekh. With no urgency or preparedness, there is a possibility of great environmental disaster caused by climate change leaving human and animal lives at peril.

As per various sources, Nepal's average temperature has been increasing at the annual rate of 0.06°C; Himalayan region has been witnessing an average increase of 0.07°C. There is a possibility that our mountains would be nude in the future due to the melting of snow caps yet respondents have not initiated conservation in an immediate manner. Although the respondent ministry seems to have instituted offices relating to climate change, yet in the absence of a separate law, the difficulty in its operation, assumption and direction of responsibilities is clear. All provisions and programs outlined in Climate Change Policy, National Adaptation Program of Action 2010 and Local Adaptation Plan for Action 2011 were supposed to be implemented throughout the country yet not enough attention seems to have gone in these matters. This is suppressing the enjoyment of right to live with dignity guaranteed under Article 16 and the right regarding clean environment under Article 30 of the Constitution. Similarly, in order to adhere to the United Nation Framework Convention on Climate Change 1992, Kyoto Protocol 1997, and the later Paris Agreement that was introduced to replace the said Protocol, and make substantive efforts to combat climate change, a separate law dealing with climate change is necessary. However, the respondents have not made any efforts in that direction.

In order to combat climate change, mere enlistment of direct policies and plans is not enough, an effective structure to implement such plans is necessary, however, no such structure has been

created. With regard to Environment Protection Act 1997 A.D. formulated for the protection of environment, it does not include provisions for climate adaptation, mitigation, the allocation of liabilities of impact of climate change, hence its inadequacy to minimize the adverse impacts of environmental hazards, impact on the human species, biodiversity, flora and fauna, effects on natural and physical objects, and maintain a clean and healthy environment is clear. The Act does not have provisions to deal with harms of climate change, climate adaptation and mitigation, the liability and obligation viz-à-viz impact and effects of climate change. Therefore, in order to have a speedy action to reduce such effect we seek a writ of mandamus or any other remedy that the Court deems fit with the following effect:

1. Since the Environment Protection Act 1997 does not encompass climate adaptation and mitigation, therefore, a separate law dealing with issues related to climate change to be drafted and enacted;
2. To put plans, policies and programs mentioned in Climate Change Policy 2011 A.D. into effect in substance immediately until a separate Act is drafted and comes into effect;
3. To actively implement and renounce the sluggish attitude and plans and policies outlined in National Adaptation Program of Action 2010, Climate Change policy, 2011, National Framework for local Adaptation Plan for Action 2011 in all local units, municipalities, wards and districts of all 7 provinces through forming local committees;
4. To formulate an effective implementation plan for adaptation and mitigation to protect from direct and indirect effects of climate change on the lives and livelihood of people in the absence of such a plan presently despite there being a direct impact of climate change in areas from Upper Himalayan Region to Lower Terai region.
5. To issue an interim order to immediately formulate an Act and implementation plan to combat climate change by effectively implementing the National Adaptation Program of Action 2010, Climate Change policy, 2011, National Framework for Local Adaptation Plan for Action 2011, Acts, laws, international agreements, and treaties, Advocate Padam Bahadur Shrestha submits.

The order of this Court dated 2074/07/15 BS (November 01, 2017 AD) required the respondents to show cause as to what the issue is? Why the order as demanded by the petitioner should not be issued? Let written reply be submitted stating reason therefor within 15 days except the time for travel after the receipt of this order, so let the order be given to the defendant along with a copy of this petition and let the file be submitted for hearing after receiving written replies or after the expiry of the limitation of statute. However, since there was no scope of irreparable harm to the petitioner, interim order was not issued.

In the written reply submitted by the Department of Environment, it is stated that the Department has been thoughtful to the issues of climate change, takes them seriously and has been working towards finding solutions to the best of its possibility and availability of resources. National Adaptation Program of Action 2010, Climate Change policy, 2011, National Framework for local Adaptation Plan for Action 2011 have been implemented to address the issues of climate change. Existing two existing policies and programs are adequate to effectively implement climate adaptation and mitigation. The intention of suggesting the application of a uniform plan and program for adaptation and mitigation throughout the nation is problematic. The National Adaptation Program has divided different districts into 5 categories on the basis of their vulnerability. 9 districts remain the most vulnerable with highest probability of danger, 17 districts have high vulnerability and remaining 49 fall in the category of medium to very less vulnerable. In accordance with the National Adaptation Program, the environment department has instituted Climate Smart Village program in fifteen districts that were categorized as highly vulnerable equipped with tools to address climate adaptation and mitigation as a result of community level efforts. The districts where programs have been implemented are Okhaldhunga, Solukhumbu, Ramechhap, Bhaktapur, Siraha, Saptari, Lamjung, Gorkha, Rukum, Rolpa, Kaski, Surkhet, Kanchanpur, Darchula and Bajhang. Since considering the impact of climate change on the basis of vulnerability and intimate to disasters in different areas, adequate mitigation measures are being implemented, there is no necessity to issue the writ.

The Ministry of Science and Technology in its written reply stated that the petition does not disclose the reasons for making the ministry a party to the present litigation, and in the lack of evident proof of damage caused by the ministry directly to the petitioner, the writ petition is liable to be quashed.

The Ministry of Forest and Land Conservation, in their written reply, has said that pollution control and environmental conservation, balance, climate change and adaptation fall under the jurisdiction of Ministry of Population and Environment, however point out that draft strategy regarding carbon trading along with Reducing Emission From Deforestation and degradation (REDD) have already been formulated. Apart from this, the Ministry has been undertaking steps towards conservation of flora and fauna, medicinal herbs, protection of endangered species and biodiversity, private forest program and Rastrapati Chure Madhesh Conservation, Garden Development Project, Community forest programs, which have been supporting and aiding in fighting climate change. The Ministry denies all accusations of not abiding by Climate Change Policy 2011 as it has been actively conducting programs outlined there along with environmental conservation and preservation and bio-diversity conservation programs in partnership with other agencies and intends to continue them in future insofar as the resources allow. Therefore, it is submitted by the ministry that the petition that is filed making Ministry of Forest and Environment is liable to be quashed.

Ministry of Law, Justice and Parliamentary Affairs requests a withdrawal of this writ as the Ministry will take existing Nepali law and climate change mitigative measures promised under international agreements and treaties into consideration while providing an opinion if a draft of new act is received from any authority. Therefore, making ministry the party for the purposes of current petition serves no purpose, hence, the Ministry of Law, Justice, and Parliamentary Affairs requests the quashing of the present petition.

Ministry of Physical Infrastructure and Transport remains alert regarding laws and policies enacted to reduce climate change and its effects on human lives and has been steering development plans accordingly as per available resources. Drafting new laws and even implementing the existing policies does not fall under the jurisdiction of this Ministry so the Ministry submits that the present petition is liable to be quashed for not being reasonable.

The Office of the Prime Minister & Council of Ministers in its written reply referred to Article 30 of the Constitution and reiterated that the right to clean environment is a fundamental right of every citizen. Destruction of natural resources and environment directly poses a threat to humans, animals, plants, biodiversity and natural habitat of species. To curb these effects and provide a clean and prosperous environment and sustainable use and efficient management of environmental resources, Climate Change

Policy 2067 (2011 A.D.), Environment Protection Act 1997, Environment Protection Rules 1997 were implemented. Nepal government and relevant departments under it have been effectively running the programs outlined in effective policies and agendas. Office of Prime Minister and Council of Ministers condemn and deny the accusation of failure of implementation of policies. In the context of drafting a new law related to environment law or amending the existing laws immediately, however it is submitted by the Office of the Prime Minister & Council of Ministers that it is the subject of exclusive legislative competence of the parliament and the same should not be ordered by the Hon'ble Court. Hence, the Office of the Prime Minister & Council of Ministers request the quashing of the petition.

The Agriculture Development ministry in its written reply mentioned that the Agriculture Development Strategy, 2072 has been implemented and the activities are being carried out accordingly. With the aim to aid farmers and increase commercial farming, the Ministry has been availing a provision of 75% premium subsidy to farmers. To limit the detrimental effects of climate change on agricultural produce the Ministry has been implementing/conducting various projects including installing small irrigation systems, drip irrigation systems, rainwater collection reservoir, plastic pond constructions, providing subsidies on water boring equipment and maintenance and storage purposes as outlined by the strategy. This Ministry has conducted four year long pilot projects in Argakhachi, Kapilvsatu, Siraha and Udayapur between 2015 and 2018 in financial assistance of FAO in consonance with the National Adaptation Program to reduce the impact of climate change in agriculture and with the intention to use the learnings of these projects to rest of the districts. Similarly, climate change awareness and advise is being provided to farmers through the financial aid of World Bank and under this Ministry's direction in 25 districts through mobile phones. Therefore, the ministry states that it has been actively involved in awareness and mitigation of harsh effects of climate change in agriculture hence benefitting the farmers as well as ensuring food security of citizens.

The Ministry of Federal Affairs & General Administration in its written reply has said that climate change, ecological justice and provision of the right to clean environment does not fall under the jurisdiction of the Ministry according to Government of Nepal (Allocation of Business) Rules 2072 barring the Ministry to partake in planning and implementing relevant laws, policies and strategies. Policies and procedures regarding environmental, forestry and biodiversity conservation and public health protection already exist. The present petition seems to be guided by superficial observation rather than a clear study and analysis of

whether the existing framework and laws have addressed the issues of climate change. Hence, it is submitted that the petition should be quashed.

The Ministry of Land Reform and Management submitted in its written reply that the claimant has failed to enlist the consequences and effects this Ministry's actions have put on him directly. The demand of drafting new environment policy does not fall under the jurisdiction of this ministry. Therefore, the ministry requests the present petition to be quashed.

The Ministry of Home Affairs in its written reply has pointed that with the intention of curbing effects of climate change, several laws and policies including the Environmental Protection Act 1997, and Environment Protection Rules 1997, Solid Waste Management Act 2068, National Park and Wildlife Conservation Act 1973, National Nature Conservation Fund Act 1983, have been drafted and implemented. The claimant has failed to enlist the consequences and effects the petitioner has encountered due to the actions of this ministry. Therefore, the ministry submits that the present petition is liable to be quashed.

Ministry of Urban Development takes the subject matter seriously. However, since this ministry has been involved in implementing and organising several programs related to climate change in collaboration with other departments and institutions, requests the writ to be withdrawn.

In the petition submitted before the bench following the publication of the weekly and daily cause lists as per the rules and also submitted for discussion, we studied the submissions.

Senior Advocate Dr. Amber Prasad Pant and Advocates Padam Shreshtha, Shatkon Shrestha, Sulochana Dhital, Binshu Kumar Thokar, Harischandra Subedi, Abhishek Adhikari, Bhuwan Prasad Wagle, Raju Phuyal, Shanta Panta from the petitioner's side, posit that the extant climate change policy does not adequately address the two internationally accredited principles of climate change mitigation and adaptation. The petitioners have argued that there is an urgent need to formulate a new comprehensive law that addresses the concerns for reduction in fossil fuel usage in industrial and transportation purpose, curtail the emission of greenhouse gases, increased resourcefulness for the effective mitigation of climate change in the community level, increasing capability of climate adaptation among others, therefore a writ of

mandamus be issued. The arguments also included an appeal for implementation of climate change adaptation and mitigation measures, and because a direct impact of climate change is faced in upper Himalayan region and lower Terai region, a separate work plan to be prepared for adaptation and mitigationa measures to be implemented under the Climate Change Policy 2010 immediately until the new Act is fomulated. Further, they demand a writ of mandamus to be issued in order to implment this work plan, local units be established in all districts, wards, municipalities and village constituenties.

Now it requiries to be seen whether the writ of mandamus should be issued as submitted by the Petitioners.

2. The petitioners have submitted that the extant law that was formulated for protection of the environment, namely, Environment Protection Act 1997, does not include provisions of climate change adaptation and mitigation, hence, there is a need for a separate law. The petitioners have demanded that until such a law is drafted and implemented, the respondents must immediately effectuate the provisions outlined in Climate Change Policy 2010. Climate change has not only affected human lives but all plants and animal species, their habitats and created an imbalance in ecology and biodiversity, therefore making it a matter of public concern. Therefore, while carrying out any activity relating to climate change, it should embrace the principle of climate justice. The need to mitigate the effects of climate change and to gradually reduce the vulnerability from disasters occuring because of climate change is similarly without contestation. If only we embrace the principles of sustainable development and allied principles of inter-generational and inter-generational equity, and formulate a law to conserve biodiversity and ecosystem, we can establish an edifice of climate justice for present and future generations.

3. Climate change, exploitation of natural resources and environmental pollution have posed a threat to the existence of ecology and biodiversity. Such threats do not just affect the organisms living today but also cause irreversible damage to nature and pose an imminent threat to several generations ahead. The matter of climate change and threat posed by pollution is directly connected to the well being of citizens who are guaranteed with the right to clean environment and conservation under the Constitution. Such kind of threat to present and future generations posed by climate change affects every citizen hence, the matters raised in the current petition are of public concern. Considering the public nature of concerns raised in the present petition, there is a meaningful relation between the issues and the petitioners.

4. A balanced coexistence, environmental justice, and reduction in destruction of environment and exploitation of natural resources due to anthropogenic causes, can be achieved. It is necessary to do a moral, balanced, and responsible usage of the ecological resources that sustain humans and lives of other species. In order to maintain the cleanliness of water, air, land and food, the human activities that have the potential of having adverse impact on these resources. Human life and ecology should be safeguarded from the hazards of nuclear tests, poisonous and harmful substances. Laws and systems should be developed that regulate harmful production at the source itself. Legal provisions that guarantee right to damages for the victim that suffers from hazardous activities, laws to punish and regulate the destructive activities done by any commercial entity, laws related to waste management in vulnerable areas, usage of chemical fertilizers, regulation of import and export of harmful materials, conservation and management of watershed areas, conservation of migratory habitats of migratory birds, effective implementation of conservation of cultural and natural resources, reduction in concentration of greenhouse gasses and in the atmosphere, and measurement and management of erratic change in weather patterns, should be in place. A law that takes into consideration the provisions of Convention on Biological Diversity 1992, United Nations Weather Change Convention 1992, The Convention on International Trade in Endangered Species of Wild Fauna and Flora 1993, Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971, Paris Agreement on Climate Change 2015, and imposes punitive as well as pecuniary sanctions on the violation of its provisions, and apart from regulatory powers, includes provisions of awareness, promotion of certain practices, seems imperative.

5. An amendment to the existing laws and an introduction of a new consolidated law that addresses the effects of climate change and its mitigation, promotes clean and renewable energy especially in the climatically vulnerable areas through provisions in the national law, stipulates social and economic development and has provisions of livelihood accordingly, addresses the areas vulnerable to climate change especially mountains, hills, Chure and Terai region, envisages the ways to mitigate the adverse effects on natural resources and livelihood, considers climate change along with desertification, biodiversity, seems necessary. A new law dealing with climate change adaptation and mitigation, ensuring environmental justice while taking measures for maintaining

clean environment with environmental conservation, and regulating production that causes impact on food, species, and ecosystem, and health seems imperative. Formulating such national law would also facilitate in effectuating the commitments under the Paris Agreement on Climate Change, 2015. Similarly, according to Article 51 (g) of the Constitution the state has to adopt a policy regarding conserving and promoting natural resources in an eco-friendly and sustainable manner, develop clean and renewable energy, increase awareness about cleanliness of the environment, reduce the impact on the environment from industrial and physical development and adopt ways to prevent or reduce adverse impact on the environment and biodiversity in the case where there is potential harm, mitigate risk of natural disasters. Additionally, issues of mitigation of climate change and adaptation directly concerns and is related to the right to life, right to have nutritious food, right to clean environment. Since climate change mitigation and adaptation by protecting the environment is the responsibility of the state according to the principle of *parens patriae* it is necessary to be timely aware of the negative impacts and risks associated with climate change.

6. To have a secure environmental evaluation and to show the road to ambitious projects and to implement environmental laws, to operate environmental fund, to facilitate the promotion of environmental adaptation and mitigation, to implement laws and to encourage compliance of them, it is necessary to manage them through a permanent legal mechanism. To address the effects of climate change through adaptation and mitigation and the high risks seen in the ecology of, *inter alia*, higher mountainous areas and to restore, including but not limited to, its ecology, accommodating following topics, a consolidated law related to climate change Act needs to be necessarily enacted:

- Minimize the adverse effects caused by climate change in the vulnerable areas and to restore them to their ordinary positions, introduce necessary legal and policy mechanisms concerning urbanization and settlement,
- Legal provision for adaptation and mitigation, promotion of sustainable development and for plantation of multi-beneficial trees in barren land, landslide prone regions, and slope land,
- Since the cause of climate change is the emission of greenhouse gases, make special legal provision for promotion and development of low carbon emitting technology, technology

that utilizes clean and renewable energy, reduce the consumption of fossil fuel consumption for the purpose of climate change mitigation, and includes provisions for forest conservation and expansion and addresses the usage of forest area the type of energy in vulnerable areas,

- In order to minimize the effects of climate change on the health of humans and multidimensional adverse effects to the environment, arrangements of legal and technological mechanisms should be made,
- Make legal arrangements to ensure ecological justice and environmental justice to the future generation through the conservation of natural resources, heritages and environmental protection while mitigating the effects of climate change,
- Make arrangements for scientific and legal instruments to evaluate and compensate individual, society and others caused by pollution or environmental degradation,
- To regulate the activities that affect the ecology and to maintain healthy and clean environment, make legal provisions and in policy highlighting the Climate Change Duties of public and private organizations.

7. Although Environmental Protection Act 1997 has made some provisions to address environmental protection along with climate change, as discussed, the provisions are inadequate regarding climate change mitigation and adaptation, hence, a separate consolidated law addressing climate change mitigation and adaptation needs to be drafted and implemented as soon as possible. In the meantime, while it is not enacted, since Climate Change Policy 2011, National Adaptation Program of Action 2010 and National Framework for Local Adaptation Plan for Action 2011 seem to have some working plans to address the effects of climate change, the writ of mandamus is issued directing adherence to those provisions. Let the copy of the decision be forwarded to the Office of the Attorney General and send the case-file to the Archive Section as per the rules.

Chief Justice

I concur with the above opinion,

_____ Sd

(Tej Bahadur K.C.)

(Justice)

Bench Officer: Harka Bahadur Chhetri

Computer: Bikesh Guaragain

Executed on Sunday, December 25, 2018 AD (10th Day of Month of Poush of the Year 2075 BS)

Judgment translated in English by:

Hardik Subedi

B.A., LL.B. (Hons.)

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