

**Supreme Court, Division Bench  
Hon'ble Justice Kedar Prasad Giri  
Hon'ble Justice Balaram K.C.**

**Order**

Writ No.3027 of the year 2059

**Subject: Mandamus.**

Petitioners: On behalf of Pro-public and on his own Advocate Prakash Mani Sharma, et.al.

Vs.

Respondents: Cabinet Secretariat, H.M.G, Singh Durbar, et.al.

- **The benefits generated by the brick kilns to the entrepreneurs, labor and the general consumers, cannot be compared with the adverse environmental impacts caused by such brick kilns. Since the brick kiln industry can be deemed as a necessary evil, it is the responsibility of all the concerned agencies and civil society to realize their responsibility and discharge their duties towards minimizing the adverse impact emanating from brick kilns.**
- **Quantitative assessment of demand of bricks in the valley and the number of brick kiln operating are to be ascertained. How many of them are registered and how many are not? What is the extent of pollution emitted by the brick kilns in the environment of the Valley? ; How much is the impact of pollution on the public health, natural resources and the cultural heritage? What are the most appropriate counteractive measures to be taken immediately as well as those to be taken in the long run? Research work aiming at those end are to be conducted.**
- **Based on such research findings, effective techniques should be devised and followed. In addition to that, priority should be given for lessening the impact of pollution emanating from such brick kilns that are operating in the vicinity of densely populated areas, schools, cultural and touristic zones, immediate measures are to be taken to lessen adverse impact in such areas.**

**Balaram K.C, J:** The synopsis of this writ petition filed under Clause (c) of Article 88 of the Constitution of Kingdom of Nepal and the order issued thereto is as under:-

Brick kiln is a kind of industry. Such an industry comes into operation only after it has fulfilled all the conditions and criteria and been registered with the concerned authority in accordance with law. The legal provision, currently, has made it obligatory to be registered with the government agency and obtaining the Permit from such agency. But contrary to the above legal provision there are in existence unauthorized brick kiln industries numbering far more than the twice the number of registered ones that are in operation in Katmandu Valley, capital of Kingdom of Nepal, without complying with the legal conditions and criteria and without obtaining even the Permits as prescribed by law. Such industries have largely contributed to the air pollution of Katmandu Valley and this has led to the infringement of the fundamental right of the people living in the valley to live in a healthy environment. Therefore, we took the liberty of being present to the honorable court for issuance of appropriate order for prohibiting the operation of the illegal bricks kilns with immediate effect.

The freedom to undertake a profession, job including business or trading concern lies within the framework of fundamental human rights. But, in no case, an industry is authorized to operate in such a way that could have adverse impact on the general health of the people. It is but natural that such enterprises can't be operated without fulfilling the prescribed legal conditions and criteria as stipulated in the Environment Protection Act, 2053, the Environment Protection Regulation, 2054 and Industrial

Enterprise Act, 2049. As the protection of environment is indirectly related to the well-being of the people, the Supreme Court has ruled that this subject matter must be considered inclusive under Article 12(1) of the constitution of Kingdom of Nepal, 2047. It is, indeed, the positive responsibility of the state to prevent adverse impact on environment and oversee the creation of pollution free environment. We, petitioners, have time and again requested the respondents through correspondence and by sending delegations to them since 2052 urging them to stop the operation of highly polluting brick kilns, but none of them took any steps to close such brick kilns. So, for the protection of rule of law we are compelled to present ourselves to the court file the writ petition.

Due to negligence of the respondents, the number of brick kilns in operation has more than doubled as compared to those with the legal entities. Currently, the number of legally operating brick kilns is 6 in number in Kathmandu, 47 in Lalitpur and 45 in Bhaktapur, totaling 98. But the number of illegally operating brick kilns are twice the number of the legally operating kilns. Research studies have confirmed these brick kilns, being of traditional technology, are not only polluting but also causing adverse impacts on public health and environment etc. They are harming the human respiratory system, diminishing the visibility, activating metal rusting factor. The extent of TSP emission within Kathmandu Valley has gone up to 4900 metric tons that is absorbed by the atmosphere; 89.9 percent of which is attributed to such brick kilns. It has been found that all people without exception from the age group of children to elderly people living around the site of such brick kilns have been suffering from respiratory ailments. The brick kilns have raised the number of death toll and the risk of suffering from respiratory diseases like, asthma, cough, skin itching allergy, etc. and the fact has been detected that there have been substantial decline in the development and production of plants and agricultural crops in and around those areas where the kilns are in operation.

The urban area of Bhaktapur and the vicinity of Changu Narayan temple have been included in the World Heritage list. Those world - renowned heritages are also recognized as important tourist centers. They are all located at a distance of less than 2 kilometers from the sites of the brick kilns. In such a situation the polluting emission emanating from the brick kilns have led to the gradual decay and rusting of the monuments, in addition to causing adverse impacts on the tourism sector. In India the brick kilns are allowed to operate at a distance between 20 to 200 kilometers from Taj Mahal which has been included in the world heritage list. But in regard to our particular case, let alone imposing a ban on the operation of brick kilns that are adversely affecting the monuments, registered in the world heritage sites, no initiative has been taken to close the brick kilns that are in operation illegally.

Similarly, the directives to close such brick kilns have been issued and the decision to prosecute them in case of defying have been made by several agencies of the government through the letters issued by Lalitpur District and Small Scale Industries Office on various dates on 2057\7\25 and 2057\9\26; similar decisions were made through the joint meeting of officers of chief district office, district cottage and small scale industries, district police office, internal revenue office of Bhaktapur on 2059\8\12 and 2059\7\12; and the ministerial level decision of His Majesty's Government dated 2058\8\18, 2058\12\20, 2059\1\23, 2059\2\2 etc. Such instances of public notices to close such industries published in the media indicate that government bodies show concern for only making decisions. But they never care for implementing those decisions, nor do they take any initiative to that end. All these have apparently resulted in the emergence of a tendency with the government agencies to make only decisions but not implementing them.

According to the Section 3 and 4 of Environment Protection Act, 2054, rule 3 and schedule 1 and 2 of Environment Protection Regulation, 2054, it has been made mandatory to conduct Initial Environment Assessment (IEA) prior to setting up brick kiln industry that produces less than 10 million bricks a year and to conduct Environment Impact Assessment (EIA) for an enterprise with a production capacity for more than 10 million bricks a year. While the sub- Rule (1) of rule 3 and Schedule 7 (16) have listed brick and tile industry as an industry which require to obtain Pollution Control Certificate. If anybody is found to act contrary to Section 7(1) and 7(2) (1) of Environment Protection Act, 2053, causing an adverse impact on environment, the concerned agency is authorized to prohibit the operation of the industry and Section 9 of the Act as well as Rule 26, 27, 28 of the Regulation have conferred on the concerned body with the legal obligation and responsibility to protect the national heritage.

Besides, the concerned agencies should have discharged their legal responsibility of canceling the permit and prohibit the industrial operation in accordance with Section 25 of the Industrial Enterprise Act, 2049. However, in contradiction to their legal obligations, the respondents have limited themselves to imposing fine to some industries and to some others issuing orders through media to stop their operation that are not even registered and have not fulfilled the terms and pre-conditions prescribed by Environment Protection Act, 2054. Such actions on the part of respondents cannot be considered to have fulfilled their legal duties. Notwithstanding the fact that they have prepared an inventory of illegal kilns, but they have not played an active role to halt their operation, having granted freedom for illegal operation have evidently given rise to room for suspecting on the respondents' motive. On 2058\11\21, 163<sup>rd</sup> meeting of the Industrial Promotion Board made a decision to stop registration of brick industries with traditional technology located within the Kathmandu valley. In regard to those which have recently acquired permit, they are allowed to transform themselves by adopting less polluting new technology by the end of Bhadra 2060. Regarding the brick kilns in operation without permit, a notice is issued in the public media that industries shall not be operated without permit and shall be penalized severely by Cottage and Small Scale Industry Department. Despite the official decision not allowing registering brick industries adopting old technologies, hundreds of such brick kilns are still in operation in Kathmandu valley in violation to their decision. But the respondents, including the Industrial Promotion Board, have not undertaken any

co *Prakash Mani Sharma and others Vs. Cabinet Secretariat and others*

As referred to in the above various paragraphs, the fundamental right of the people to live in clean and healthy environment has been hit hard and we, the petitioners and all the citizens living in the Kathmandu valley, have been debarred from accessing the fundamental human right on account of the failure on the part of respondents to discharge sincerely their constitutional and legal liabilities entrusted to them. Hence, an order of Mandamus be issued against the respondents in accordance with Article 88(2) of the Constitution of Kingdom of Nepal, 2047 for making an inventory of those illegally operating brick kilns after having them identified with immediate effect to halt the operation of such brick kilns and take stern legal actions against the operators of such illegal brick kilns.

Although it has been announced that the decision has been taken to compel the traditional chimney brick kilns to transform themselves into entities adopting clean and less polluting technology, a tendency has been observed that they take decisions but fail to get them implemented. Hence, it has given rise to suspicion on their seriousness for implementation. Therefore there is a need for giving an order to get the decision implemented once it is taken. An order of Mandamus is issued against the respondents compelling them to put that into effect through interpretation of legal provisions and to ensure that all the related decisions taken by His Majesty's Government on different dates are enforced. It is again requested that a court order be issued to ascertain the extent of damage inflicted on the health of local people, agricultural crops and environment. Besides, an appropriate order is issued directing them to compensate such damages. Similarly, to ascertain the amount of compensation, a high level committee be immediately formed under the coordination of a retired judge or a sitting judge of the Supreme Court, consisting of an expert of concerned institution on health and environment along with a member of the concerned government agencies. The committee will dedicate itself in undertaking a research work and submit a study report. As recommended by the committee to HMG, an appropriate order is issued to ensure that the affected victims are compensated; such being the substance of the petition.

What constitutes the facts of the case? Is there any ground for denying the issuance of an order as claimed by the petitioner? The respondents are notified to submit a return reply through Attorney General Office within a period of 15 days. After receiving the written reply or after the expiry of the time given, the case is submitted according to rule; such was the order of the single bench on 2054\10\22.

Regarding the issue related to adverse impact on environment due to the emission of smoke and dust particles from the brick kilns operated with traditional technology within the Kathmandu valley, the 163<sup>rd</sup> meeting of Industrial Promotion Board has already made a decision on 2058\11\21 that the trial of new technology that has been prevailing in other countries is underway. For the time being, the registration of brick kilns using traditional technology in the valley shall be halted. It has been decided that the necessary legal provision shall be devised to ensure that such brick kilns adopt new technology within

one and half year's period. This ministry has been taking due care to ensure that the traditional brick industry causing adverse impact on ecological system shall be prohibited and be regulated as per the law. Proper attention is being paid to ensure the people's accession to the right conferred by the constitution related to the environmental balance, and to ensure the protection of industry as well as the professional and occupational rights of the citizens. Since the ministry has already taken a decision on 2059\2\2 to the effect that the owners of brick kilns adopting traditional technology causing environmental pollution in the Kathmandu valley, harming, thereby, the public health, are to be penalized with fine; and the concerned agencies of the government has been given directives to halt such industries with immediate effect. So it is requested that the petition be dismissed; such being the substance of the written reply of the Ministry of Industries, Commerce and Supplies.

Since this Ministry has not made any decision causing violation of the petitioners' rights, nor has it harmed the petitioners in any way, the writ petition be dismissed, as there is no reason for filing the case against the ministry; such being the substance of the written response to the Ministry of Home Affairs.

The Department of Cottage and Small Scale Industries has published a directive in Gorakhapatra Daily on 2059/6/24 and, at the same time, the office issued a public notice, prohibiting both the operation of brick industry having traditional technology without registration, and without fulfilling the official processes as laid down by the Industrial Enterprise Act, 2049 and Environment Protection Regulations, 2054. It was found that some brick industries are in operation ignoring the notice and such enterprises are to be fined between Rs 100,000 to Rs 150,000 as per the ministerial level decision of HMG taken last year on 2054/2/2. Besides, they have been directed to stop the operation of the plants. In this year as well, legal actions have been initiated against the industries in operation without being registered and without fulfilling the prescribed official formalities as laid down under the Section 25 of Industrial Enterprises Act, 2049. Since the accusation of the petitioners that we have not taken action seriously on this matter are thus totally untrue, the writ petition be dismissed; such being the substance of the written reply of the Cottage and Small Scale Industry office, Kathmandu.

HMG has already taken policy decisions to replace brick kilns operating with traditional technology by new less polluting technology. Necessary legal provisions are being devised aiming to replace the already registered brick kilns within a year and half by less polluting technology and put an end to the registration of brick kilns with traditional technology. This department and the subordinate agencies are committed to implement the decision of the 163rd meeting of Industrial Promotion Board held on 2058/11/21. So the writ petition is dismissed; such being the written reply of the Cottage and Small Scale Industry Department, Kathmandu.

This Trade Promotion Board is always alert and conscious that the clean and healthy environment is an indispensable substance for human life. The 163<sup>rd</sup> session of the Board has made necessary decisions to the effect that the brick kilns industry that are in operation will have to adopt and install new technology that are currently popular in other countries. The objective of the decision is to lessening the effect on polluting the environment caused by the emission of smoke and dust particles from the brick kilns operating in Kathmandu valley. Likewise, the ministerial decision of HMG dated 2059\8\26 has strictly imposed the prohibition of registration of the new brick industry if they were to install "Moving Bull Trench Kiln." The new brick kiln must adopt new technology i.e. fixed chimney and VSBK only. Besides, the industry must have the ownership of land covering a radius of at least 200 feet from the central point of the brick kiln and those installations should be located at a distance of at least 1 km away from the forest area. It is mandatory to undertake an EIA study for those located at a distance of 5 kms away from the government forest area. It is also mandatory to undertake an IEE study only if the installation of the plant is located at a distance of 1 km, including a binding to limit the emission up to standard 900mg\nm etc. Such were the various decisions taken by the ministry. Undermining all their efforts on our part, the allegation of its petition that the respondents did not care for implementing the law is totally imaginary and is thus worthy of dismissal; such being the substance of the written reply of Industrial Promotion Board.

Section 5 and 6 of Local Administration Act, 2028 has conferred the Chief District Officer the responsibility of discharging duties in accordance with its policies, regulations and direction of HMG as well as the obligation to protect the public health. In case people filed complaints with the office,

the local administration looks into the matter and has always been playing a cooperative role in the interest of its people. Therefore, the writ petition deserves to be dismissed; such being the substance of the written reply of the District Administration Office, Kathmandu.

This office has taken the initiative of mobilizing the representatives of the political parties of the district in order to protect the environment and bring, therefore, the illegally operated brick kilns under the framework of legal jurisdiction. Similarly efforts have been made to arouse public awareness intensively in the concerned area. However, the action of exercising other additional legal actions against the brick industries does not fall within the authority of the office. So, the writ petition is requested to be dismissed; such being the substance of the written reply of the district Administration Office, Bhaktapur.

The Cabinet Secretariat and the concerned agencies under it have been undertaking the follow-up monitoring activities from time to time in accordance with Work Classification Regulation, 2057, to ascertain whether or not the ongoing activities are in line with HMG's policies, decisions and as per the law. Since the petitioners' contention is groundless, we request that the writ petition be dismissed; such being the substance of the written reply of the Cabinet Secretariat.

The Department of Cottage and Small Scale Industry and this Office had published a public notice on 2054/6/24 in Gorkhapatra daily prohibiting the operation of brick industries with traditional technology. Having found that some brick kilns were operating ignoring the public notice and without being duly registered, such industries have been directed to be closed with a fine ranging from Rs 50,000 and Rs 150,000 in accordance with the decision made by HMG on 2058/1/23 and 2058/12/2. In this year alone, 33 brick kiln industries have been directed to close with a fine on each at the rate of Rs 200,000 following the decisions of HMG on 2054/10/29. Since the petitioners' allegation that stern action has not been taken on this matter is fabricated, the writ petition be dismissed; such being the substance of the written reply of the Department of Cottage and Small Scale Industry Office, Lalitpur.

The petitioners nowhere in the petition have been able to clarify the reason for making this Ministry respondent. As the petitioners could not substantiate with evidences the violation of their rights, the writ petition is therefore worthy of dismissal. Although it has been made mandatory for a brick industry that produces more than 10 million bricks per annum to conduct Environment Impact Assessment (EIA) according to Environment Protection Act, 2053 and Schedule 2 of Environment Protection Regulation, 2054, no such report has ever been submitted to this ministry for approval. As this ministry is fully oriented towards the protection of environment and towards prevention and control of pollution, the writ petition is requested to be dismissed; such being the substance of the written reply of the Ministry of Population and Environment, HMG.

In Lalitpur district there are 50 legally registered brick kilns and only nine kilns under operation have not been registered. So the contention that the numbers of illegally operated brick kilns are twice the number of registered ones is untrue. The brick kilns operated without being registered according to Section 10 of Industrial Enterprises Act, 2049 can be penalized following the decision of HMG in accordance with Section 25(1) of the said Act. Last year the brick kilns that were operated illegally without being registered were fined to a minimum amount of Rs.50, 000 up to Rs.150, 000 each and they were also ordered to be closed. Consequently, an amount of Rs.1, 050,000 was collected from the ten brick kilns. But Babulal Maharjan has not paid the fine of Rs. 150,000 as yet. The district administration office has been requested several times to take necessary action to ensure that the money be collected from him. As this office has identified and listed such illegally operated brick kilns for the purpose of processing them into closure and penalizing them, this is under the consideration of HMG. Therefore, the writ petition is requested to be dismissed; such being the substance of the written reply of the Cottage and Small Scale Industry Office, Lalitpur.

In regard to this writ petition submitted as per the rule, the learned advocate Raju Prasad Chapagain pleaded that the various studies and research works have confirmed that the brick kilns adopting traditional technology (Bull's Trench Kiln) have made impact adversely on the people's health in Kathmandu valley. The level of emission emanating from the brick kilns in Kathmandu valley is estimated at a range of 89.90 percent (TSP). It can result in damaging the human respiratory system enhancing the

factor that causes the metals to rusting. The polluting emission of the brick kilns have not only caused adversities to human beings but have also negatively affected agricultural products, vegetation and the soil of the area. Urban areas of Bhaktapur and the Changu Narayan, which are listed in the World Heritage, are being endangered due to the operation of the brick kilns. Consequently the tourism industry is subjected to decline. The monitoring units of brick kilns, the respondents, do not even possess a realistic datum on the number of brick kilns operating in the different districts. That is the reason why the number of unregistered brick kilns in operation have exceeded twice the number of registered ones. Such kilns should have been dealt severely with legal action pressuring them to be closed pursuant to Section 25 of the Industrial Enterprise Act, 2049, but the situation does not show that the brick kilns have been dealt effectively although some of them have been apparently fined. The situation turned out to be extremely serious, up to the dangerous level, on account of the inability on the part of respondent agencies to pursue with preparedness the matter concerning the seriousness of the issue related to the public health. Therefore, it is essential to issue an order of Mandamus against the respondents to identify those illegally operating brick kilns and make an inventory of such enterprises and to ensure that severe action is taken against the entrepreneurs. Furthermore, let the respondent agencies be obliged to oversee that the brick kilns with traditional technology transform themselves through adopting less polluting technology in accordance with the decisions taken by the government from time to time, with the objective of reducing pollution emanating from the brick kilns. The learned advocate also pleaded that the court is required to issue an appropriate order to HMG to form a high level committee comprising concerned experts to assess the impact on public health and the extent of damage caused till to-date following the unlawful operation of the brick kilns to ensure that the concerned victims are compensated.

The learned Joint -Attorney Saroj Prasad Gautam pleaded on behalf of HMG that the government and the concerned agencies are sensitive to any possible adverse impact on public health as a result of pollution from the brick kilns. Convening the 163<sup>rd</sup> Board Meeting on 2058/11/21, Industrial Promotion Board made severe decisions to address the issue of the pollution emitted by the traditional brick kilns (Moving Bull Trench kilns). These include the adoption of the latest and least- polluting technology within 18 months in replacement of its traditional Moving Bull Trench kiln technology, halting the registration of out-dated kilns and closing the unregistered units. Necessary initiatives have also been taken to oversee the implementation of the decisions. Similarly, a ministerial decision taken by the HMG on 2054/8/26 has banned the adoption of traditional technology. Instead, as regards the installation of a fixed chimney or VSP, it has been made obligatory for the concerned industry to be located at least one kilometer away from the forest area; EIA and IEE have been made mandatory before they are put into operation ; use of hay, tyre, plastics have been banned from using in their operation. It has also been decided that they should adopt the latest technology prevailing in other countries aiming at reducing the pollution. The claim of the petitioners that HMG has remained inactive is baseless as it has notified through Nepal Gazette to cancel the registration of those brick kilns that do not meet the emission standard and these decisions have been monitored to oversee its execution through the office of the concerned Cottage and Small Scale Industry. The concerned officers have made an inventory of brick kilns located in their respective districts. Since illegally operated brick kilns have been imposed fines, ranging from Rs100,000 to Rs. 150,000 and some were forced to be closed ; the writ petition is worthy of dismissal; such being the pleading of the learned government attorney.

After listening to the argument put forward by the learned counsels for the petitioners and the defense as well as having reviewed the case file, it appears that the following questions are to be addressed prior to taking decision on this issue:

1. Whether or not a welfare state can permit any industrial enterprise to operate under the condition that it pollutes the environment adversely affecting the health of the people? Does the environmental pollution fall under the scope of environmental justice? Or, does it not?
2. Whether or not the agencies with the responsibility of monitoring the polluting and health hazardous enterprises with the aim of regulating them under the law, should act effectively and undertake result-oriented activities?
3. Whether or not, the respondents, the government and the concerned agencies are effectively undertaking the activities directed towards regulating the legally or illegally operating brick kilns, and controlling the pollution caused by them?

#### 4. Whether or not the writ should be issued as claimed by the petitioners?

While contemplating the first question, there is no dispute on the fact that the sub-Clause(e) of Clause (2) of Article 12 of the Constitution of the Kingdom of Nepal, 2047 in providing the freedom of carrying any occupation, employment, industry and trade. But the constitutional freedom to be engaged in any occupation, employment, industry and trade, however, is not absolute because there is also the provision of sub-Clause (5) directed to restrict the freedom if it goes against the rule and outside the periphery of law. The provision of sub-Clause (5) that nothing in sub-Clause (e) should be deemed to have prevented the making of laws to impose restrictions on any act which may stand to adversely affect public health or morality of the general public, nor can the sub-Clause restrict the government's monopoly rights to undertake any specific industry, business or service or to lay down any precondition or qualification for undertaking any industry, business, profession or employment. The provision has made it evidently clear that the citizens' rights to take up any occupation, employment, industry and business doesn't stand against and beyond the criterion set by the prevailing law. Therefore, any enterprise including brick kiln mentioned in the petition could be undertaken provided it complies with the provisional limit of the constitution.

Laws relating to environment, occupation, industry etc came into being for the implementation of the above constitutional provision. The Industrial Enterprise Act, 2049 has prescribed elaborate procedures to be adopted by industrialists covering registration of the industry to all aspects of operation of the industry. The above Act has made it necessary to obtain license and if an industry is established without license or without fulfilling the terms and conditions mentioned in the license and those mentioned in the registration certificate are not complied with, the Section 25(1) of the said Act has conferred His Majesty's Government to fine them up to five lakh rupees, cancel their registration license and give an order to close the industry. The above provision of the Act shows that the right to freedom of occupation, job, industry and business is not an absolute right, rather, it is a right to be exercised only under the terms and conditions prescribed by law.

As far as addressing the issue of whether or not the adverse effects to public health and environment caused by polluting activities fall under the environmental justice, the Article 12 (1) of Constitution of Kingdom of Nepal has laid down that except as provided for by law, no person shall be deprived of his or her personal liberty. Clean environment is essential for human life. The existence of all living beings including vegetation is endangered by polluted environment. In such a situation the right to life of human beings is likely to come to an end.

This court has taken into account this issue of environmental pollution years ago and has been drawing attention of His Majesty's Government by issuing directives in the form of judicial decisions. The full bench of this court has drawn attention to the need of environmental law in Nepal in the case of petitioner Surya Prasad Dhungel versus Gadavari Marble Industry of 2049 B.S (W.A.V No.35-Mandamus etc). At that time there were no Act and Regulation relating to environment and the credit goes to that directive in some way for the advent of current environmental laws. The polluted environment deprives the human race of the liberty of right to life conferred by the Constitution. It is the fundamental right of every citizen to live in a pollution-free environment. "As clean and healthy environment is essential for fullness of life, the right to live include the right to clean and healthy environment". The principle propounded in the above mentioned case is such that there is no controversy that polluted environment causes deprivation of personal liberty conferred by Constitution. Similarly, Article 12(1) confers the right to live and that is possible only in clean environment. The principle that the polluted environment deprives a person of his right to live was referred to in the case of Godavari Marble Industry. Cases of 2056, writ No.3109 (2058/4/23), of 2057, writ No.2791 (2058/2/19), and of 2058, writ No.28 (2058/6/11) were the relevant ones. In view of such constitutional provisions and the principle propounded by the Supreme Court on the cases cited above there is no controversy that the issue of environmental pollution is worthy for judicial consideration.

The second issue to be resolved is related to who is responsible for maintaining clean environment which is so necessary for the existence of human life. While deliberating on the appropriate and effective step to be taken for preventing the environmental pollution and on the legal means to address the problem of

protection and promotion of environment, it can be deduced that the responsibility for the promotion and protection also lies with man himself, is an unquestionable fact. Given that each and every person cares to keep his surrounding environment neat and clean with awareness. In other words, environment can be kept clean provided we are fully sensitive to our responsibility to that end.

On the one hand, there is the need for industrialization and development activities, while, on the other hand, man is facing the problem of environmental pollution resulting from the rapid pace of industrialization. Consequently, there has arisen mutually conflicting challenges, in the form of a deterrent force calling for the adoption of effective measures to address the problem of protection from the polluting environment. One cannot ignore the various initiations and efforts being taken at the national and international levels for long past aiming at harmonious growth combined with environmental protection. The United Nations Organizations and its subordinate agencies have taken some concrete steps towards that end. It is evident that the attention of the world community has been focused on the concept of Environmental Jurisprudence from the time of the Stockholm Conference held in 1972. Moreover, the attention of the whole world was drawn towards the protection of environment dating from the world Conference on conservation which was also commonly known as "Earth Summit" convened at Rio de Janeiro in Brazil in 1992. The "Agenda 21" endorsed by this conference underlines the concept of sustainable development that propounds that the utilization of natural resources of this world should not be monopolized by the present generation alone but also be sustained for the benefit of the generations to come.

Since Nepal has participated in the conference as well as expressed her commitment to its outcome, there is no doubt that His Majesty's Government has the prime responsibility of implementing its decisions. It is now the responsibility of the government to take effective measures aiming at protection of environment in pursuance of the written endorsement of various international treaties and conventions on environment for the protection of environment and as dictated by the constitution of Kingdom of Nepal, 2047 as well as the prevailing laws of Nepal. One cannot deny this fact. Article 26 (4) of Constitution of Kingdom of Nepal, 2047 has laid down that the state shall give priority for preventing adverse impacts of environment emanating from the ongoing physical developmental activities and make special arrangement for the protection of endangered animals, forest and vegetation. Such being the constitutional provision, it is the constitutional obligation of His Majesty's Government to formulate policies and make necessary legal provisions for preventing the pollution of environment and implementing those policies and laws effectively. It is apparent that the government has framed and put into effect the Environment Protection Act, 2053 and Environment Protection Regulation, 2054, to fulfill the state's responsibility of implementing the policies on environment as directed by the constitution. But the emission standards and the Permissible Limits have yet not been prescribed for some industries although the above laws have come into effect for a long time. The directions issued by this court reflect that the legal provisions have not been implemented in exact terms. It is the prime legal responsibility of his Majesty's Government to oversee that environment is well protected. Judiciary also has a role and responsibility to that end. Despite the formation of a separate Ministry of Environment, necessary measures were not undertaken pursuant to Article 12 (1) and 26(4) of the constitution. Therefore, it is evident from the above deliberation that this court was obliged to draw the attention of His Majesty's Government and its subordinate agencies to this issue frequently. That is why His Majesty's Government should embark on more vigorous and effective measures aiming at the implementation of the policies regarding the protection of environment in the real sense of the terms rather than limiting itself to the act of sloganeering.

While pondering over the third question seeking resolution, it is related to the claim of the petitioners that although the brick kilns operated with traditional technology in the valley have caused serious adverse impacts on man's health as well as environment of the area, the government and its subordinate agencies seem to have taken superficial actions, instead of undertaking effective measures to solve the problem. Consequently they failed to halt the operation of the illegally operating brick kilns without registration. Besides, there is the claim that the respondents don't have authentic data on those brick kilns etc; such being the contention of the writ petition. Pondering on it, one cannot deny the fact that the brick kilns operating in Kathmandu valley have been polluting the environment of this area, while causing adverse impacts on public health and national heritages. The studies conducted by the various

governmental and non-governmental agencies on various occasions have proved this fact. In addition, the conclusions of the studies and research work mentioned in the writ petition have testified to this fact.

In reviewing the written reply of the respondents, it is clear that the brick kilns in operation without registration had been identified, they have been put under rigorous supervision, and some have been either fined up to Rs 500,000 or ordered to be closed down. The meeting of Industrial Promotion Board held on 2058/11/21 has apparently made several decisions, for example, halting, henceforth, the registration of brick kilns adopting traditional technology (Moving bull trench kiln) as those kilns operating in Kathmandu valley are found to have been making adverse impacts on public health. The brick kilns operating after registration shall also be compelled to adopt new type of less polluting technology within one and half year and those without registration shall be forced to be closed down. Besides, the legal action shall be undertaken against them. Similarly, the ministerial level decision of HMG dated 2059/8/26, have underlined that the owners of new brick kiln adapting traditional technology should not be allowed to register their industries. New ventures should adhere to the rule of adapting fixed chimney or VSBK technology for brick production. Besides, they are prohibited to use such things as wood, rubber, tyre, plastic etc. as fuel, and the Emission Standard should be as prescribed by HMG. The brick kiln should be allowed to be installed at a distance of at least one kilometer away from a densely populated area and should be allowed to be located at a distance of at least five kilometer away from the forest area. These norms are to be carried out strictly; such being the substance of the written reply of the respondents.

While going through these written replies from the government agencies it is apparent that the brick kilns operated without permission were to be fined and such industries were to be closed down. Similarly, the written version of Cottage and Small Scale Industry office was such that the moving bull brick kiln industries should not be given permission for registration henceforth. In regard to those kilns that have already been registered, they should be pressed to install plant with less polluting technology within a period of one and half year. Such was the version of the Industrial Promotion Board. Reviewing the HMG's decision dated 2059/8/29, it is apparently clear that in addition to several other things, and they were required to adhere to emission standard as prescribed by HMG.

Besides, the brick kiln plants were required to be located at a distance of at least one kilometer away from the densely populated area and at a distance of five kilometer from the forest area. Three years have elapsed since the timing of decisions made by HMG and Industrial Promotion Board till to-date of the hearing of this case. If the executive body which is in charge of governing the state makes any decision and communicates it with its court about its decision in the course of hearing, naturally it is expected that those decisions should have been complied with and put into effect in the true sense of the term. But the learned government counsel, while pleading that took place after three years, could not enlighten the court about the details as to which of those decisions were put into effect and which ones could not be carried out. He could also have explained why they were not implemented and when they could be implemented etc. He has apparently failed to produce details about them. It is clear that a separate Ministry has been constituted by the state with the objective of controlling the pollution and maintaining clean environment in the country. As a case has been filed against the Ministry of Environment, addressing such a sensitive subject as environmental pollution which is under consideration of the court, the Ministry could have produced the progress report or additional information on the status of implementation of the decisions till the date of hearing of the case in the court. Since no such information was furnished, the court has grounds to assume that the statements on actions mentioned in the written reply were intended to address the stated decisions alone. Thus it appears that the policies that were formulated have been limited to the sphere of paper work as against the responsibility of putting them into implementation. This court hereby seriously draws the attention of the Minister of Environment on this issue as it stands against the citizen's right to live in pollution-free and pure environment. Nobody is authorized to pollute the environment. Brick kilns, i.e. brick industry are a kind of industry that pollutes environment. Emission standards are fixed for such enterprises in other countries with the objective of bringing their pollution under control. Emission standard has been laid down for brick industry in India as well. In India maximum limit for the concentration of particular matter (Mg/w / Cu. m) is fixed on the basis of the trench width and production volume. The brick industries are classified into three categories- (1) producing less than 15,000 bricks per day, (2) 15,000 to 30,000 bricks per day and (3) above 30,000

bricks per day. In regard to those industries producing 15000 – 30,000 bricks per day, having 15.22 ft trench width, emission limit has been fixed for them up to 750 mg /N/Cu. m. In our country, the Regulation to this effect has come into force for the last nine years but the reality is that Emission Standard has not been prescribed as yet despite the realization that the brick is a polluting industry and this should be taken seriously.

As the brick industry is also linked to right of housing, there is a need to strike a balance between industry and pollution. The Ministry of Environment is entrusted with an important responsibility of controlling environmental pollution under our Environment Protection Regulation, 2054. This Regulation came into force on 2054/3/12. The Ministry of Environment assumes the role of protector and the watchdog against the environmental pollution. The Ministry gives, however, an impression that provisions of Regulation are meant to be applicable only for the forth- coming brick industries alone, whereas they are binding to brick industries that are in operation prior to the enforcement of the Regulation. That kind of interpretation is not justifiable. The industrial pollution with its adverse impact on environment and life of the people is sure to persist regardless of time of installation of the plants. It is the duty of the Ministry of Environment to implement the Regulation and oversee that the provisions of Regulation are strictly followed by the brick industries. The rule 16 of Chapter 3 of Regulation stipulates that industries operating prior to the enforcement of the Regulation are required to obtain provisional pollution control Certificate within 90 days from the commencement of the Regulation. Since the Ministry of Environment asserts the compliance of the legal provision in its written reply, it has not evidently complied with legal responsibility. The criteria for the application of Rule 15 of the Regulation has not laid down for brick industries, as has been referred to in the written reply and in the pleading of the government counsel.

The benefits generated by the brick kilns to the entrepreneurs, labor and the general consumers, cannot be compared with the adverse environmental impacts caused by such brick kilns. Since the brick kiln industry can be deemed as a necessary evil, it is the responsibility of all the concerned agencies and civil society to realize their responsibility and discharge their duties towards minimizing the adverse impact emanating from brick kilns. In this regard, scientific research works are required to be done to explore into such questions as to how many brick kilns could be allowed to be operated in Kathmandu valley without causing substantive negative impact on the environment of this area. Quantitative assessment of demand of bricks in the valley and the number of brick kiln operating are to be ascertained. How many of them are registered and how many are not? What is the extent of pollution emitted by the brick kilns in the environment of the Valley? ; How much is the impact of pollution on the public health, natural resources and the cultural heritage? What are the most appropriate counteractive measures to be taken immediately as well as those to be taken in the long run? Research work aiming at those end are to be conducted. Based on such research findings, effective techniques should be devised and followed. In addition to that, priority should be given for lessening the impact of pollution emanating from such brick kilns that are operating in the vicinity of densely populated areas, schools, cultural and touristic zones, immediate measures are to be taken to lessen adverse impact in such areas.

In contemplating for the resolution of the final question as to whether or not the writ order should be issued as claimed by the petitioner. There is no controversy that the brick kilns pollute environment nor is there any controversy regarding the requirement of bricks for human settlement, development and construction works. In the absence of bricks, no houses can be built for human settlement. Lack of them can adversely affect the national development and construction works. This court cannot ignore the fact that there is no substitute for brick industry for the time being, nor can it be denied that it is an environment pollutant industry. Whereas the entrepreneurs running brick industries are geared up to gaining personal benefits but the pollution that is created directly harms the natural environment. As a consequence, it has direct bearing on the health of the common people. Hence, if the brick industry is not to install pollution controlling machine or does not adopt VSBK technology in its operation by discarding traditional technology, the Ministry of Environment and the related agencies should be ready to take firm decision against them in consideration of larger public interest and in pursuance of the principle that the private interest yield to larger public interest within a fixed period of time to comply with the decision. As HMG is entrusted with the constitutional responsibility of governing the country, it is its constitutional duty to enforce the law in the real sense to protect the health of the people from the harms caused by the

polluting environment. Therefore, these directives are issued to His Majesty's Government for their execution as stated here under:-

1. To form a team comprising representatives each from the Ministry of Commerce and Supply, Ministry of Science and Technology, Ministry of Physical Planning and Public Works, Ministry of Labor and Transport, Department of Housing and professional experts as required along with the representatives from the petitioner-pro-public. The task of this team is to determine the number of industries that have polluted the environment, and those that have installed pollution- protection device and other those that have not;
2. To assess the impact of the closure of the brick kilns on national construction and development works as well as on the construction of civil houses and to study on possible alternatives in replacement of brick kilns.
3. To oversee closure of such brick industries that are located in and around the tourist resorts meant for the high class tourists contributing foreign exchange to the national treasury, those located at the vicinity of schools where children get education, and those located in densely populated rural areas.
4. Except for those areas mentioned in the above No.3, brick kilns located in other areas be made mandatory to install pollution controlling devices within the time limit as recommended by this committee through the legally authorized official or agency. This is valid to those brick kilns that are found emitting pollution from such study.

The team is assigned to achieve those tasks mentioned in the above 1, 2 and 3 within six months period and the copy of the related progress report be submitted to this court. The directive is issued to respondents allowing appropriate time required for the accomplishment of tasks as mentioned in the above No.4. The writ petition is deemed to be dismissed. One copy of the order is sent to Attorney General Office for their information and case file be handed over as per rule.

I concur above decision.

Justice Kedar Prasad Giri

Done on 24<sup>th</sup> Mangsir, 2064 B.S. (10<sup>th</sup> December, 2007)