

Case Brief

Adv. Bigyan vs GON



Petitioners	a. Adv. Bigyan Singh Bista b. Adv. Basanta Joshi
Respondents	a. Nepal Government, Office of Prime Minister and Council of Ministers b. Nepal Government, Ministry of Forestry and Environment
Third Party Stakeholders	a. Ampik Energy Private Limited b. Independent Power Producers' Association, Nepal (IPPAN)
Writ Type	Writ of Certiorari, Mandamus and others
Case Number	078-WF-0025
Verdict	Writ quashed but directive order issued

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Contributors

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A. Procedural History

1. The case was filed as a 'Public Interest Litigation' before the Supreme Court (the "Court"). The case was later referred to the Full Bench by the Division Bench. The Full Bench was composed of Hon'ble Justice Hari Prasad Phuyal, Hon'ble Justice Dr. Kumar Chudal, and Hon'ble Justice Til Prasad Shrestha.

B. Fact of the Case

2. A writ petition was filed on 15 June 2021 (*Asadh 1, 2078*) by the Petitioners challenging the amendment and addition made to the 'Working Policy on the Construction and Operation of Physical Infrastructures inside Protected Areas 2065' (the "Working Policy") by the Council of Ministers on 27 May 2021 (*Jestha 13, 2078*) (the "Amendment").
3. In essence, the Amendment granted permissibility to construct hydro power project plants of greater capacity inside protected areas and decreased the threshold of monthly discharge of water from 50% to 10% for projects with capacity more than 100MW to 250 MW.

C. Petitioners' Claim

4. The Petitioners argued that the Amendment in question would negatively affect protected areas and its biodiversity. Following were the major claims of the Petitioners:
 - a. To nullify the aforementioned decision of the Council of Ministers and prevent any such actions within a protected area by issuing orders of *Certiorari* and *Mandamus*, respectively.
 - b. To issue an *Interim Order* temporarily halting the implementation of the Council of Ministers' decision.
5. Upon an *ex parte* hearing, the Court on 20 June 2022 (*Asadh 6, 2079*) had issued an interim order to stay the implementation as claimed.

D. Issues

6. The following issues were raised before the Court:
 - a. *Can infrastructural projects such as hydropower be constructed inside a national park and wildlife conservation area (protected area) or not?*
 - b. *Is the Working Policy a 'legislation' or is it a 'policy'? Can it be judicially reviewed or not?*
 - c. *What is the relationship between environment, climate change, national parks and wildlife conservation areas and development?*

E. Decision and Reasonings

7. The Full Bench of Supreme Court, on 15 June 2022 (*Jestha 32, 2079*) rendered a decision to quash the writ petition.

8. **First Issue:**

No legal instrument has prohibited the construction of physical infrastructures inside a protected area. The National Park and Wildlife Conservation Act of 1973 (2029), the Forest Act of 2019 (2076), and the Industrial Enterprises Act of 2020 (2076), all permit the use of forest areas, including protected regions, for constructing physical infrastructure. This is especially the case for projects that are designated as “national priority” under the Industrial Enterprises Act of 2020. Hence, the Court declined to issue the writ as prayed by the Petitioners.

9. **Second Issue:**

a. The Court ruled that there is no ambiguity regarding the nature of the Working Policy. Since it was issued by the Council of Ministers and has no legal source, it is clearly a policy document and not a piece of legislation.

b. Further, the primary issue addressed by the Court in this regard was whether the decision of the Council of Ministers is subject to judicial review or not. The Court ruled that a policy document is not subject to judicial review as the Court can only exercise its power under Article 133 sub-article (1) of the Constitution of Nepal when a primary or a secondary legislation drafted under it, or any executory order is in contradiction with the Nepalese Constitution. Any decision regarding construction, management, or execution of a hydropower project falls within the jurisdiction of an executive body. As the Working Policy has no legal source and is merely a policy document, it cannot be scrutinized by the judiciary.

10. **Third Issue:**

a. Nepalese laws have always been guided by the principle of sustainable development, among others. Legal documents have safeguarded the interrelationship between environment and development.

b. The Court has further laid down the importance of hydro power projects in the field of development with further emphasis to green energy and its contribution to

environment. Thus, the Court has prioritized sustainable development rather than segregating development and environment.

11. In addition to the above, the Court has also rendered 4 (four) directive orders in order to regulate the construction of physical infrastructures inside protected areas. The directive orders mainly ordered the concerned authorities to promulgate either a 'Procedure' or a 'Directive' that would prove beneficial in the implementation of the National Parks and Wildlife Conservation Act, 1973 (2029). The orders further laid emphasis on the importance of balancing between environment and development.

F. Conclusion

12. In conclusion, the Court's decision highlights the crucial balance between environmental protection and development, reinforcing the principle of sustainable development. By emphasizing that economic growth must not come at the expense of environmental degradation, the Court has reaffirmed the need for policies and projects to respect ecological limits but reinforce the pillars of development simultaneously. This ruling serves as a reminder that development should be pursued in a way that meets present needs without compromising the ability of future generations to enjoy a healthy and sustainable environment.

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Mr. Chaulagain is a distinguished legal professional of Nepal with more than 18 years of experience in the legal sector. His first-hand expertise lies on matters concerning project finance, energy and infrastructure projects, mergers and acquisitions, legal due diligence, and legal reforms. As a corporate and litigation expert, his profound understanding of legal matters is an invaluable asset, and his contributions significantly benefit those seeking professional legal guidance.

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