THE WRITTEN STATEMENT REVISITED

A PERSPECTIVE ON KAILASH –Vs- NANHKU & ORS
2005 AIR SCW 2346

By

Sri S.M. Deka
Director
North Eastern Judicial Officers' Training Institute (NEJOTI)

THE PREFACE

On the 6th of April 2005 a Three Judge Bench of the Supreme Court decided Civil Appeal No.7000 of 2004 arising out of the Judgment of the Allahabad High Court in an Election Petition. In the Election Petition the eventual date fixed for filing of the Written Statement by the respondent. Defendant was 03.07.2004 a date within 90 days of the date of service of summons on the defendant of the Election Petition. However, the defendant appellant could file the Written Statement only on 08.07.2004. He filed an application for condonation of the delay of five days. "The High Court felt satisfied that the reason assigned by the defendant / appellant in support of the prayer for extension of time was good and valid. However, the prayer was denied because the High Court felt that it had no power to do so". This was because the Written Statement was filed beyond the period of 90 days from the date of service of summons provided by the proviso to Rule 1 of Order VIII of the Code of Civil Procedure, 1908 (hereinafter 'the CPC' for short) as introduced by Act 22 of 2002 with effect from 01.07.2002.

Three questions arising for decision in the appeal before the Supreme Court are :

(1) *Whether Order VIII Rule 1 of the CPC is applicable to the trial of an Election Petition under Chapter II of the Representation of the People Act, 1951 ?*

(2) *Whether the rules framed by the High Court governing the trial of Election Petitions would override the provisions of the CPC and permit a Written Statement being filed beyond the period prescribed by Order VIII Rule 1 of the CPC ?*

(3) *Whether the time limit of 90 days as prescribed by the proviso appended to Rule 1 of Order VIII of the CPC is mandatory or directory in nature ?*

Unanimous answers to these three questions are respectively "no", "yes" and "directory". The Supreme Court also observed that "the issue raised" in this appeal arises frequently before the courts and is of some significance affecting a large number of cases ……". This atleast, in so far as the third question is concerned, seems to be an understatement. The answer to the third question is of momentous significance through out India because it is for the first time that the Supreme Court has given a definitive judgment on a question vexing the courts through out India. This momentous Judgment requires detailed analysis and under standing. The third question answered in this Judgment Kailash –Vs- Nanhku & Ors. AIR SCW 2346 (hereinafter referred to as Kailash) only is being considered in this essay. Kailash hereinafter will mean the third question in Kailash only.

2. ANALYSIS OF KAILASH

Para, 23 to 45 of Kailash contain the detailed discussion of the question and reasons for the answer that the provision of Order VIII Rule 1 is not mandatory but is directory. The judgment first excerpts the basic considerations for amendments from the Objects and Reasons of the Code of Civil Procedure (Amendment) Act 1976, They are (a) fair Trial in accordance with the principles of Natural Justice. (b) expedition in disposal of cases and (c) fair deal to poorer sections of the society. Then the Supreme Court briefly notices the alteration of the time frame of 30 days enacted in the Code of Civil Procedure (Amendment) Act 1999 to the present 90 days by the Amendment Act 2002 pursuant to the resistance of the members of the Bar. The purpose of these two amendments was summarized in the phrase "to reduce delay in the disposal of Civil cases".

Next analyzing the provision of Order VIII Rule I CPC the Supreme Court observed.

(1) The provision casts an obligation on the defendant to file the Written Statement within the time frame but does not deal with the power of the Court.
(2) The provision is procedural and not substantive.
(3) The object of the provision is to curb the mischief of unscrupulous defendants adopting dilatory tactics.

However the dominant reason for the answer seems to be that the provision is procedural and not substantive. In support of this dominant reason general principles found in four Supreme Court cases to the effect that procedure is the handmaid of justice and not the mistress, a lubricant not a resistant etc. were quoted. Of Special significance of the four cases is Sangram Singh Vs Election Tribunal AIR 1955 S.C. 425 because it deals with the CPC as well.

On the vexed question of Mandatory or Directory, Principles of Statutory Interpretation by Justice G.P. Singh was referred.

Next, two decisions, "having a direct bearing on the issue arising for decision before us" namely (2002)6 SCC 33 and (2002)6 SCC

635 were considered and former was preferred. The conclusion reached was detailed in para 40, 41, 42, 43 and 44 and a summary of the conclusions are in para 45. For the present purpose only conclusion 45 (iv) and 45(v) are relevant and are quoted hereunder :

> **"(iv) The purpose of providing the time Schedule for filing the Written Statement under Order VIII Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of the Order VIII of the CPC couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the Written Statement beyond the time Schedule provided by order VIII Rule I of the CPC is not completely taken away.**
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> **(v) Though Order VIII Rule I of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of Civil causes which persuaded the Parliament to enact the provision in the present form, it is held that Ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, however briefly, by the court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."**

In para, 43 the Supreme Court also observed thus :

> **" In no case, the defendant shall be permitted to seek extension of time when the Court is satisfied it is a case of laxity of (sic) gross negligence of the defendant or his counsel. The Court may impose costs for dual purpose:**
>
> **(i) to deter the defendant from seeking any extension of time just for asking and**
> **(ii) to compensate the plaintiff for the delay and inconvenience caused to him."**

The Supreme Court directed the High Court to take on record the Written Statement already filed on payment of costs of Rs.5000/- to the Election Petitioner/Respondent "within four weeks from to-day" that is 06.04.2005.

2.1 The two principal pillars on which the entire reasoning rests appears to be (1) that the provision belongs to the domain of procedural law and (2) that the provision designed to achieve speedy justice should not be interpreted to scuttle justice. Both these premise would bear closer examination. Before that the most striking feature of Kailash may be considered. Unlike most Supreme Court Judgments on a question of law specially when the question is res integra Kailash does not even once refer to the views from the High Courts on the question. It is usual for the Supreme Court to note the conflict of views, if any, on such a question then resolve it by its definitive Judgment. In fact in Kailash the Supreme Court while considering answers to the first two questions noticed two decisions from the Allahabad and Madhya Pradesh High Courts vide para 15 in Kailash. That, however did not happen on question No.3. It will be worthwhile to consider the views from the High Courts of which there is no dearth.

3. THE HIGH COURTS' VIEWS

What was discovered on an earlier visit in 2003 to Order VIII Rule 1 may be briefly narrated first in this revisit. Earliest Judgment on the question appeared to be the one dated 21.-1.2003 rendered by the Karnataka High Court reported in ILR (2003) I Kant. 2205 (vide AIR Notes on cases section) AIR 2003 NOC 378 (Kant). Then the following four Judgments were found . AIR 2003 Karnataka 345 dated 17.04.2003, AIR 2003 Andhra Pradesh 409 dated 17.04.2003, AIR 2003 Delhi 280 dated 05.05.2003 and lastly 2003 (3) GLT 30 from the Gauhati High Court dated 13.05.2003. It was felt that except the last one from the Gauhati

High Court all the other Judgments failed to uphold the intent and purpose of the amended Code based on the recommendation of the Malimath Committee. Barring the Gauhati High Court Judgment all the other three High Courts did not think that Order VIII Rule I provides an inflexible time frame for filing the Written Statement, a view in line with Kailash as it turned out. The Gauhati High Court however held that the time frame cannot be allowed to be breached and a written statement can in no case be accepted if filed after 90 days of the service of summons, a view held by the Allahabad High Court in the Election Petition but rejected by the Supreme Court in Kailash. Upto 09.03.2004 the Gauhati High Court delivered three other reported Judgments dealing with the issue rendered by three different Judges. All these Judgments are in consonance with 2003 (3) GLT 30. These three Judgments are reported in 2005 (1) GLT 538 also in (2004) 3 GLR 612 dated 08.04.2004, 2004(2) GLT 630 dated 28.04.2004 and (2004) 3 GLR 248 dated 09.03.2004. Unlike in the Gauhati High Court in the Karnataka High Court there are several conflicting decisions on Order VII Rule 1 of the CPC. All these Judgments were considered in AIR 2004 Karnataka 246 by a Division Bench of the High Court and the Division Bench held like the Gauhati High Court that the provisions of order VIII Rule 1 is mandatory and the court has no power to extend the time for filing the written statement beyond the 90 days deadline set by the provision. This view in direct opposition to the view mandated in Kailash, can be taken as the representative of the alternative view from the High Courts. It is surprising that despite the Supreme Court, sensing the importance of the issues involved in Kailash, requesting an eminent amicus curie to assist the court in addition to the learned counsels of the parties the alternative view was not presented to the Supreme Court. Had the alternative view represented by AIR 2004 Karnataka 246 been placed before the Supreme Court a few grey areas in Kailash would certainly have been illuminated. The alternative view deserves a closer examination.

4. ANALYSIS OF THE ALTERNATIVE VIEW

The Division Bench of the Karnataka High Court first noted the two distinct view points "urged before us by learned counsels for the parties", one of inflexibility the other of elasticity of the time frame provided in Order VIII Rule I of the CPC. The Judgment noted the Object and Reasons of the Amendment Act, considered the "Rule of purposive construction" or "the mischief Rule" enunciated in the Heydon's case and relied on several Supreme Court decisions in support of the Mischief Rule.

Next, considering the question whether the provision is mandatory or directory the Judgment extracted the following from Crawford on Statutory Construction :-

> **"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."**

On the use of negative words in the proviso to Order VIII Rule I the Division Bench once again referred to Crawford. The following may be quoted :

> **" Prohibitive or negative words can rarely, if ever, be directory, or, as it has been aptly stated, there is but one way to obey the command "thou shall not" and that is to completely refrain from doing the forbidden Act. And this is so, even though the Statute provides no penalty for disobedience ....."**

In the same connection the holding, in the five Judge decision in M. Pentaiah Vs Muddala Veeramallappa AIR 1961 S.C 1107, that negative words are clearly prohibitive and are ordinarily used as a legislative device to make a Statute imperative, was referred to by the Division Bench. The impact of the provisions of Order VIII Rule 9 and 10 of the CPC was considered. Restating what Crawford indicated regarding non providing of any penalty for the breach of a provision as being not material the Division Bench held that consequence of breach of the time frame in order VIII Rule 1 is indeed provided in Rule 10. It was further held that Rule 9 does not hold the key to a correct interpretation of Rule I of Order VIII. The applicability of the provisions of Section 148 and Section 151 of the CPC was considered at length. It was held that these provisions cannot apply. Thus having reached the conclusion that the time frame enacted in Order VIII Rule I of the CPC is mandatory, the Division Bench of the Karnataka High Court while parting referred to (2002) 6 SCC 635, the decision by a Three Judge Bench of the Supreme Court which was not preferred in Kailash to (2002) 6 SCC 33, a Judgment of a Two Judge Bench dealing with the same topic under the Consumer Protection Act, 1986. The Division Bench cannot be said to have applied (2002)6 SCC 635 as a law declared by the Supreme Court in interpreting the provisions of Order VIII Rule 1 of the CPC. Incidentally in AIR 2004 Karnataka 271 decided by a Single Judge a day before the Division Bench decided AIR 2004 Karnataka 246 (2002)6 SCC 635 was considered as a binding authority on the interpretation of Order VIII Rule I in preference to (2002) 6 SCC 33. In reality none of these cases can be

considered as precedents in interpreting the provisions of Order VIII Rule I of the CPC. The two statutes that is the CPC and the Consumer Protection Act, 1986 are not statutes in Pari-materia. The provisions of Section 13 of the latter Act and the provisions of Order VIII Rule 1 of the CPC are not in pari-materia. Language used in the two provisions differs widely. Order VIII Rule 10 provides the penal consequences for breach of Order VIII Rule I though Rule 1 itself is silent about the consequences of its breach. Indeed, the language of the provisions of Section 13 of the Consumer Protection Act, 1986 and the absence of any provision for penalty for its breach are the reasons that persuaded the Supreme Court to hold the view it did in (2002) 6 SCC 33.

The representative alternative view from the High Courts has been projected in some detail only for the purpose of showing that it deserved consideration by the Supreme Court before the Supreme Court finally settled the issue regarding the true nature of the provision of Order VIII Rule 1 of the CPC.

5. SUBMISSIONS NOT MADE

(A) Legislative History

The earliest Code of Civil Procedure was of 1859. That was followed by the Code of Civil Procedure, 1861. Both were repealed by the Code of Civil Procedure, 1877. In turn the latter was repealed by the Code of Civil Procedure, 1882, which finally was replaced by the CPC. In all these Acts from 1859 till the CPC was amended by the Code of Civil Procedure (Amendment) Act 1976 the provision of Order VIII Rule 1 which started as Section 120 in 1859 Act remained the same. The provision till the amendment in 1976 was that it is in the discretion of the defendant to file or not to file the written statement. For the first time by the Amendment Act of 1976 the word "may" in the provision was replaced by the word "shall". This was done in pursuance of the "basic consideration" quoted in Kailash from para 5 of the Objects and Reasons of Amending Act No. 104 of 1976. In para 6 thereof one can read the important changes proposed. The proposal on the Written Statement is at para 6(I) reading thus :-

> **" Provisions are being made to ensure that Written Statement and documents are filed without delay."**

Thereafter how by Amendment Act 46 of 1999 and by the Amendment Act 22 of 2002 the time frame for filing of the written statement first fixed at 30 days then altered to 90 days was enacted has been noticed both in Kailash and by the High Courts. A look back at this legislative history of the provision spanning the years from 1859 to 2002 cannot but be a significant pointer to the legislative intent. The nature of the provision that is whether it is Procedural or Substantive is but one among the tests determinative of the mandatory or directory

character. Kailash seems, from the opening sentences in the summary extracted at para 2 above, to have bestowed the reason of the provision being procedural the pride of place. The intention of the legislature as reflected from the Legislative history appears to make the provision of Order VIII Rule I mandatory.

B. *Re Sangram Singh, AIR 1955 SC 425*

The second pillar on which Kailash rests seems to have directly emanated from Sangram Singh. It has repeatedly been stated in Kailash that the purpose of the provision is to expedite not scuttle hearing /justice. Implicit in this is the assumption that on failure to file the Written Statement the defendant is completely shut out from the hearing/justice. Till 1976 hearing could continue without a Written Statement. In Sangram Singh the hearing of the Election Petition was proceeding exparte. On an adjourned date the defendant's counsel appeared but was not allowed to take any part in the proceeding because the Tribunal said that it was proceeding exparte at that stage. The defendants' application for setting aside the exparte proceedings was also rejected. The hearing for the defendant thus was scuttled. It is in this background the Supreme Court interpreted the procedural aspects of the CPC. The conclusion in Sangram Singh is that despite non-filing of Written Statement consequently proceeding exparte the defendant can cross-examine the witnesses for the plaintiff, submit arguments and even lead evidence on his behalf limited to showing the infirmity of the plaintiff's case and to impeaching the credibility of the plaintiff's witnesses. Indeed, the three principles extracted from Sangram Singh at para 30 of Kailash in their tails appear to contain the sting. Tails are quoted hereunder :-

> **"(i) ..... therefore be guarded against (provided always that justice is done to "both" sides) lest the very means designed for the furtherance of Justice be used to frustrate it.**
>
> **(ii) ..... and they should not be precluded from participating in them. Of course, their must be exceptions and when they are clearly defined they must be given effect to."**
>
> **(iii) ..... be permitted to exclude presentation of the litigants' defence unless there be an express provision to the contrary."**

The above aspect of Sangram Singh was not presented before the Supreme Court.

(C) Order V Rule I of the CPC

Like Order VIII Rule I, Order V Rule I also has almost a similar legislative history till it attained the present from in the CPC with effect from 01.07.2002. By Act 104 of 1976 the second proviso was added enabling insertion of a direction to file the Written Statement on the day of appearance fixed in the summons. By the same amendment Form 2 in Appendix B to the CPC has been amended to accommodate the direction. With effect from 01.07.2002 under Order V Rule I summons is to be issued "to appear and answer ..... and to file the Written Statement ..... within thirty days from the date of service of summons ..... ". The second proviso has been drastically altered and is almost a verbatim reproduction of the proviso to Order VIII Rule I of the CPC. It is trite to say that in interpretation of a statute every word of the statute and every one of its provisions should be considered. The non consideration of the provisions of Order V Rule I of the CPC appears to leave a gap in the reasoning. The repetition of the provision at two places in the CPC appears to point to the anxiety of the Legislature to remove a major hindrance to speedy disposal of Civil Cases that is the delay in completion of the pleadings and to make the time frame mandatory. There was no mention of Order V Rule I of the CPC either in Kailash or in the Judgment of the High Court.

(D) Power of the COURT

In Kailash no argument relating to the source of power of the Court to extend the time seems to have been advanced by the learned counsels. Unlike the High Court Judgment Kailash, therefore contains no mention of either Section 148 or Section 151 of the CPC. This requires closer scrutiny. Even without that, the assumption regarding the existence of power without considering its source and without contrasting the assumed power with the provisions of Order VIII Rule I of the CPC implicit in Kailash appears to be another crease in Kailash needing ironing out. This is being discussed further hereinbelow.

However to end the topic one may refer briefly to paragraph 27 at page 148 of Salmond on Jurisprudence, Twelfth Edition. There the author has listed eight circumstances destroying or weakening a precedent. Of particular relevance to the present purpose is the following at page 153 under circumstance (6) with the heading "Precedents Sub Silentio or not fully argued" –

> **"A precedent is not destroyed merely because it was badly argued, inadequately considered and fallaciously reasoned.**

Thus a rather arbitrary line has to be drawn between total absence of argument on a particular point, which vitiates the precedent, and inadequate argument, which is a ground for impugning the precedent only if it is absolutely binding and indistinguishable."

6. THE GREY AREAS AND DIFFICULTIES

The provision in Order VIII Rule I CPC contains two "shall"s and one "shall not". The first imperative is certainly directed at the defendant but the other two imperatives are for the court to fulfill. In other words "shall be allowed" is but the passive form of "the court shall allow". Similarly "shall not be latar then etc" is just another form of saying that the court shall not specify a day later than 90 days. The general jurisdiction to enlarge time is contained in Section 148 of the CPC. Pursuant to the objective of achieving speedy disposal Section 148 has also been amended. Now enlargement of time can only be for a total of 30 days. Special procedural provisions are in Order VIII Rule I for Written Statement and Order XVII for hearing etc. Since the provisions of Order VIII Rule I is wider than that provided in Section 148 CPC for Written Statement the wider provision will prevail. Though the provision enables the defendant to file the Written Statement within thirty days of service of summons without any order from the court in practice it is usual to file an application seeking time to file the Written Statement on the day of appearance itself even if the defendant appears within 30 days deadline. The Court then fixes the next date for filing the Written Statement. The power under Section 148 is exhausted on expiry of the 30 days from the date fixed by the court. Therefore, extension can be granted only upto 90 days under the provisions of Order VIII Rule I CPC. From Manoharlal Vs Seth Hiralal AIR 1962 SC 527 to Shipping Corporation of India Vs Machado Brothers, AIR 2004 SC 2093 there is a whole body of precedents supporting the view that Section 151 cannot apply in view of the existence of specific provision for enlargement of time, more so in view of the prohibition in the provision of Order VIII Rule I of the CPC to extend time beyond 90 days. The importance of the question of power to extend the time can be considered from yet another angle. In the event of Order VIII Rule I and Order V Rule 1 remaining unamended by the Parliament by the Amendment Acts of 1999 and 2002 and only Section 148 is amended as at present could the court grant time after time for filing of the Written Statement ? In Kailash the question of power to extend the time seems to have passed sub silentio.

On the 11th May 2005 Kailash was pressed before the Gauhati High Court in arguing for acceptance of a delayed Written Statement in W.P.(c) No.2623 of 2005. After quoting para 39 to 44 in full and part of para 45 (v) from Kailash the High Court summarized thus :

> **"From the aforementioned observations of the Apex Court, it will be seen that the whole emphasis is on the observance of rigidity attached to the provisions of Order VIII Rule I CPC. It is in rarest of the rare cases, an exception can be made and that too on making out a clear case warranting such exception."**

Borrowing from the above one may say that it is in the rarest of rare cases if the rarest of rare Judicial Officer fixes the first date of filing of the Written Statement, deliberately or through inadvertence on the 91st day of service of summons an application may probably be considered under Section 148 CPC to extend the date further at the most by another thirty days. The circumscriptions provided in Kailash for making the exception to extend the time seems capable of operating for the period of 60 days succeeding the first 30 days. Kailsh seems to say that during the first 30 days as well extension is not to be granted merely for the asking but the provision seems to enact a right in the defendant to file the Written Statement "within thirty days from the date of service of summons on him". Kailash does not say specifically anything about the number and period of extension of time after 90 days. Pre 01.07.2002 without limit provision of Section 148 of the CPC surely cannot be restored by interpretation.

In most, if not all, of the cases reported the Written Statement had been filed beyond the 90 days time frame provided under Order VIII Rule I and the prayer to the court was for acceptance of the Written Statement and not specifically for extension of any time to file the Written Statement. The applications are more in the nature of an application for condonation of delay. Indeed in the Election Petition before the Allahabad High Court the delay from 03.07.2004 to 08.07.2004 was prayed to be condoned and to accept the Written Statement. Kailash says (see para 26) that provision of Order VIII Rule I does not specifically take away the power of the court to take the Written Statement on record though filed beyond the time as provided for. Thereafter in para 40 onwards Kailash speaks only of extension of time not of the power of the court referred to in para 26. Surely there is a difference between extension of time, which will be sought to enable filing of the Written Statement yet to be filed and condonation of delay in acceptance of a Written Statement already filed. Can it be that what the court is prohibited from doing directly by extending the time for filing beyond 90 days can be done indirectly by accepting the Written Statement filed without intervention of the Court beyond 90 days ?

These are some of the gray areas and difficulties needing further illumination.

7. THE CONSEQUENCES

Kailash has permitted the defendant to have a foot in the door of the time frame. Experience from both sides of the Judicial divide that is from the Bench and the Bar tells that the foot in the door of time frame would in time serve to throw the door wide open and almost restore the position prevailing before 01.07.2002. The circumscriptions like, interest of Justice, circumstances beyond the control of the party, grave injustice, costs, affidavit and documentary proof etc. designed by Kailash to restrict exercise of the power of extension of time may, in time by a combination of pliant Judges and ingenious lawyers, be converted into tools for causing delay sought to be suppressed by the Parliament.

8. THE POSTCRIPT

The earlier visit in 2003 to Order VIII Rule I of the CPC was ended thus :

> **" The legislature after due deliberation in various forum spanning a period of over seven years enacted the Amended Code in Order to speed up delivery of Civil Justice. The Executive brought this new law into force with effect from 01.07.2002. From the discordance emanating from the four decisions of the four High Courts presented in this essay the Judiciary appears to have unwittingly helped restoration of the status quoante in this regard. This writing may be appropriately ended with the expectation that the Supreme Court someday would resolve the discordance by restoring the intent and purpose of the Amended Code. For all one knows the case from the Gauhati High Court may be the one to fulfill the expectation."**

Incidentally the case from the Gauhati High Court is Baliram Prasad Gupta Vs Md. Isa 2003(3) GLT 30 and it did reach the Supreme Court. However by Order dated 01.09.2003 the Supreme Court dismissed the SLP in limine.

To the extent Kailash declares the law in Order VIII Rule I of the CPC the expectation expressed above has been fulfilled. In the circumstances this revisit may be ended with only a plea to the Supreme Court to consider on an appropriate occasion the alternative view from the High Courts alongwith the Supplementary submissions presented here and either reiterate, relume, reinforce or reject Kailash.