THE HIGH COURT OF MEGHALAYA

W.P. (C) No.395/2013

1. Amrit Cement Industries Ltd., a company incorporated under the Companies Act, 1956 having its registered office at Lower Lachumiere, Opp. Horse Shoe Building, Shillong 793001, Meghalaya represented by its authorized attorney Shri. M.P. Sharma.

2. Shri. Pradeep Kumar Bagla, Managing Director, Amrit Cement Industries Ltd., Lower Lachumiere, Opp. Horse Shoe Building, Shillong 793001. **::::** Petitioners

- ***Vs*** -

1 The State of Meghalaya, represented by the Secretary to the Govt. of Meghalaya, Revenue & Disaster Management Department, Shillong.

2. The Principal Secretary to the Govt. of Meghalaya, Revenue & Disaster Management Department, Shillong.

3. The Deputy Commissioner and the Competent Authority under the Meghalaya Transfer of Land (Regulation) Act, 1971, East Jaintia Hills District, Khliehriat, Meghalaya.

4. The Director of Industries, Govt. of Meghalaya, Lachumiere, Shillong.

5. The Chairman, Single Window Agency, Directorate of Industries, Govt. of Meghalaya, Lachumiere, Shillong **::::** Respondents

BEFORE
THE HON'BLE MR. JUSTICE T NANDAKUMAR SINGH

For the petitioners	:	Mr. HS Thangkhiew, Sr. Adv, Mr. N Mozika, Advs
For the respondents	:	Mr. K S Kynjing, Advocate General, Mr. KP Bhattacharjee, GA
Date of hearing	:	***15.12.2014***
Date of Judgment	:	***28.01.2015***

JUDGMENT AND ORDER

The relief sought for in the present writ petition (i) for deemed sanction is centered around the principle of legal fiction created under Section 4(4) of the Meghalaya Transfer of Land (Regulation) Act, 1971 (for short 'the said Act, 1971'); (ii) for quashing the impugned order dated 30.03.2011 so far as the writ petitioners are concerned is based on the well settled law that by an executive order the statutory rules cannot be whittled down; (iii) the impugned order dated 30.03.2011 will not be applicable to the applications of the writ petitioners dated 03.08.2009 and 21.05.2010 for sanction or permission under Section 4(4) of the said Act, 1971 inasmuch as, the executive order or impugned order dated 30.03.2011 will have the effect of only prospective in operation and; (iv) the impugned order dated 30.03.2011 cannot be a "notification" contemplated or defined under Section 2(c) of the said Act, 1971 or the "notification" under the proviso to Section 3(1) of the said Act, 1971.

2. Heard Mr. HS Thangkhiew, learned senior counsel assisted by Mr. N Mozika, learned counsel appearing for the petitioners and Mr. KS Kynjing, learned Advocate General assisted by Mr. KP Bhattacharjee, learned GA appearing for the respondents.

3. The fact leading to the filing of the present writ petition is tersely put up for deciding the core questions call for decision in the present writ petition. The petitioner No.1 (petitioner company) is a company incorporated under the Companies Act, 1956 vide Certificate of Incorporation having Corporate Identity No.U26940ML2008PLC008302-2008-2008 dated 24.01.2008 issued by the Registrar of Companies, Shillong and having its registered office at Lower Lachumiere, Opp. Horse-shoe Building, Shillong-

793001, East Khasi Hills District, Meghalaya and the petitioner No.2 is the Managing Director of the petitioner-company. The Govt. of Meghalaya promotes entrepreneurs/companies to invest money in setting up of industries in the State of Meghalaya. With a view to facilitate and expedite the various clearances and Govt. approvals required by entrepreneurs as also to promote investments in the State, the Governor of Meghalaya was pleased to constitute a Committee which will act as Single Window Agency for all investments in the State. The Committee shall consist of:-

(i) Chief Minister of Meghalaya	Chairman
(ii) Chairman, MeSEB, Meghalaya	Member
(iii) Principal Secretary, Revenue Department	Member
(iv) Commissioner & Secretary, Industries Department	Member
(vi) Commissioner & Secretary, Tourism Department	Member
(vii) Principal Chief Conservator of Forest	Member
(viii) Managing Director, M.I.D.C., Ltd.	Member
(ix) Secretary General, C.I.M. Shillong	Member
(x) Director of Industries, Meghalaya, Shillong	Member Secretary

The purposes for constituting the Single Window Agency is available in the official website of the Industries Department, Govt. of Meghalaya and it reads as follows:-

Official website of Industries Department
Government of Meghalaya
Commerce & Industries Department

Single Window Agency

With a view to facilitate and expedite the various clearances and Government approvals required by entrepreneurs as also to promote investments in the State, the Governor of Meghalaya is pleased to constitute a Committee which will act as Single Window Agency for all investments in the State. The Committee will consists of the following members:-

1.	*Chief Minister, Meghalaya*	*Chairman*
2.	*Chairman, MeSEB, Meghalaya*	*Member*
3.	*Principal Secretary, Revenue Department*	*Member*
4.	*Commissioner & Secretary, Industries Department*	*Member*
5.	*Commissioner & Secretary, Tourism Department*	*Member*
6.	*Principal Chief Conservator of Forest*	*Member*

7.	*Chairman, State Pollution Control Board*	*Member*
8.	*Managing Director, M.I.D.C. Ltd*	*Member*
9.	*Secretary General, C.I.M., Shillong*	*Member*
10.	*Director of Industries, Meghalaya, Shillong*	*Member Secretary*

Chairman is also empowered to co-opt Member(s) for a particular meeting whose presence is likely to facilitate decisions.

I. *The terms of reference of the Committee will be as follows :*

1. *To facilitate the expeditious issue of all clearance/approvals required from the various Department and Agencies of the State Government to any entrepreneur applying for the same and to assist there in obtaining clearance from other bodies/ organisation in the State.*
2. *To assist entrepreneurs in obtaining various clearances and approvals from the Central Government and its agencies.*
3. *To take up with financial Institutions/Commercial Banks, wherever required, for expediting sanction and disbursement of loans/working capital to prospective entrepreneurs.*
4. *To facilitate and expedite on land matters for the setting up of Industry.*
5. *To facilitate local entrepreneurs in having an interface with Industrial association, Central Government, Boards and Authorities etc.*
6. *To attend to all enquiries from all prospective entrepreneurs relating to the law, procedures, practices etc, governing investments in the State, and*
7. *To continuously review the various clearance and approvals required for investment in the State by entrepreneurs, with a view to simplify them as also to minimise procedural constraints to ensure flow of investments in the State.*

II. *Member Secretary (Director of Industries) will function as the nodal authority to receive and process all reference made to the Committee and will also act as "Escort" for intending entrepreneurs.*

III. *Regional Chief Conservator of Forest, Shillong will also be requested to attend as a special invitee whether so required.*

IV. *In case requiring urgent/immediate disposal, Committee would take resolutions/ decisions through circulation.*

V. *In case where a member is unable to attend meetings due to unavoidable circumstances, he would depute a senior officer empowered to take decisions on the issue which are to be considered in the meeting.*

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4. The petitioner-company had/has undertaken an industrial project for setting up a 0.90 million tonnes per annum Cement Plant along with a 10 Megawatt Captive Power Plant at Umlaper village, Elaka Rymbai, Jaintia Hills District (now East Jaintia Hills District), Meghalaya with an initial project cost of Rs. 164.50 crores (revised project cost of Rs.420.26 crores). The project envisages to give employment to local tribals and also to contribute a substantial amount of revenue to the State and Central exchequer by way of taxes. Over and above, the petitioner-company had entered into Agreements and Memorandum of Understanding with Elaka Rymbai, Minkre and Moosiang Lamare village authorities committing CSR (corporate social responsibility) initiatives for the welfare of local residents of Umlaper village by way of setting up of a higher secondary school, dispensary, drinking water facility, merit scholarship to deserving candidates for pursuing further education and production-based contribution to Elaka fund for carrying out development projects etc. Further, the petitioner-company has also committed to promote the economic and other interests of the local tribals by way of preference in employments in the petitioners' cement plant, procurements and supplies, purchase of raw materials like limestone and shale, contract works for construction activities and sale of cement to locals at concessional rates etc.

5. The petitioner-company approached the Single Window Agency, constituted with a view to facilitate and expedite the various clearances and Govt. approvals required by entrepreneurs and to promote investments in the State, for considering the proposals of the company for setting up of industries aforementioned for granting approval. The Single Window Agency after due consideration of the proposal of the petitioners-company was pleased to grant the approval to the petitioners' proposal for setting up of the aforesaid company subject to the conditions that:

(a) Submit a detailed project report and site plan lay out.

(b) Induct a local tribal promoter partner in its company and submit an undertaking to the effect that the local partner/partners will at no point of time be removed from the company.

(c) The company shall have its headquarter within the State of Meghalaya.

(d) A commitment letter to abide by the employment policy of the State as per Industrial Policy 1997/subsequent policy(s) that may be notified from time to time.

(e) File the industrial entrepreneurs memorandum (IEM) with the SIA, New Delhi in case the investment in plants machineries exceeds Rs.500.00 lakhs. Submit copy of the acknowledgement of IEM from SIA at the earliest.

(f) In case the investment in plants machineries does not exceed Rs.500.00 lakhs, the company is to apply to GM, DIC of the concerned district for the registration vide office Memo No.M/Dind/Genl.83/2008/131 dated 13.11.2008 (*Annexure-6 to the writ petition*) which reads as follows:-

" *GOVERNMENT OF MEGHALAYA*
DIRECTORATE OF INDUSTRIES

No.M/Dind/Genl.83/2008/131 dated 13th November, 2008

To,
The Director,
M/S Amrit Cement Industries Ltd.
Trinity, 226/1, AJC Bose Road,
6th Floor Kolkatta-700020.

Sub: SWA Approval for setting up of Industries in the State.

Sir,
With reference to the above I am to inform you that the Government has approved your application for setting up of;

Item	*Location*	*Capacity*	*Capital Investment*
Cement plant along with Captive power Plant of 10 MV	*Village Umlaper, Elaka Rymbai, Jaintia Hills District*	*0.90 Million tones per annum*	*Rs.164.50 Crores*

You are, therefore, requested to submit the following to the undersigned.

(i) Submit the detailed project report and site plan lay out.

(ii) Induct a local tribal promoter partner in your firm and submit an undertaking to the effect that the local partner/partners will at no point of time be removed from the firm.

(iii) Your company shall have its headquarter within the State of Meghalaya.

(iv) A commitment letter to abide by the employment policy of the State as per Industrial Policy 1997/subsequent policy(s) that may be notified from time to time.

(v) File the industrial entrepreneurs memorandum (IEM) with the SIA, New Delhi in case the investment in plants machineries exceeds Rs.500.00 lakhs and submit copy of the acknowledgement of the IEM from SIA at the earliest.

(vi) In case the investment in plants m/c does not exceed Rs.500.00 lakhs, you are to apply to GM, DIC of the concerned district for the registration.

Please note that this approval is subject to (i) prior Environment Clearance from Ministry of Environment and Forest, Govt. of India (ii) Clearances from Meghalaya State Electricity Board & Meghalaya State Pollution Control Board (iii) other statutory clearance and subject to all laws in force.

This approval shall be valid for a period of 18(eighteen) months from the date of issuing this letter and shall automatically lapse unless effective steps are taken. Violation of any of the clause liable for cancellation of SWA approval.

Yours faithfully,
Sd/-
(D.K. Areng)
Director of Industries,
Meghalaya, Shillong.

Copy to:

1. The Chairman, Meghalaya State Electricity Board, Lumjingshai, Polo Hills, Shillong.

2. Principal Chief Conservator of Forests, Government of Meghalaya, Shillong.

3. The Under Secretary to the Government of Meghalaya, Industries Department.

4. The Chairman, Meghalaya State Pollution Control Board, Lum Pyngad, Shillong.

5. General Manager District Industries Centre, Jaintia Hills District, Jowai."

6. The said approval of the Single Window Agency dated 13.11.2008 was further subject to (i) prior Environment Clearance from Ministry of Environment and Forests, Govt. of India (ii) Clearances from Meghalaya State Electricity Board & Meghalaya State Pollution Control Board (iii) other statutory clearance and subject to all laws in force. The petitioner-company had complied with all the terms and conditions stipulated in the said approval of the Single Window Agency dated 13.11.2008. The petitioner-company had submitted the detailed project report and the site plan layout and also inducted a tribal promoter as a Director of the company and further submitted an undertaking that the local Director will at no point of time be removed from the petitioner-company. The petitioner-company also opened its Head Office within the State of Meghalaya and the same was duly certified by the Director of Industries vide letter dated 31.03.2009. The petitioner-company further submitted a commitment letter to abide by the employment policy of the State as per the Industrial Policy 1997/subsequent policy(s) that may be notified from time to time and also filed the industrial entrepreneurs memorandum (IEM) with the SIA, New Delhi and annexed a copy of the acknowledgement of IEM from SIA in the writ petition. The petitioner-company obtained prior environment clearance from the Ministry of Environment and Forests, Govt. of India and also clearances from the Meghalaya State Electricity Board (now Meghalaya Energy Corporation Ltd.) and the Meghalaya State Pollution Control Board. The environment clearance from the Ministry of Environment and Forests, Govt. of India dated 17.03.2010 is available at Annexure-8 to the writ petition and also the clearance from the Meghalaya State Pollution Control Board dated 07.05.2010 is also available at Annexure-10 to the writ petition.

7. The petitioner-company required land measuring about 110 hectares for setting up the cement plant and limestone land for limestone mining. The petitioner-company filed an application on 03.08.2009 under Section 4 of the said Act, 1971 before the Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District for granting of sanction for transfer of 5,65,078 sq.mtrs (56.5 hectares approx.) of land at Umlaper village, Jaintia Hills District (now East Jaintia Hills District) which is owned by one Shri. Bhalang Singh Phanbuh who is a tribal and also one of the Directors of the petitioner-company in favour of the petitioner-company for setting up of cement plant and captive power plant. The said application was duly received by the then Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District. The petitioner-company again on 21.05.2010 submitted another application under Section 4 of the said Act, 1971 in the prescribed form as provided under the said Act, 1971 before the then Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District for grant of sanction for transfer of 1,95,236 sq.mtrs (19.52 hectares approx.) which is the land of Shri. Bhalang Singh Phanbuh in favour of the petitioner-company for setting up of cement plant and captive power plant. The said application was duly received by the then Additional Deputy Commissioner, Khliehriat Civil Sub-Division. Upon receipt of the said applications, the then Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District after issuing public notices of intended transfer and also after causing necessary inquiries as provided under the said Act, 1971 vide letter No.KSD/Rev-84/2008/33 dated 05.08.2010 recommended for grant of sanction for transfer of the aforesaid lands having an area of 7,60,314 sq.mtrs (76 hectares approx.) of land in favour of the petitioner-company. The then Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District further observed that setting up of the petitioners' cement plant will greatly benefit the local tribals as indicated in

the written agreement signed by the petitioner-company with the Elaka and Minkre and Musiang Lamare villages that the local tribals will greatly benefit from the cement plant by means of employment, supply of raw materials and transport of finished products. The said recommendation of the then Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District dated 05.08.2010 (*Annexure-15 to the writ petition*) reads as follows:-

"*GOVERNMENT OF MEGHALAYA*
OFFICE OF THE SUB-DIVISIONAL OFFICER KHLIEHRIAT
CIVIL SUB-DIVISION:KHLIEHRIAT

No.KSD/Rev-84/2008/33 Dated Khliehriat the 5th August, 2010

To,
The Joint Secretary to the Govt. of Meghalaya,
Revenue & Disaster Management Department,
Meghalaya, Shillong.

Subject: Sanction for transfer of land u/s 3(1) of L.T. Act.

Sir,

In inviting a reference to the above cited subject, I am to inform you that Shri. Bhalang Singh Phanbuh of Lower Lachumiere, East Khasi Hills District intend to transfer his plot of land situated at Umlaper village Rymbai, Elaka Khliehriat Sub-Division measuring a total area of 7,60,314 sq.mtrs (Volume (1)=5,65,078 sq.mtrs & Volume (2)=1,95,236 sq.mtrs) to M/s Amrit Cement Industries Ltd. for setting up Cement plant and Captive power plant involving 17 plots. In this regard the following points may be taken for consideration.

1) That the notice in Form D (see rule 6(1) of land transfer act have been duly issued and no one has filed any objections or given any intention of purchase the said land within the stipulated time.

2) That a joint application made by the land owner and the Company in Form A Part I and Part II (rule 4(1) has been submitted and enclosed herewith. It may be mentioned that Shri. Bhalang Singh Phanbuh is the land owner of all the 17 plots of land and he is also the Director of Amrit Cement Industries Ltd., hence he is both the transfer as well as the transferee.

3) That Shri. Bhalang Singh Phanbuh has purchased all the plots from different land owners as shown in the land holding certificates and sale deeds enclosed herewith and the particulars of the plot are shown as at Annexure-I.

4) That the land documents have been verified and found to be in order and NOC from Jaintia Hills District Council, Doloi Elaka

Rymbai and Headman concerned have been obtained and attached herewith.

5) That the transferee has paid the application fees of Rs.250/- vide challan No.3255 dt. 2nd December, 2009 and Rs.250/- vide challan No.594 dt.25th May, 2010.

6) That the company has obtained Single Window Agency clearance valid up to 18 months from the date of issue.

7) That as far Environment Clearance and consent to establish is concerned, the same has been obtained from Ministry of Environment & Forests on 17th March, 2010 and from Meghalaya State Pollution Control Board on 19th April, 2010. (copy enclosed).

8) Four copies of Sketch Maps showing the layout of the land are also enclosed for your information and ready reference. The land have been inspected and verified by self.

9) That the purpose of this transfer is for setting up of Cement Plant and Captive Power Plant and that setting up of such plant will greatly benefit the local tribals as shown in the registered agreements made between the Company and the Elaka, the Company and the Mynkre village and also with the Musiang Lamare village. Agreements are enclosed for your ready reference. More and above this, local tribals not only of the Elaka but of the State as whole will be benefited from this plant by means of employment, supply of raw materials and transport of finished products. Hence, the proposed transfer will more likely promote economic interests of the Schedule Tribes in the area.

10) That the Company seeking the transfer is carrying out the business in the area and hence necessary for them to reside in the area.

11) That the land proposed for transfer is not required as place of worship/cremation ground.

In view of the above sanction for transfer may be recommended.

Yours faithfully,
Sd/-
Addl. Deputy Commissioner,
Khliehriat (c) Sub-Division,
Khliehriat."

8. Learned senior counsel for the writ petitioners by heavily relying on the legal fiction created under Section 4(4) of the said Act, 1971 contended that sanction applied for under the said applications of the

petitioner-company dated 03.08.2009 and 21.05.2010, shall deem to have been granted after expiring of six months from the date of filing the said applications by the competent authority. The petitioners further stated that the impugned order dated 30.03.2011 is not a notification/notice contemplated under Section 2(c) and proviso to Section 3(1) of the said Act, 1971. For deciding this point, it will be more convenient to quote Sections 2(c), 3 & 4 of the said Act, 1971 as follows:-

Definition

*"**2.** In this Act, unless the context otherwise requires:-*

****** ***** ******

(c)"notification" means notification in the Official Gazette of Meghalaya;

****** ***** ******

Transfer of land

***3.** (1) No land in Meghalaya shall be transferred by a tribal to a non-tribal or by a non-tribal to another non-tribal except with the previous sanction of the competent authority:*

Provided that the Government of Meghalaya is satisfied may, from time to time, by notification, prohibit any transfer of land within such area or areas as may be specified in the notification and there upon the competent authority shall not sanction any such transfer of land under the provision of this Act, within such area or areas.

Provided further that no notification made under the preceding proviso shall apply to transfer of land for any of the purposes mentioned in clause (e) or clause (f) of sub-section (I) of Section 4."

(2) Every notification issued under the proviso to sub-section (1) of this Section shall:-

(i) have effect on the date of its first publication in the official Gazette of Meghalaya;
(ii) be laid, as soon as may be after its publication in the official Gazette, before the House of the Legislative Assembly of the State;

3. Any transfer of land made in contravention of the provisions of this section shall be void and shall not be enforceable in any Court.

Disposal of Application

4. *(1) In granting or refusing sanction under section 3 the competent authority shall take into account the following matters according to the circumstances of each case:-*

(a) Whether the non-tribal holds any other land in Meghalaya;

(b) Whether there is any other tribal willing to take the land on transfer at the market value;

(c) Whether the non-tribal seeking to take the land on transfer is carrying on any business, profession or vocation in or near the area and whether for the purposes of such business, profession or vocation, it is necessary for him to reside in the area;

(d) Whether the proposed transfer is likely to promote the economic interests of the Scheduled Tribes in the area.

(e) Whether the land proposed to be transferred is actually required as a place of public religious worship by any community or as burial or cremation ground.

(f) Whether the land sought to be transferred is for the purpose of implementing a scheme to promote the interests of the tribals in the field of education or industry.

(2) Every order granting or refusing sanction shall be in writing and in the case of refusal shall contain reasons for such a refusal.

(3) Every application for sanction under this section shall be disposed off by the competent authority as early as possible as and not later than six months.

(4) If no order is passed by the Competent Authority on such application within six months, it shall be deemed that sanction has been accorded."

9. On 27.05.2011, the petitioner-company submitted another application under Section 4(4) of the said Act, 1971 before the then Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District for sanction for transfer of land measuring about 3,43,256 sq.mtrs (34.26 hectares approx.) at Umlaper village, Jaintia Hills District (now East Jaintia Hills District) which is the land of Shri. Bhalang Singh Phanbuh in favour of the petitioner-company for setting up of cement plant and captive power plant. The said application was duly received by the then Additional Deputy Commissioner, Khliehriat Civil Sub-Division, Jaintia Hills District. The failure on the part of the competent authority to dispose of the said application within six months i.e. not later than 03.02.2010, 21.11.2010 and

27.11.2012 respectively would mean that under the legal fiction created under Section 4(4) of the said Act, 1971, sanction sought for under the said applications shall deem to have been granted by the competent authority.

10. The Govt. of Meghalaya vide order No.RDS.45/2011/2 dated 30.03.2011 (impugned order) had purportedly put on hold any transfer of land to non-tribals in terms of Sections 4(1)(e) and 4(1)(f) of the said Act, 1971 pending consideration of the amendment of the Act and also for restructuring of the industrial investment policy in Meghalaya. The petitioners stated that the impugned order dated 30.03.2011 is ultra vires and in clear violation of second proviso to Section 3(1) of the said Act, 1971 inasmuch as, the second proviso to Section 3(1) of the said Act, 1971 provides that no notification made under the first proviso shall apply to transfer of land for any of the purposes mentioned in clause (e) or clause (f) of Sub-Section (1) of Section 4. Clause (f) of Sub-Section (1) of Section 4 of the said Act, 1971 reads as "*4(f) whether the land sought to be transferred is for the purpose of implementing a scheme to promote the interests of the tribals in the field of education or industry*." The petitioners further stated that under the first proviso to Section 3(1) of the said Act, 1971, the Govt. of Meghalaya by notification may prohibit the transfer of any land and thereupon, the competent authority shall not sanction transfer of any land under the provisions of the said Act, 1971 and such notification (i.e. notification under first proviso) shall not apply under second proviso to section 3(1) of the said Act of 1971 to transfer of any land for any purposes mentioned in Clause (e) or Clause (f) of Sub-Section (1) of Section 4 of the said Act, 1971. Even if the impugned order dated 30.03.2011 is presumed for the time being as a notification issued under first proviso to Section 3(1) of the said Act, 1971, will not apply to the transfer of land for any purposes mentioned in Clause (e) and Clause (f) of Sub-Section (1) of Section 4 of the said Act, 1971. From the

above factual matrix, it is clear in the present writ petition that the transfer of the said land for which three applications dated 03.08.2009, 21.05.2010 and 27.05.2011 had been filed are for the purposes mentioned in Section 4(1)(f) of the said Act, 1971. In this context, this Court is of the considered view that the impugned order dated 30.03.2011 is not sustainable in the eyes of law so far as the transfer of the said lands are concerned. The petitioners further stated that the impugned order dated 30.03.2011 cannot be the notification as provided under Section 2(c) and first proviso to Section 3(1) of the said Act, 1971 inasmuch as, the impugned order dated 30.03.2011 is not notified in the official Gazette of Meghalaya and is also infraction of second proviso to Section 3(1) of the said Act, 1971.

11. The respondents had filed affidavit-in-opposition and in nowhere of the affidavit-in-opposition filed by the respondents stated that the impugned order dated 30.03.2011 was notified in the official Gazette of Meghalaya.

12. Mr. HS Thangkhiew, learned senior counsel appearing for the petitioners strenuously contended that under the legal fiction created under Sub-Section (4) of Section 4 of the said Act, 1971 sanction sought for or the permission applied for by the petitioners under the said applications dated 03.08.2009, 21.05.2010 and 27.05.2011, shall deem to have been sanctioned by the competent authority. In support of his submission, Mr. HS Thangkhiew, learned senior counsel placed heavy reliance on the decisions of the Apex Court in ***(i) Harish Tandon v. Addl. District Magistrate, Allahabad, U.P. & Ors: (1995) 1 SCC 537; (ii) State of T.N. v. Arooran Sugars Ltd.: (1997) 1 SCC 326; (iii) Srinivasa Rao v. Land Tribunal, Sedam & Anr: (2001) 9 SCC 383; (iv) Live Oak Resort (P) Ltd. & Anr v. Panchgani Hill Station Municipal Council & Anr: (2001) 8 SCC 329***.

13. The role of a provision in a statute creating legal fiction is by now well settled. A statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done. The Apex Court in ***Harish Tandon's*** case ***(Supra)*** clearly held that full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion and further held that the Court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. In the present case, the statutory fiction is to be resorted to between the petitioners and the competent authority. The statutory fiction i.e. deemed sanction is to be resorted to and the purpose of statutory fiction is for granting sanction. Paras 13, 14 & 15 of the *SCC* in ***Harish Tandon's*** case ***(Supra)*** read as follows:-

> "*13. The role of a provision in a statute creating legal fiction is by now well settled. When a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. Thereafter full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion. In the well-known case of* ***East End Dwellings Co. Ltd. v. Finsbury Borough Council****: **1952 AC 109: (1951) 2 All ER 587** Lord Asquith while dealing with the provisions of the Town and Country Planning Act, 1947, observed:*
>
> > *"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it….The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."*
>
> *That statement of law in respect of a statutory fiction is being consistently followed by this Court. Reference in this connection may be made to the case of* ***State of Bombay v. Pandurang Vinayak****: **AIR 1953 SC 244: 1953 SCR 773**. From the facts of that case it shall appear that Bombay Buildings*

(Control on Erection) Ordinance, 1948 which was applicable to certain areas mentioned in the schedule to it, was extended by a notification to all the areas in the province in respect of buildings intended to be used for the purposes of cinemas. The Ordinance was repealed and replaced by an Act which again extended to areas mentioned in the Schedule with power under sub-section (3) of Section 1 to extend its operation to other areas. This Court held that the deemed clause in Section 15 of the Act read with Section 25 of the Bombay General Clauses Act has to be given full effect and the expression 'enactment' in the Act will cover the word 'Ordinance' occurring in the notification which had been issued. In that connection it was said:

> *"The corollary thus of declaring the provisions of Section 25, Bombay General Clauses Act, applicable to the repeal of the ordinance and of deeming that ordinance an enactment is that wherever the word 'ordinance' occurs in the notification, that word has to be read as an enactment."*

14. In the case of ***Chief Inspector of Mines v. Karam Chand Thapar****:* ***AIR 1961 SC 838: (1962) 1 SCR 9*** *it was said:*

> *"Were these regulations in force on the alleged date of contravention? Certainly, they were, in consequence of the provision of Section 24 of the General Clauses Act. The fact that these regulations were deemed to be regulations made under the 1952 Act does not in any way affect the position that they were laws in force on the alleged date of contravention. The argument that as they were 'regulations' under the 1952 Act in consequence of a deeming provision, they were not laws in force on the alleged date of contravention is entirely misconceived."*

15. In the case of ***J.K. Cotton Spinning and Weaving Mills Ltd v. Union of India****:* ***1987 Supp SCC 350: 1988 SCC (Tax) 26: AIR 1988 SC 191: (1988) 1 SCR 700*** *it was said:*

> *"It is well settled that a deeming provision is an admission of the non-existence of the fact deemed. Therefore, in view of the deeming provisions under Explanations to Rules 9 and 49, although the goods which are produced or manufactured at an intermediate stage and, thereafter, consumed or utilized in the integrated process for the manufacture of another commodity is not actually removed shall be construed and regarded as removed. The Legislature is quite competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist."*

14. The Apex Court in ***Arooran Sugars Ltd.*** case ***(Supra)*** reiterated that the role of a provision in a statute creating legal fiction is by now well settled and the Courts have to give full effect to such statutory fiction and it has to be carried to its logical conclusion. Para 11 of the *SCC* in ***Arooran Sugars Ltd.*** case ***(Supra)*** reads as follows:-

> "*11. Sections 5 and 6 of Act 25 of 1978 contain deeming fiction in its different clauses while purporting to omit and remove the amendments which had been introduced by Act 7 of 1974 in the Principal Act. The role of a provision in a statute creating legal fiction is by now well settled. When a statute creates legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be restored to. Thereafter courts have to give full effect to such a statutory fiction and it has to be carried to its logical conclusion. In the well-known case of* ***East End Dwellings Co. Ltd. v. Finsbury Borough Council: 1952 AC 109: (1951) 2 All ER 587****, Lord Asquith while dealing with the provisions of the Town and Country Planning Act, 1947, observed:*
>
> > *"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it….The statute says that you must imagine a certain state of affairs. It does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs…."*
>
> *That statement of law aforesaid in respect of a statutory fiction is being consistently followed by this Court. Reference in this connection may be made to the cases of* ***State of Bombay v. Pandurang Vinayak Chaphalkar: 1953 SCR 773: AIR 1953 SC 244; Chief Inspector of Mines v. Karam Chand Thapar: (1962) 1 SCR 9: AIR 1961 SC 838: (1961) 2 LLJ 146; J.K. Cotton Spg. And Wvg. Mills Ltd. v. Union of India: 1987 Supp SCC 350: 1988 SCC (Tax) 26: (1988) 1 SCR 700; M. Venugopal v. Divisional Manager, LIC: (1994) 2 SCC 323: 1994 SCC (L&S) 664: (1994) 27 ATC 84 and Harish Tandon v. A.D.M.: (1995) 1 SCC 537****.*

15. The Apex Court in ***Srinivasa Rao's*** case ***(Supra)*** held that after permission shall deem to have been granted under the provisions of legal

fiction, any order passed by the competent authority, after permission shall deem to have been granted under the legal fiction, shall have no effect. Paras 2, 3, 4 and 5 of the *SCC* in ***Srinivasa Rao's*** case ***(Supra)*** read as follows:-

> "*2. Exemption for this area was claimed by the appellant on the ground that he had applied for the conversion of this land into non-agricultural land on 17-4-1973, but the permission for conversion was granted by the Assistant Commissioner, Sedam, by his order dated 24-7-1974.*
>
> *3. The Land Tribunal, Sedam, as also the High Court went by the date of the order of the Assistant Commissioner, Sedam, and came to the conclusion that since the permission for conversion was granted after 17-3-1974, it would be of no benefit to the appellant. In recording this finding, the Tribunal as also the High Court, both, overlooked the provision of Section 95(5) of the Karnataka Land Revenue Act which provides as under:*
>
> > *"95. (5) Where the Deputy Commissioner fails to inform the applicant of his decision on the application made under sub-section (2) within a period of four months, from the date of receipt of the application, the permission applied for shall be deemed to have been granted."*
>
> *4. Under this provision a legal fiction has been created to the effect that if the applicant is not informed of the order on the conversion application within four months from the date on which the application was made conversion shall be deemed to have been passed.*
>
> *5. Since in the instant case the order granting conversion was passed on 24-7-1974, i.e., well after the period of four months, the provision of Section 95(5) of the Act became immediately applicable and therefore the application shall, fictionally, be deemed to have been granted on the expiry of four months from the date on which it was made. Since the application was made on 17-4-1973, it shall be deemed to have been granted on 17-8-1973 which is a date earlier than the relevant date, namely, 17-3-1974 and, therefore, the said area could not have been treated as part of agricultural holding of the appellant for purposes of determining the ceiling on surplus area under the Act."*

16. The Apex Court in ***Live Oak Resort (P) Ltd.*** case ***(Supra)*** held that after the deemed sanction had been granted on the expiry of the stipulated period, the subsequent rejection of the application for sanction has

no correlation with deemed sanction and such subsequent rejection cannot affect any work of construction being declared as unauthorized. In that case, the application for construction of additional floor shall be deemed to have been granted under the Maharashtra Regional and Town Planning Act, 1966 and in terms of standardized building bye-laws and construction in pursuance of the deemed sanction cannot be held as an unauthorized one and subsequent rejection for the application for sanction does not have any manner or relevant with deemed sanction. Para 29 of the *SCC* in ***Live Oak Resort (P) Ltd.*** case ***(Supra)*** reads as follows:-

> "*29. As regards the issue of deemed sanction, the High Court answered it in the negative recording therein that the appellants were refused of any sanction though beyond the period as such deemed sanction would not arise. Unfortunately, we cannot lend our concurrence thereto. Panchgani Municipal Council being a 'C' Class municipal council of Maharashtra in its Standardised Building Bye-laws, in particular, bye-law 9.2 records that while the authority may sanction or refuse a proposal, there stands an obligation on the part of the authority to communicate the decision and where no orders are communicated within 60 days from the date of submission of the plan either by way of a grant or refusal thereto, the authority shall be deemed to have permitted the proposed construction. In view of our observation noticed hereinbefore, we are not inclined to go into this issue in any detail suffice, however, to record that the submissions pertaining to deemed sanction have substance and cannot be brushed aside in a summary fashion. Eventual rejection does not have any manner of correlation with deemed sanction – it is only that on expiry of the 60 days that the sanction is deemed to be given, subsequent rejection cannot be thus affect any work of construction being declared as unauthorized. The deeming provision saves such a situation. As noticed above, we are not inclined to detain ourselves any further on this score.*"

17. Mr. HS Thangkhiew, learned senior counsel appearing for the petitioners also contended that by a catena of decisions of the Apex Court, it is now well settled that by an executive order the statutory rules cannot be whittled down. In support of his contention, he relied on the decision of the Apex Court in ***Uday Pratap Singh & Ors v. State of Bihar & Ors: 1994***

Supp (3) SCC 451. The executive order i.e. the impugned order dated 30.03.2011 which is neither the notification issued by the State Govt. under Section 2(c) nor under first proviso to Section 3(1) of the said Act, 1971 cannot whittle down the statutory provisions i.e. second proviso to Sub-Section (1) of Section 3, Section 4(1)(f) and Section 4(4) of the said Act, 1971. Para 6 of the *SCC* in ***Uday Pratap Singh's*** case ***(Supra)*** reads as follows:-

> "*6. By a catena of decisions of this Court, it is now well settled that by an executive order the statutory rules cannot be whittled down nor can any retrospective effect be given to such executive order so as to destroy any right which became crystallized. ……*"

18. Mr. HS Thangkhiew, learned senior counsel further contended that the impugned order dated 30.03.2011 will be prospective in operation inasmuch as, the notification or order are always prospective in operation unless the express language renders it otherwise making it effective with retrospective effect. Even if the illegal order dated 30.03.2011 is accepted as a legal one for the sake of arguments, it will not be applicable to the said two applications of the petitioners dated 03.08.2009 and 21.05.2010 for sanction under Section 4 read with Section 3 of the said Act, 1971. Mr. HS Thangkhiew, learned senior counsel appearing for the petitioners in support of his contention placed heavy reliance on the decisions of the Apex Court in ***(i) MRF Ltd Kottayam v. Assistant Commissioner (Assessment) Sales Tax & Ors: (2006) 8 SCC 702; (ii) Rafiquennessa v. Lal Bahadur Chetri: AIR 1964 SC 1511; (iii) Bakul Cashew Co. & Ors v. Sales Tax Officer, Quilon & Anr: (1986) 2 SCC 365; (iv) Union of India & Anr v. Kartick Chandra Mondal & Anr: (2010) 2 SCC 422 and; (v) Hukam Chand etc. v. Union of India & Ors: (1972) 2 SCC 601***.

Para 27 of the *SCC* in ***MRF Ltd., Kottayam's*** case ***(Supra)*** reads as follows:-

"*27. The provisions of the Act or notification are always prospective in operation unless the express language renders it otherwise making it effective with retrospective effect. This Court in* ***S.L. Srinivasa Jute Twine Mills (P) Ltd. v. Union of India: (2006) 2 SCC 740: 2006 SCC (L&S) 440*** *has held that it is a settled principle of interpretation that: (SCC p. 747, para 18)*

> "…… *retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary*."

Para 9 of the *AIR* in ***Rafiquennessa's*** case ***(****Supra****)*** reads as follows:-

"*9. Mr. Chatterjee contends that the Assam High Court was in error in coming to the conclusion that the proceedings which were pending between the parties at the appellate stage on 6th July, 1955 when the Act came into force, fell to be governed by the provisions of S. 5. He argues that at the relevant date when the suit was filed by the appellant, he had acquired a right to eject the tenant under the terms of the tenancy, and he contends that where vested rights are affected by any statutory provision, the said provision should normally be construed to be prospective in operation and not retrospective, unless the provision in question relates merely to a procedural matter. It is not disputed by him that the legislature is competent to take away vested rights by means of retrospective legislation. Similarly, the legislature is undoubtedly competent to make laws which over-ride and materially affect the terms of contracts between the parties; but the argument is that unless a clear and unambiguous intention is indicated by the legislature by adopting suitable express words in that behalf, no provision of a statute should be given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law, no objection can be taken to them. Mr. Chatterjee has relied upon the well known observations made by Wright J. in re Athlumney; Ex parte Wilson 1898-2 QB 547 when the learned Judge said that it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. He added that there was one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights. In order to make the statement of the law relating to the relevant rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, we ought to add that retrospective operation of a statutory provision can be inferred even in cases where such retroactive operation appears to be*

clearly implicit in the provision construed in the context where it occurs. In other words, a statutory provision is held to be retroactive either when it is so declared by express terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur."

Bakul Cashew Co. case ***(Supra)*** held that an authority which has the power to make subordinate legislation cannot make it with retrospective effect unless it is so authorized by the legislature which has conferred that power on it. Para 8 of the *SCC* in ***Bakul Cashew Co.*** case ***(Supra)*** reads as follows:-

"*8. As regards the power of Government to cancel the notification which had been issued earlier, the High Court has upheld the power of the Government to do so. We think that the High Court was right in taking that view. The liability to pay sales tax arose at the point of time when the purchases were made. The power of exemption in the instant case was exercised through a retrospective notification which was a piece of subordinate legislation. It has been held by this Court that an authority which has the power to make subordinate legislation cannot make it with retrospective effect unless it is so authorised by the legislature which has conferred that power on it. The law on the above point is neatly summarised in* ***ITO v. M.C. Ponnoosse: (1970) 1 SCR 678****: **(1969) 2 SCC 351: AIR 1970 SC 385** at pages 681-682 thus: (SCC pp.354-5, para5)*

> *"Now it is open to a sovereign legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are - in the words of Willes, J. in* ***Phillips v. Eyre: 40 Law J. Rep (NS) QB 28, 37*** *– "no doubt prima facie of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But*

*where no such language is to be found it has been held by the courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect; (see Subba Rao, J. in **Dr. Indramani Pyarelal Gupta v. W.R. Nathu: (1963) 1 SCR 721: AIR 1963 SC 274**) - the majority not having expressed any different opinion on the point; **Modi Food Products Ltd. v. CST: AIR 1956 All 35: (1995) 6 STC 287: ILR (1995) 2 All 612**; **India Sugar Refineries Ltd. v. State of Mysore: AIR 1960 Mys 326** and **S. Shivdev Singh v. State of Punjab: (1959) 61 PLR 514**."

19. Lastly, Mr. HS Thangkhiew, learned senior counsel appearing for the petitioner contended that the competent authority cannot take advantage of their own wrong or their own lapses inasmuch as, the competent authority had failed to issue the sanction or failed to take the decision before the expiry of six months as mentioned under Sub-Section (4) of Section 4 of the said Act, 1971. In support of his contention, he relied on the decision of the Apex Court in ***Kusheshwar Prasad Singh v. State of Bihar & Ors: (2007) 11 SCC 447***. Paras 14, 15 & 16 of the *SCC* in ***Kusheshwar Prasad Singh's*** case ***(Supra)*** read as follows:-

"*14. In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court in **Mrutunjay Pani v. Narmada Bala Sasmal**: **AIR 1961 SC 1353** wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim commodum ex injuria sua nemo habere debet (no party can take undue advantage of his own wrong).*

*15. In **Union of India v. Major General Madan Lal Yadav: (1996) 4 SCC 127: 1996 SCC (Cri) 592** the accused army personnel himself was responsible for delay as he escaped from detention. Then he raised an objection against initiation of proceedings on the ground that such proceedings ought to have been initiated within six months under the Army Act, 1950. Referring to the above maxim, this Court held that the accused could not take undue advantage of his own wrong. Considering the relevant provisions of the Act, the Court held that presence of the accused was an essential condition for the commencement of trial and when the accused did not make himself available, he could not be allowed to raise a contention that proceedings were time-barred. This Court (at SCC p. 142,*

para 28) referred to Broom's Legal Maxims (10th Edn.), p. 191 wherein it was stated:

> *"It is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."*

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourbale interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".

20. For the foregoing discussion, this Court is of the considered view that sanction sought for under the said applications dated 03.08.2009, 21.05.2010 and 27.05.2011 filed by the petitioners, shall deem to have been granted by the competent authority; and also that any order, after deemed sanction, passed by the authority in correlation with the deemed sanction shall have no effect and also that the impugned order dated 30.03.2011 is illegal. Accordingly, the impugned order dated 30.03.2011 is hereby quashed and in consequence thereof, the impugned notice dated 06.11.2013 is also hereby quashed.

21. In the result, the writ petition is allowed.

22. Parties are to bear their own costs.

JUDGE

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