THE HIGH COURT OF MEGHALAYA

SHILLONG

WP(C)NO. 3 OF 2016

Shri Balios Swer,
Son of Smti Siomal Swer,
r/o 16, Khliehriat West,
East Jaintia Hills-793002
Meghalaya **::: Petitioner**

- Vs –

1. The State of Meghalaya,
Represented by Secretary to the
Government of Meghalaya,
Forest & Environment Department,
Shillong.

2. The Principal Chief Conservator of Forest,
HoFF, Meghalaya, Shillong.

3. The Principal Chief Conservator of Forest
(T), Meghalaya, Shillong. **::: Respondents**

-BEFORE-
HON'BLE MR JUSTICE T NANDAKUMAR SINGH
CHIEF JUSTICE (ACTING)

Advocate for the Petitioner	:::	Mr K Paul, Adv.
Advocate for the Respondents	:::	Mr S Sen Gupta, Addl. Sr. GA, Meghalaya.
Date of hearing	:::	15.01.2016
Date of Judgment & Order	:::	27.01.2016

JUDGMENT AND ORDER

As agreed to and prayed for by Mr K Paul, learned counsel, appearing for the petitioner as well as Mr. S Sen Gupta, learned Addl. senior GA, appearing for the State respondents, this writ petition was taken up for final disposal at the admission stage.

2. Factual matrix :

The main relief sought for in the present writ petition is for a direction to the respondent authorities, more particularly, respondents No. 2 and 3 to allow the petitioner to continue with the traditional mining of sandstones and limestone and transportation from the area, with sparse vegetation unfit for any kind of cultivation, situated in remote hills terrain. The entire life, culture and economy of the petitioner as also of local population have revolved only around limestone and sandstones mining. The petitioner and other similarly situated people are quarrying of limestone from their lands and selling it to local lime kilns and other buyers and earning their livelihood. It is the admitted case of both the parties that the land tenure system in Khasi and Jaintia Hills Districts, where the land as well as the minerals underneath belong to the land owners as per the Sixth Schedule of the Constitution of India, is totally unique and different from the rest of the country. According to the petitioner, their land tenure system is based on the following : (i) Socio-political history of these areas; (ii) the fact that these areas were never a part of British India and these areas ceded to the Union of India by an Instrument of Accession signed by the Chiefs of the then 25 Khasi States; (iii) land tenure system prevalent in the area prior to signing of Instrument of Accession; (iv) land tenure system prevalent in the area post Instrument of Accession till date; (v) lack of any kind of ryotwari settlement of lands by the British Government before independence of India or by the State Government of Assam or of Meghalaya after independence; and (vi) absence of any law made either by the State or by the Parliament vesting all mineral rights in the State. As such, surface rights over the land as well as the minerals below the land belong to the land owners. It is not disputed by the learned Addl.

senior GA that as per the website of Mining and Geology Department, Govt. of Meghalaya, the limestone reserve in Meghalaya is about 15,100 million tones. At present, the mining of limestone in Meghalaya is not developed on account of being carried out on a very small scale level. However, sandstone and limestone quarries do not cause any significant damage to the environment for the reason that the lands having sandstone and limestone remain barren and not considered fit to grow plants and forest. Only shrubs like vegetation can grow in such places provided the area is excavated. It is further the admitted case of the parties that the lands having sandstone and limestone remain barren and it is not fit for vegetation and also the trees could not grow on it.

3. The traditional activities of local inhabitants of the State of Meghalaya excavating limestone and sandstone from the outskirt of the forest, where it is very rocky and not fit to grow plants, for construction works and other purposes and also for earning their livelihood had been considered by the Apex Court in **Lafarge Umiam Mining Private Limted vs. Union of India and others, reported in (2011)7 SCC 338**.

4. In the case in hand, the concerned Divisional Forest Officer, Khasi Hills (T) Division, Shillong, had issued No Objection Certificate to the petitioner and others inhabitants to extract and export limestone from private land which is outside the forest area and further allowed to supply and export of limestone anywhere within and outside the State on payment of Forest royalty, income tax and VAT to the Forest Department.

5. Hon'ble the Apex Court in ***Lafarge Umiam Mining Private Limited (supra)*** held that: "In our view, the natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development. They equally know the concept of forest degradation. They are equally aware of systematic scientific exploitation of limestone mining without causing of "environment degradation". Hon'ble the Apex Court was further fully satisfied that the natives and the indigenous people of Nongtrai village are fully conscious of their rights and obligations towards clean environment and economic development. Hon'ble the Apex Court further defined the meaning of "forest" as provided in the United Khasi and Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958, that the meaning of "forest" would be unbroken area having more than 25 trees having girth of more than 120 cm per acre. Hon'ble the Apex Court held that "prior approval" requirement under the Environment Protection and Pollution Control-Forest (Conservation) Act, 1980, need for the area declared to be "forest" and as such prior approval is not needed for area which is not a forest. Paras 88, 92, 97, 98, 101, 102, 103 and 120, are quoted hereunder:

> ***"88. At the outset, one needs to take note of Section 2 of the 1980 Act which stipulates prior approval. That section refers to restriction on the dereservation of forests or use of forest land for non-forest purpose. It beings with non obstante clause. It states that :***
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> > ***"2. Restriction on the dereservation of forests or use of forest land for non-forest purpose – Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing-***
> >
> > ***(i) * * * ***
> >
> > ***(ii) That any forest land or any portion thereof may be used for any non-forest purpose;"***
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> ***This is how the concept of prior approval by the Central Government comes into picture. <u>Thus,</u>***

prior determination of what constitutes "forest land" is required to be done.

92. The council by its letter dated 28.4.1997 had informed the State Government that the area in question did not fall in the forest. Apart from the said letter, the Chairperson of the Expert committee appointed by the State of Meghalaya being the principal Chief Conservator of Forests also submitted his report in which it was expressly stated that the mining lease granted by the State Government did not fall in the forest. Since the mining lease granted by the State did not fall in the forests, the State Government did not submit any proposal to the Central Government under Section 2 of the 1980 Act as it treated the site in question as falling on the outskirts of the forests. It is almost after nine years that there was a change of view on the part of MoEF under which the report of the Expert committee headed by the principal Chief Conservator of Forests was given a go-by. Between 1997 and 2007, the view which prevailed was that the project site stood located on the outskirts of the forests.

96. In the hearing, the purpose, objective, composition and procedure of environmental public hearing was discussed. The Headman of Nongtrai was also present. He gave reasons as to why the village durbar had agreed to the proposed project. The main reason being that the limestone was abundantly available in the area but the same remained unutlised by local villagers themselves due to lack of infrastructure. That, for economic development of the local population, the village durbar had decided to lease the area required for the project to Lafarge. In the meeting, the economic benefits of the local people from the project proponent were also discussed. The environmental implications were also discussed. The mitigating measures to be adopted by the project proponent were also discussed to maintain the ecology and environmental balance of the area. The objections of certain persons were also noted and discussed. The durbar came to the conclusion that there was no destruction of any caves. The complainant was not even present during the hearing. Thus, a public hearing did take place on 3.6.1998.

97. One more aspect at this stage needs to be mentioned. Public participation provides a valuation input in the process of identification of forest. Today, amongst the tribals of the North-East, there is a growing awareness of the close relationship between poverty and environmental pollution. According to Environmental Law and Policy in India by Shyam Divan and Armin Rosencranz, "many native and indigenous people are fully aware of what constitutes preservation and conservation of biodiversity. Many

native and indigenous people have many a times opposed government policies that permit exploitation on traditional lands because such exploitation threatens to undermine the economic and spiritual fabric of their culture, and often results in forced migration and resettlement, the struggle to protect the environment is often a part of the struggle to protect the culture of the native and indigenous people.

98. In our view, the natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development. They equally know the concept of forest degradation. They are equally aware of systematic scientific exploitation of limestone mining without causing of "environment degradation". However, they do not have the requisite wherewithal to exploit limestone mining in a scientific manner. These natives and indigenous people know how to keep the balance between economic and environment sustainability.

101. At this stage one more argument advanced on behalf of SAC needs to be addressed. According to SAC, in this case a decisive factor which clearly shows that there is "forest" on the core area is the statutory definition of forest contained in the United Khasi and Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958. Section 2(f) defines the expression "forest" and the tree count emerging from the High-powered Committee (HPC) Report which establishes that the area answers the statutory definition. According to SAC, in terms of the said definition of forest, if there exists more than 25 trees per acre then it is a forest. This argument has no merit.

102. According to Shri Krishnan Venugopal, learned senior counsel appearing on behalf of the village durbar of Nongtrai Village (Respondent 5), SAC has not stated the full facts in this regard. We find merit in this contention. Section 5 of the 1958 Act inter alia provides that no timber or forest produce shall be removed for the purpose of sale, trade and business without prior permission. Section 7 of the said Act deals with restrictions on felling of trees and further provides that no tree below 1.37 m in girth at the breast level shall be felled. Thus, it is the trees of a particular girth and breast height and not every tree should be counted while computing whether a particular area is a forest area or not. In fact in the year 2007, a survey of the unbroken area was conducted by the Forest Department of the State of Meghalaya wherein an inventory of the existing trees was prepared based on their nature and girth. The said record confirms that the unbroken area has less than 25 trees per acre having girth of more than 120 cm per acre.

> ***103. It is in view of the existence of the 1958 Act, which is a local legislation, that the native people as also the State officials like the DFO understood the area in the light of the said Act. It is important to note once again that this understanding of the natives and tribals about the Local Act is an important input in the decision-making process of granting environmental clearance. It is deeply engrained in the local customary law and usage. It is so understood by the Expert committee headed by the then Principal Chief Conservator of Forests on the basis of which the State granted the mining lease saying that there was no forest. This certificate was granted by the State in terms of the order of this Court dated 12.12.1996.***
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> ***120. Accordingly, this matter stands disposed of keeping in mind various facets of the word "environment", the inputs provided by the village durbar of Nongtrai (including their understanding of the word "forest" and the balance between environment and economic sustainability), their participation in the decision-making process, the topography and connectivity of the site to Shillong, the letter dated 11.5.2007 of the Principal Chief Conservator of Forests and the report of Shri BN Jha dated 5.4.2010 (HPC) (each one of which refers to economic welfare of the tribals of Village Nongtrai), the polluter pays principle and the intergenerational equity (including the history of limestone mining in the area from 1858 and the prevalent social and customary rights of the natives and tribals). The word "development" is a relative term. One cannot assume that the tribals are not aware of principles of conservation of forest. In the present case, we are satisfied that limestone mining has been going on for centuries in the area and that it is an activity which is intertwined with the culture and the unique landholding and tenure system of Nongtrai Village. On the facts of this case, we are satisfied with the due diligence exercise undertaken by MoEF in the matter of forest diversion. Thus, our order herein is confined to the facts of this case".***

6. The Apex Court in ***Lafarge Umiam Mining Private Limited (supra)*** held that the land of the nature where the local inhabitants have been carrying traditional activities of excavating sandstone and limestone is not a forest within the meaning of forest as defined by Hon'ble the Apex Court in ***TN Godavarman Thirumulpad's case***.

7. From the *ratio decidendi* of ***Lafarge Umiam Mining Private Limited (supra)***, it is clear that the Apex Court did not put any embargo on the continuation of traditional excavation and transportation of limestone and sandstone from the areas aforesaid and also further the Apex Court already held that the aforesaid areas are not a forest.

8. A Division Bench of this Court had passed a judgment and order dated 30.06.2015 in writ petition being WP(C)No. 140 of 2014 in which the writ petitioner was granted the lease to collect compensatory fee from the trucks loaded with minerals like coal and limestone and also for reclamation of the un-classed forest falling within the jurisdiction of the Garo Hills Autonomous District Council, Tura, at Dainadubi Chokpot and Baghmara. The fact of the case is mentioned in paras 5, 6, 7 and 8 of the judgment and order dated 30.06.2015, passed in WP(C)No. 140 of 2014, which reads as follows :

> ***" 5. The petitioner herein was also granted lease to collect compensatory fee from the trucks loaded with minerals like coal and limestone for reclamation of un-classed forest falling within the jurisdiction of the GHADC, Tura at Dainadubi, Chokpot and Baghmara on the following terms and conditions :***
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> > ***1. The concerned lease holder should deposit an amount of Rs. 1,00,000/- (Rupees one lakh) only per month at the end of every month positively failing which this order will be cancelled without further notice.***
> >
> > ***2. That the rate to be collected is fixed at Rs. 300/- (Rupees three hundred) only from each truck loaded with coal and limestone from the areas as listed above.***
> >
> > ***3. That the money receipt of the same should be issued to the concerned truck driver.***
> >
> > ***4. That the receipt books for collection of such fees will be supplied by the GHADC on payment of***

Rs. 200/- (Rupees two hundred) only per book and the counterfoils of the used up Receipt Books should be returned to the office of the Chief Forest Officers, GHADC, Tura at the end of every month.

5. That the period for such collection is allotted on trial basis for 3(three) months with effect from the date of issue of this order.

6. On expiry of the allotted period of 3(three) months on trial basis, fresh order shall be made in accordance with the prevalent rules and regulations of the GHADC, Tura to the interested person(s).

7. That the collection of such fees etc. should not disturb the smooth movement of other vehicles in any way.

8. That 2 (two) personnel from the Forest Department shall be deprived to check and monitor the operation of the collection points and to check the records maintained thereof and to report the same to the authority on monthly basis."

6. Thus, the petitioner set up a forest check gate at Nagulpara and Dainadubi in East Garo Hills district in the complex belonging to one Smti Nikse Areng of Dainadubi which is situated on the National Highway 62. The complex had been constructed after obtaining all the clearance from the competent authorities such as Deputy Commissioner, North Garo Hills District, Superintendent of Police, North Garo Hills District, Ministry of Road Transport and Highways, Govt. of India, PWD(Roads), Williamnagar Circle, Ministry of Road Transport and Highways. It is also stated that the complex is situated away from the highway and is connected with an approach road which also been constructed on obtaining requisite permissions from the competent authorities. It is also stated in the writ petition that in terms of notification issued by the GHADC a prescribed receipt was to be issued for every such collection and two personnel from the Forest Department of District Council were to be deputed to check and monitor the operation of the collection points and to check the record maintained thereof. These forest personnel were The lease was essentially for three months but was made extendable for full term upon fulfillment of the requirements. The petitioner set up the forest check gate at Nangalpara with the prior approval of the district Council and built up the necessary infrastructure by investing substantial amount of money and the same was operationalised after completing all the formalities. The petitioner was strictly adhering to the stipulation contained in

the order dated 20.12.2013. The petitioner was regularly depositing the monthly lease amount of Rs. 1 lakh. That is why being fully satisfied with the performance of the petitioner, the GHADC by office Order No. 222, dated 4.3.2013 extended the lease for a period of three years with effect from 20.3.2014 to 19.3.2017 on the same terms and conditions as contained in the Order dated 20.12.2013.

7. The Deputy Commissioner, North Garo Hills District vide his letter dated 3.3.2014 convened a meeting on 5.3.2014. The meeting was attended by all the concerned including the writ petitioner and the officers of the GHADC. In the said meeting, the discussion was made to close down the entire unauthorized check gates causing illegal collection without any authority of law. However, the petitioner states that it was also decided not to interfere with the lawful collections.

8. In this background, on 11.3.2014, the District of North Garo Hills carried out operation to close down all the unauthorized collection booths, but strangely without any rhyme or reason or even without issuing a show cause, the forest check gate allotted to the petitioner on lease was also simultaneously closed down. Being aggrieved, the petitioner by way of instant writ petition has assailed the action of closure of forest check gate allotted to him on the ground of being arbitrary and illegal. The forest check gate was set up to facilitate the collection of compensatory fee from the trucks loaded with minerals like coal and limestone for reclamation of un-classed forest falling within the jurisdiction of the GHADC."

9. Vide Para 30 of the said judgment and order, this Court dismissed the writ petition with direction that except in cases where licence for extraction of minerals has already been granted or lease deed for that purpose has already been entered into in accordance with the directions of Hon'ble the Supreme Court in the judgments, all other mining activities shall have to stop. For easy reference, Para 30 of the said judgment and order is quoted hereunder :

"30. For the reasons foregoing, we dismiss the writ petition with direction that, except in cases where licence for extraction of minerals has already been granted or lease deed for that purpose has already been entered into in accordance with the directions of Hon'ble the Supreme Court in the judgments referred to hereinabove, all other mining activities shall have to stop and in future the State shall not grant any licence

> ***or enter into a lease deed for extraction of minerals without (i) consultation with the CEC; (ii) drawing a comprehensive scheme and; (iii) creating a Fund for reclamation in the interest of sustainable development and intergenerational equity, and for the purpose of rectifying the damage caused to the forest and environment."***

10. On conjoint reading of the judgment of Hon'ble the Apex Court in ***Lafarge Umiam Mining Private Limited and TN Godavarman Thirumulpad (supra),*** and the judgment and order of this Court dated 30.06.2015, it is crystal clear that the traditional excavation and transportation of limestone and sandstone under relevant Act, Rules and By-laws in the State of Meghalaya by the local inhabitants from a place which is not a forest as held by Hon'ble the Apex Court in ***Lafarge Umiam's*** case is not stopped by the Apex Court and this Court. But in future, the State Government shall not grant any new mining licence/lease or enter into a lease deed for extraction of minerals without (i) consultation with the CEC; (ii) drawing a comprehensive scheme and; (iii) creating a Fund for reclamation in the interest of sustainable development and intergenerational equity, and for the purpose of rectifying the damage caused to the forest and environment.

11. However, judgment and order of this Court dated 30.06.2015 passed in WP(C)No. 140 of 2014, was called for a review being Review Petition No. 10 of 2015. Vide judgment and order dated 26.11.2015, the earlier judgment and order dated 30.06.2015 is modified only to the extent :

> ***"15. In view of the above discussion, we are not required to exercise the review jurisdiction even though the aforesaid notifications were not available, for whatever reason, before the Court during the hearing of the writ petition. As such, the impugned judgment is modified only to a limited extent that since the statutory agency, namely, State Level Environment***

> ***Impact Assessment Authority (SLEIAA), Meghalaya has been constituted, now State shall seek clearance from the SLEIAA for grant of any license or lease for extraction of minerals which shall act in accordance with law instead of CEC. As regards second and third directions, namely, (ii) drawing a comprehensive scheme and (iii) creating a Fund for reclamation in the interest of sustainable development and intergenerational equity and for the purpose of rectifying the damage caused to the forest and environment, we do not find a valid ground to interfere for the simple reason that the private writ petitioners have heavily relied upon the mandate of judgment in Lafarge Umiam Mining Pvt Ltd v. Union of India and Others, reported in (2011) 7 SCC 338 in their review petition which has dealt with the issues behind the directions No. (ii) and (iii) of the impugned judgment passed in writ petition. The judgment in Lafarge Umiam Mining has been discussed and relied in Goa Foundation's case (supra). Our directions No. (ii) and (iii) of the impugned judgment are only based on the ratio of the Goa Foundation's case. Thus, we decline to consider the prayer for review of the said directions No. (ii) and (iii)."***

12. The directions of this Court in judgment and order dated 30.06.2015 shall be prospective. Regarding this point, it would be suffice to refer to the decision of the Apex Court (Constitution Bench) in ***Managing Director, ECIL, Hyderabad and others vs. B Karunakar and others, reported in (1993) 4 SCC 727***, of which paras 33 and 34 of SCC read as :

> ***"33. Questions (vi) and (vii) may be conserved together. As has been discussed earlier, although the furnishing of the enquiry officer's report to the delinquent employee is a part of the reasonable opportunity available to him to defend himself against the charges, before the forty-second Amendment of the Constitution, the stage at which the said opportunity became available to the employee had stood deferred till the second notice requiring him to show cause against the penalty, was issued to him. The right to prove his innocence to the disciplinary authority was to be exercised by the employee along with his right to show cause as to why no penalty or lesser penalty should be awarded. The proposition of law that the two rights were independent of each other and in fact belonged to two different stages in the inquiry came into sharp focus only after the Forty-second Amendment of the Constitution which abolished the second stage of the inquiry, viz., the inquiry into the nature of punishment.***

As pointed out earlier, it was mooted but not decided in E Bashyan case by the two learned Judges of this Court who referred the question to the larger Bench. It has also been pointed out that in KC Asthana case no such question was either raised or decided. It was for the first time in Modh. Ramzsan Khan case that the question squarely fell for decision before this Court. Hence, till November 20, 1990, i.e., the day on which Mohd. Ramzan Khan case was decided, the position of law on the subject was not settled by this Court. It is for the first time in Mohd. Ramzaan Khan case that this Court laid down the law. That decision made the law laid down there prospective in operation, i.e., applicable to the orders of punishment passed after November, 20, 1990. The law laid down was not applicable to the orders of punishment passed before that date notwithstanding the fact that the proceedings arising out of the same were pending in courts after that date. The said proceedings had to be decided according to the law prevalent prior to the said date which did not require the authority to supply a copy of the enquiry officer's report to the employee. The only exception to this was where the service rules with regard to the disciplinary proceedings themselves made it obligatory to supply a copy of the report to the employee.

34. <u>However, it cannot be gainsaid that while Mohd. Ramzan Khan case made the law laid down there prospective in operation, while disposing of the cases which were before the Court, the Court through inadvertence gave relief to the employees concerned in those cases by allowing by allowing their appeals and setting aside the disciplinary proceedings. The relief granted was obviously per incuriam. The said relief has, therefore, to be confined only to the employees concerned in those appeals. The law which is expressly made prospective in operation there, cannot be applied retrospectively on account of the said error. It is now well settled that the courts can make the law laid down by them prospective in operation to prevent unsettlement of the settled positions, to prevent administrative chaos and to meet the ends of justice. In this connection, we may refer to some well-known decision on this point."</u>

13. For the aforesaid reasons, the respondents, more particularly respondents No. 2 and 3, shall allow the petitioner and other similarly situated persons, who were continuing on traditional excavation and transportation of limestone and sandstone at the time of passing of the judgment and order dated 30.06.2015 in WP(C)No. 140

of 2014, to continue the traditional excavation and transportation of limestone and sandstone under the Acts, Rules and By-laws in the State of Meghalaya. However, for grant of any new mining lease (excluding traditional excavation and transportation of limestone and sandstone), the State authority should seek clearance from the State Level Environment Impact Assessment Authority (SLEIAA) instead of CEC as directed in the said judgment and order of the Court dated 26.11.2015.

14. This writ petition is allowed with the above directions.

15. Let the copy of this judgment and order be issued to the Chief Secretary, Govt. of Meghalaya, the Principal Secretary (Forest), Govt. of Meghalaya and the Principal Chief Conservator of Forest, Govt. of Meghalaya, for information and compliance.

CHIEF JUSTICE
(ACTING)

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