

(2004) 07 GAU CK 0005

In the Gauhati High Court

Case No : Misc. Case No's. 1524, 1525, 1526 and 1527 of 2004 and W.P. (C)
No's. 3455, 3056, 3457 and 3458 of 2004

Union of India (UOI) and Others

APPELLANT

Vs

Dharampal Satyapal Ltd.

RESPONDENT

Date of Decision : 02-07-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35F
Finance Act, 1954 — Section 154
Finance Act, 2003 — Section 154

Citation : (2004) 2 GLT 703

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : K.N. Choudhury, I.N. Choudhury and R. Dubey, for the Appellant;
R.K. Goswami and D. Baruah, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—All these four applications have been filed by the Union of India praying for vacating the interim orders passed in the connected writ petitions. The facts and the issue involved being the same, they were heard analogously and are being disposed of by this common order.

2. Before filing the present four writ petitions, four other writ petitions being W.P. (C) No. 2921/2004; W.P.(C) No. 3075/2004; W.P.(C) No. 3076/2004 and W.P.(C) No. 3077/2004 were filed by the Petitioners assailing the legality and validity of orders of recovery passed by the Deputy Commissioner of Excise/Assistant Commissioner of Excise and the orders of the Appellate Authority i.e. the Commissioner of Excise refusing to entertain the appeals preferred against the said orders unless the conditions precedent of depositing the amounts in question is fulfilled as provided for u/s 35F of the Excise Act, 1944. The orders of recovery were passed pursuant to the retrospective amendment of the provisions relating to exemptions from excise duty to the products with the manufacturing

of which the Petitioners are engaged. Even prior to that, amendment was carried out to the provision, which excluded the products of the Petitioners. The writ Petitioners unsuccessfully challenged that, by filing writ petitions. However, on appeal (writ appeals), the decision of the learned Single Judge was reversed holding that it was impermissible to withdraw the benefits. By the judgment, adjustment and refund of duty paid pursuant to the withdrawal of benefits were provided. The judgment of the Division Bench in the writ appeals has since been stayed by the Supreme Court on appeals preferred by the Union of India.

3. In the abovementioned earlier four writ petitions, the Petitioners apart from making challenge to the consequential orders of recovery and refusal to entertain the appeals unless the pre-condition of depositing the amount is fulfilled, also put a challenge to the vires of Section 154 of the Finance Act, 2003 by which the retrospective amendments to the provision of exemption of tax/duty was brought. During the course of motion hearing of the said writ petitions, the learned Counsel appearing for the Petitioners on being questioned as to what would survive once the interim prayer relating to the impugned orders dated 6.6.2003 and 31.3.2004 in W.P.(C) No. 2921/2004 and other such orders passed in other three writ petitions were decided either way, submitted rather argued for final disposal of the matter. However, in view of the challenge put to Section 154 of the Finance Act, 2003, the writ petition could not have been decided finally and the matters would have been confined to consideration of the interim prayers only and on being pointed out the same, learned Counsel for the Petitioner took time for instruction from his clients/Petitioners and the instruction was submitted on a later date that the Petitioners would not pursue the challenge to Section 154 and their writ petitions would confine only to the consequential orders dated 6.6.2003 and 31.3.2004 issued pursuant to Section 154. However, a liberty was sought for to make independent challenge to Section 154 of the Act.

4. It is in the above background, the four writ petitions were finally disposed of by a common judgment and order dated 18.5.2004, but for which the same would have been an interim order. In the judgment the submission for final disposal and liberty to challenge the vires of Section 154 are indicated in paragraph 1 and 27 of the judgment as follows:

1. The first writ petition, being W.P.(c) No. 2921/2004 was heard at length during motion hearing. Although the learned Counsel for the parties primarily argued on the prayer for interim relief, but on being pointed out that nothing might survive for final adjudication once the interim matter was decided either way, having regard to the nature of relief sought for in the writ petition, the learned Counsel for the parties agreed for final disposal of the case. Thus the matter was taken up for final decision at the motion hearing itself.

27. ...Mr. M. Bhuyan, learned Counsel appearing for the Petitioners upon instructions submitted that although a challenge has been put to Section 154 of the Finance Act, 2003, the Petitioners would not like to pursue the same in these proceedings. However, liberty was prayed for to make challenge to the same

independent of these proceedings. Liberty is granted making it clear that the same will have no bearing so far as the impugned orders in the present proceedings are concerned....

5. Thus the interim matter/prayer in the aforesaid writ proceeding stood concluded with the passing of the judgment and order dated 18.5.2004. After the judgment was delivered, learned Counsel for the Petitioners prayed for stay of the effect and operation of the judgment. However, the prayer was rejected. Strangely enough the Petitioners filed the instant four writ petitions on 20.5.2004 making the same very prayers as in the earlier four writ petitions and moved the same unlisted (as disclosed by the learned Counsel for the parties) on the same very day before another Court and obtained the interim orders in question restraining the Respondents to make any recovery in pursuance to any notification/circular/order issued thereunder which naturally included the impugned orders dated 6.6.2003 and 31.3.2004. Although the Petitioners have made a statement in the writ petitions in respect of the earlier proceeding and disposal thereof by judgment and order dated 18.5.2004 in paragraph 4(xxii) of the writ petition and the liberty granted therein to make challenge to the vires of Section 154, but conveniently suppressed the condition attached to the same that such a challenge would not have any bearing to the impugned orders and that the prayer for stay of the judgment was rejected.

6. Mr. P.K. Goswami, learned Senior Counsel appearing for the writ Petitioners, who are the Respondents in the Miscellaneous Cases advanced two fold arguments viz. (i) the liberty granted by this Court for assailing Section 154 of the Finance Act, 2003 in view of withdrawal of the prayer for challenge to the same in the earlier writ proceedings would as a natural corollary include the liberty to challenge all consequential orders thereof and (ii) the earlier writ proceedings being only confined to the appellate orders of the Commissioner of Excise insisting for pre-depositing the amount pursuant to the order of recovery before entertaining the appeals, the writ Petitioners are entitled to make challenge to the orders of recovery while making challenge to the vires of Section 154. He extensively argued on the implications and repercussions of the retrospective amendment in question. He also submitted that similarly placed persons/business establishments having been granted similar stay orders as in the instant case, the Petitioners are also entitled to same kind of treatment lest the same leads to judicially impropriety. In this connection he placed reliance on the decision of the Apex Court as reported in *Vishnu Traders v. State of Haryana and Ors.*

7. Mr. K.N. Choudhury, learned Senior Counsel appearing for the Respondents in the writ petitions who are the applicants in the Miscellaneous Cases first questioned the very conduct of the writ Petitioners in filing the writ petitions making the same very prayers so far as the same relate to the consequential orders pursuant to the retrospective amendment in question which were already adjudicated in the earlier writ proceeding. Referring to the averments made in

the writ petitions relating to the earlier proceedings, he submitted that there being suppression of material fact so far as the same do not disclose the condition attached to the liberty granted for independent challenge to Section 154, Mr. Choudhury, strenuously argued that with such kind of suppression and virtually making the same very prayers as in the earlier writ proceedings, the conduct of the Petitioners does not behove of a bonafide litigant. He also elaborately argued the purported fact situation leading to the retrospective amendment in question and as to how the Petitioners allegedly used the benefit of tax exemption for their own personal gain without there being any advent to industrialization, a much cherished goal of NE Region which led to withdrawal of the benefits retrospectively.

8. In the earlier writ petitions, the Petitioners questioned the legality and validity of the orders of recovery as well as the orders of the Appellate Authority refusing to entertain the appeals preferred against the orders of recovery. They also questioned the legality of Section 154 of the Finance Act, 1954. This is evident from paragraph 4 of the earlier judgment dated 18.5.2004 which is quoted below:

4. By this writ petition, the Petitioners seek to challenge the legality and validity of the order dated 6.6.2003 passed by the Deputy Commissioner of Central Excise, Guwahati holding the Petitioners to be liable to pay an amount of Rs. 27,62,44,664/- on account of different heads as indicated in the order itself and the order dated 31.3.2004 passed by the Commissioner of Central Excise (Appeals), Guwahati directing the Petitioners to deposit the said amount u/s 35F of the Central Excise Act, 1944 as precondition for hearing the appeal filed by the Petitioners against the said order dated 6.6.2003.

9. To quell any doubt the relevant statements/paragraphs in the earlier writ petitions including the statements in Synopsis and list of dates and events and the cause title of the writ petitions are quoted below:

SYNOPSIS AND LIST OF DATES AND EVENTS

1. The Petitioners in the present petition are challenging the correctness and legality of the impugned order dated 31st March, 2004/2nd April, 2004 passed by the Commissioner of Central Excise (Appeals), Guwahati, directing the Petitioners to deposit an amount of Rs. 27,62,44,664/- u/s 35F of the Central Excise Act, 1944 as a condition for hearing the appeal filed by the Petitioners against the order dated 6.6.2003 passed by the Deputy Commissioner of Central Excise, Guwahati.

2. The Petitioners are also challenging the correctness and legality of the order dated 6.6.2003 passed by the Deputy Commissioner of Central Excise, Guwahati confirming the demand of Rs. 27,62,44,664/- against the Petitioners.)

CAUSE TITLE OF THE WRIT PETITIONS IN THE MATTER OF:

Illegal order dated 6.6.2003 passed by the Deputy Commissioner of Central Excise, Guwahati purportedly denying the refunds still due and ordering for

recovery of the amounts already refunded in terms of Notification No. 32/99-CE dated 8.7.99

IN THE MATTER OF:

Illegal order dated 31.3.2004/2.4.2004 passed by the Commissioner of Central Excise (Appeals), Guwahati directing the Petitioner to deposit the amount of Rs. 27,62,44,664/- u/s 35F of the Central Excise Act, 1944 as pre-deposit.

GROUNDS OF CHALLENGE

E. The impugned order dated 6.6.2003 was passed by the Deputy Commissioner in gross violation of the Principles of Natural Justice inasmuch as no Show Cause Notice or opportunity of personal hearing was granted to the Petitioners prior to the passing of the said order. An amount of more than Rs. 25 crores is being sought to be recovered from the Petitioners by the impugned order without even putting the Petitioners to notice on what grounds the said recovery is being made. Thus, the impugned order dated 6.6.2003 passed by the Deputy Commissioner is liable to be set aside for this reason itself.

26. The Petitioner, therefore, respectfully submits that the interest of justice and the balance of convenience require that, pending the hearing and final disposal of the present petition, the operation of the impugned orders dated 6.6.2003 and 31.3.2004/2.4.2004 be stayed by this Hon''ble Court and the Respondents, their agents, servants and subordinate be restrained by an interim order and injunction of this Hon''ble Court from taking any action of any description, directly or indirectly to implement or give effect to the said order dated 6.6.2003 and 31.3.2004/2.4.2004 ad to initiate any recovery proceedings consequent thereupon. The Petitioners respectfully submit that if interim and ad-interim reliefs in these terms are not granted to the Petitioners, then grave and irreparable hardship damage and unjust will be caused to them.

10. The prayers made in the earlier writ petitions are quoted below:

a) For a declaration that the impugned order dated 6.6.2003 passed by the Deputy Commissioner of Central Excise, Gauhati confirming duty demand of Rs. 27,62,44,664/- is illegal, bad in law and null and void.

b) For a declaration that the impugned order dated 31.3.2004 passed by the Commissioner of Central Excise (Appeals) Gauhati directing the Petitioners to pre-deposit the entire duty of Rs. 27,62,44,664/- is illegal, bad in law and null and void;

c) For a writ mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case ordering the Commissioner (Appeals) to decide the appeal of the Petitioners on merits without insisting on pre-deposit of any part of the duty demand of Rs. 27,62,44,664/-;

d) For a writ of mandamus or writ in the nature of mandamus or any other

appropriate writ, order or direction as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case canceling the order dated 31.3.2004/2.4.2004 passed by the Commissioner (Appeals).

e) For a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case canceling the order dated 6.6.2003 passed by the Deputy Commissioner of Central Excise, Guwahati;

f) For a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction as this Hon''ble Court may deem fit and proper in the facts and circumstances of the case canceling the detention memo dated 23.4.2004 passed by the subordinate and officers of the Respondent No. 5.

g) For a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction as this Hon''ble Court appears fit and proper, in the facts and circumstances of the case, prohibiting and restraining the Respondents, their agents, servants and subordinates from implementing or taking any action of any description directly or indirectly in pursuance of or on the basis of the provisions of the said Section 154 of the Finance Act, 2003 which may also be declared as unconstitutional illegal, bad in law and null and void.

h) That ending the hearing and final disposal of the present petition, the operation of the impugned orders dated 6.6.2003 and 31.3.2004/2.4.2004 passed by the Deputy Commissioner and the Commissioner (Appeals) respectively and so also the consequential recovery proceedings initiated be stayed by this Hon''ble Court and the Commissioner (appeals) be directed not to dismiss the appeal of the Petitioner for want of pre-deposit and also restrain the officers and servants of the Respondent No. 5 from taking any action of any description directly or indirectly in pursuance of or to give effect to the aforesaid orders.

i) For ad interim reliefs in terms of prayers (a) to (h) hereinabove;

j) For the costs of and relating to the present Petitioners;

k) For such further and other orders and reliefs, as the nature and circumstances of the case may require.

11. Let us now examine the averments made in the present writ petitions which will naturally have a bearing to the plea of raising the same very issues as were raised in the earlier writ petitions. The relevant averments are quoted below:

IN THE MATTER OF

Illegal order dated 6.6.2003 issued by Deputy Commissioner, Central Excise, Guwahati purportedly denying the refunds still due and ordering recovery of the amounts already refunded in terms of the Notification No. 32/99-CE dated 8.7.99

4.(xxi) However, most strangely the Respondent No. 4 herein in purported

exercise of the powers u/s 154 of the Finance Act, 2003 passed an order dated 6.6.2003 against the Petitioner confirming the duty demand of Rs. 276244664/- including the amount of Rs. 254634087/- which was paid by the Petitioner prior to the judgment and order dated 3.12.2002 passed by this Hon''ble Court. A copy of the said order is enclosed herewith and marked as Annexure-H.

4.(xxii) Aggrieved by the said order dated 6.6.2003 passed by the Respondent No. 4 the Petitioner preferred an appeal before the Commissioner (Appeals), Guwahati. It may be pertinent to mention here that along with the memo of appeal the Petitioner also filed an application for waiver of the pre deposit. The learned Commissioner (Appeals) however most arbitrarily rejected the petition for waiver of the pre deposit and directed the Petitioner to deposit the entire amount of duty. The Petitioner being aggrieved had filed a writ application before this Hon''ble Court being W.P.(C) No. 2921/2004. The said writ petition however was dismissed by an order dated 18.5.2004 and the Petitioner company is taking steps to file an appeal against the said order. It may also be mentioned herein that in the said proceedings vires of Section 154 of the Finance Act, 2003 was made but subsequently the said challenge was withdrawn by the Petitioner with a liberty to challenge the said provision independently. Accordingly liberty has been granted by this Hon''ble Court. The Petitioner craves leave of this Hon''ble Court to refer and rely to the appeal memo filed before the Commissioner (Appeals), the waiver application and the judgment of this Hon''ble Court dated 18.5.2004 at the time of hearing.

11.A That your Petitioner begs to state that the impugned actions of the Respondents in issuing the demand notice/order dated 6.6.2003 is violative of the provisions of Section 11A of the Central Excise Act, 1944.

16. The Respondents are now resorting to the impugned Section 154 to reject the refunds due and recover the amounts already refunded to the Petitioner. To that end the respondent No. 4 vide order dated 6.6.03 in purported exercise of the powers u/s 154 of the Finance Act, 2003 passed an order dated 6.6.2003 against the Petitioner confirming the duty demand of Rs. 276244664/- including the amount of Rs. 25434087/- which was paid by the Petitioner prior to the judgment and order dated 3.12.2002 passed by this Hon''ble Court. The Officers of the Respondent department have issued the notice of attachment of excisable goods for recovery of the said duty inspite of the protest letter of the Petitioner.

17.A The Petitioner have not filed any other petition, either in this Hon''ble Court or in any other High Court or in the Hon''ble Supreme Court of India, in respect of the subject matter of the present writ petition.

19. As stated above, the Respondents, have proceeded to implement the retrospective amendment contained in the Finance Act, 2003 and have proceeded to apply the same to the Petitioners case. If that is permitted to continue to happen, grave hardship harassment and injury will be caused to the Petitioners, for which there would be no warrant or justification whatsoever. The

Petitioners would then be compelled to pay over to the Excise authorities a sum of Rs. 276244664/- thereby causing severe prejudice to the Petitioners.

12. The prayers made in the writ petitions are quoted below:

a) for a declaration that the provisions of Section 154 of the Finance Act, 2003, in so far as they amend retrospectively the provisions of the said Notification No. 32/99 dated 8.7.99 and are unconstitutional, illegal, bad in law and null and void.

b) For a writ prohibition or writ in the nature of prohibition, or any other appropriate writ, order or direction as this Hon''ble Court appears fit and proper in the facts and circumstances of the case, prohibiting and restraining the Respondents, their agents servants and subordinates from implementing or taking any action of any description, directly or indirectly in pursuance of or on the basis of the provisions of the said Section 154 of the Finance Act, 2003 in so far as they amend retrospectively the provisions of the said Notification No. 32/99 dated 8.7.99 and retrospectively withdraw the benefit of exemption under the said Notification No. 32/99 with effect from 8.7.99 and are unconditional, illegal, bad in law and null and void.

c) For a writ of mandamus or writ in the nature of mandamus or any other appropriate writ, order or direction as this Hon''ble Court appears fit and proper in the facts and circumstances of the case ordering and directing the Respondents, their agents, servants and subordinates to pay to the Petitioner the amount of Rs. 254634087/- being the amount of refund to which the Petitioners are entitled under the said Exemption Notification No. 32/99 in respect of the period from 1.3.2001 till 3.12.2002, together with the interest thereon @ 15% per annum, from the respective dates on which the amount in question were refundable by the Respondents, up to the date on which the same is finally repaid and refunded to the Petitioners.

d) For a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, as to this Hon''ble Court appears fit and proper, in the circumstances of the case, setting aside/canceling or quashing the order dated 6.6.03 (Annexure-H) passed by the Respondent No. 4 directing recovery of the amount already refunded and denying the refund of the amount still due in terms of the Notification No. 32/99 dtd. 8.7.99.

e) That, pending the hearing and final disposal of the present petition, the operation of the impugned retrospective amendment made by Section 154 of the Finance Act, 2003, in so far as it relates to pan masala containing tobacco products and the availability of the benefits of exemption under the said Notification No. 32/99 in respect of pan masala containing tobacco products be stayed by this Hon''ble Court, and the Respondents, their agents, servants and subordinates be restrained by an interim order and injunction of this Hon''ble Court from taking any action of any description, directly or indirectly in pursuance of or to give effect to the said retrospective amendment made by the Finance Act, 2003 and also stay the operation of the aforesaid order dated

6.6.2003 passed by the Respondent No. 4.

f) For ad interim reliefs in terms of prayers (b) to (e) hereinabove;

g) For the costs of and relating to the present Petitioners;

h) For such further and other orders and reliefs, as the nature and circumstances of the case may require.

13. From the above, there is no gainsaying that the present writ petitions with some variations and additions are the replicas of the earlier writ petitions praying the same very relief toying with the misplaced interpretation of the liberty granted so much so that in paragraph 17A of the writ petition, the Petitioners have made statements that they have not filed any other petition, either in this Court or in any other High Court or in the Hon'ble Supreme Court in India, in respect of the subject matter of the present writ petitions. The statement in paragraph 17A has been verified to be true to the knowledge of the deponent who had verified the averments made in the earlier writ petitions.

14. As discussed above, although the vires of Section 154 was also put to challenge in the earlier writ proceeding, however, same was withdrawn after the writ petitions were extensively heard. Such a situation did arise in view of the arguments and submissions made by the learned Counsel for the Petitioners centering around the impugned orders of recovery and the appellate orders thereof and upon instruction from the Petitioners for which he took time on conclusion of the hearing withdrawing the challenge to Section 154 and praying for liberty to make challenge to the same independent of the said proceedings. But for such a course of action, the writ petitions could not have been decided finally without hearing on the question of validity of Section 154 and the earlier judgment dated 18.5.2004 would have been an interim order in respect of the interim prayers made by the Petitioners. What would have happened then is the moot question. Could it be open to the Petitioners to make a challenge to the same very consequential orders by filing a separate writ petition? Needless to say, that the answer would be in the negative. Only remedy that would have been left for the Petitioners was to make a challenge to the order by way of preferring writ appeals which in fact they have taken recourse to in respect of the final judgment and order. The fact of preferring writ appeals against the judgment and order dated 18.5.2004 has been brought to the notice of this Court by the Petitioners by filing affidavits after conclusion of hearing of these Miscellaneous Cases. The affidavits were filed on 14.6.2004 apprising this Court of filing the writ appeals and the interim orders passed therein. As per the revelation made in the affidavits, interim orders have been passed providing not to dismiss the appeals pending before the Commissioner of Excise on ground of not depositing the amounts in question during the pendency of the writ appeals.

15. It is not understood as to what for the factum of preferring writ appeals and the orders passed therein in respect of the earlier writ proceedings was required to be brought to the notice of this Court and that too after conclusion of hearing

of the Miscellaneous Cases where the question for determination is as to whether a second writ petition could have been filed virtually making the same very prayer as in the earlier writ petitions under the garb of the liberty granted to make independent challenge to Section 154. This will necessarily have to be answered having regard to the fact situation involved in the earlier writ petitions and the projections of the case by the Petitioners and the submissions made on their behalf. This has already been noticed above. The question that necessarily arises on the face of the present writ proceedings is as to what for the Petitioners resorted to the earlier writ proceedings, if, what they could not achieve in that proceeding, they could achieve the same in the present writ proceedings in the garb of the liberty granted.

16. The earlier writ petitions were filed on the same very grounds as the present writ petitions. The vires of Section 154 of the Finance Act, 2003 was also challenged. As in the instant cases, there also the Petitioners placed reliance on the interim orders passed by this Court in respect of the challenge put to Section 154 in other writ petitions. The interim orders passed in the present writ petitions are in tune with the interim orders passed in those writ petitions. However, this Court having regard to the fact situation involved in the earlier writ proceeding did not pass the same kind of order and instead adjudicated the consequential orders passed by the authorities of the Revenue as were challenged before this Court. Upon adjudication of the same, this Court found no infirmity with those orders and passed the judgment and order accordingly. The writ Petitioners also accepted this position by furnishing their consent towards withdrawal of challenge to Section 154 and praying for liberty to put challenge to the same independently. Had it not been so, the writ petitions would have been kept pending to test the challenge to Section 154 while deciding the interim prayer only. However, the Petitioners while insisting for decision on the interim prayers as in the present writ petitions took liberty to challenge Section 154 independently. In my considered opinion such a liberty cannot cloth the Petitioners to make challenge to the consequential orders once again which have already been adjudicated in the earlier writ proceedings.

17. The course of action adopted by the Petitioners have given rise to a strange situation in which they not only played with the precious time of the Court, but played with the judicial discipline which is not expected of a bonafide litigant. If the Petitioner could get the desired result relating to their interim prayer by initiating the present writ proceeding, the question necessarily arises is as to what for the earlier writ proceeding was initiated. Is it by way of taking a chance for favourable consideration and upon failure to achieve the same to take recourse to another writ proceeding on the same very ground in the garb of the liberty granted? Having regard to the facts and circumstances involved in both the proceedings and the manner and method in which the Petitioners invoked the writ jurisdiction of this Court, I am constrained to hold the answer to be in the affirmative. Here is a case in which the same very Petitioners who unsuccessfully agitated the consequential orders and for that matter the recoveries in question

which arose pursuant to the retrospective amendment in question, in view of the final judgment of this Court which otherwise would have been in the form of an interim order, resorted to the present writ proceeding on the same very grounds and obtained the desired results by way of an interim order as if the same is by way of an appeal against the earlier judgment and order.

18. In view of the above, it is really not necessary to discuss the case laws relied on by the learned Counsel for the parties. The issue involved in this case is not to be judged with the help of any case laws. There is no scope for any interpretation of the clear and unambiguous term of the liberty granted. Even otherwise also there is no scope for the Petitioners to pray for the same very interim orders taking recourse to another writ proceeding and taking advantage of the liberty granted making the earlier writ proceeding meaningless and in the process playing with the precious time and judicial decorum of the Court. The conduct of the Petitioners leads to the irresistible conclusion that they played fraud with the Court and did not approach this Court with clean hands. If that be so, not to speak of favouring them with any interim order, even their writ petitions are liable to be dismissed. However, I refrain myself from expressing any opinion, more particularly when I am concerned only with the prayer made in the Miscellaneous Applications. I leave that to be decided at the time of final hearing of the writ petitions without being guided by any of the adverse observations made in this order.

19. The Apex Court in the case of State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, had the occasion to deal with a situation in which the concession earlier granted before the Court was sought to be controverted. The Apex Court observed as follows:

4. When we drew the attention of the learned Attorney General to the concession made before the High court. Shri A.K. Sen who appeared for the State of Maharashtra before the High Court and led the arguments for the Respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in Somasundaran v. Subramanian AIR 1926 PC 136. We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principles is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can

contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in *Madhusudan v. Chandrabati* AIR 1917 PC 30. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

4.A In *R. v. Mellor* (1858) 7 Cox CC 454 Martin B was reported to have said: We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity.

5. In *The King Emperor Vs. Barendra Kumar Ghose*, Page, J. said.

... these proceedings emphasize the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animad version.

6. In *Sarat Chandra Maiti and Others Vs. Bibhabati Debi and Others*, Sir Asutosh Mookherjee explained what had to be done:

It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the judge without delay and ask for rectification or review of the judgment.

7. So the Judges record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else.

20. In the instant case, the present Miscellaneous Cases raising the issue relating to the propriety and validity of the interim orders in question is fortunately before the same very Court, which decided the earlier writ petitions. The context in which the liberty was granted cannot be put to any ambiguity or to be swayed by any other consideration than the one under which the liberty was granted. The plain and unambiguous meaning of the liberty granted in the earlier writ proceeding cannot be allowed to be interpreted in the manner and method in which the same has been sought to be interpreted by the Petitioners. The question is not what may be supposed and has been intended but what has been said. The Petitioners cannot usurp the judicial function under the disguise of interpretation. The circumstances and the context in which the liberty was granted are clear, plain and unambiguous. There is no scope for reading

something into it, which will naturally lead to the kind of situation in which the Petitioners are in and have put the Court to be in. An intention to produce an unreasonable result is not to be imputed to the clear and unambiguous situation which emerged in the earlier writ proceeding. The finality, which arrived in the earlier writ proceeding, cannot be allowed to reopen in another writ proceeding.

21. The decision on which Mr. Goswami placed reliance i.e. Vishnu Traders (supra) is primarily to bring home his point of argument relating to consistency in approach and uniformity in the exercise of judicial discretion even in the matter of interlocutory orders. The decision is totally misplaced in the present circumstances more particularly in the context in which the same has been pressed into service. The Petitioners after taking recourse to the earlier writ proceeding taking a chance for favourable consideration by way of praying for interim orders in respect of the consequential orders pursuant to the retrospective amendment in question and after having failed to achieve the same could not have obtained the desired result by taking recourse to another writ proceeding and then to press into service the aforesaid decision regarding consistency in approach and uniformity in the exercise of judicial discretion even in the matter of interlocutory order unmindful of their own conduct in seeking such a remedy. The Apex Court in the said case while observing about consistency in approach and uniformity in the exercise of judicial discretion also observed that in the matters of interlocutory orders, principle of binding precedents cannot be said to apply and recorded the exception to the approach where factual differences require a different treatment.

22. In the instant case the Petitioners after having failed to obtain the interim order on the same analogy of consistency in approach and uniformity in judicial discretion in the first round of litigation which has since attained its finality cannot take recourse to the said principle in another writ proceeding pertaining to the same very matter, unmindful of their own duty to follow the principles of consistency in approach" emphasized by the Apex Court and instead place this Court to a kind of situation putting in jeopardy the principle of uniformity in the exercise of judicial discretion, as if the Petitioners have got the licence to play with the judicial time taking the task of reminding the Court of consistency in judicial approach conveniently forgetting their own inconsistent approach.

23. For the foregoing reasons and discussions, I have no hesitation to hold that the Petitioners are not entitled to the interim orders as have been granted to them and accordingly, the same stand vacated. However, in case of making any recovery from the Petitioners same will be subject to the final outcome of the final adjudication.

24. The Miscellaneous Applications succeeds. The interim orders dated 20.5.2004 passed in the instant writ petitions stand vacated.