Supreme Court of India
Mafatlal Industries Ltd., ... vs Union Of India Etc. Etc on 19 December, 1996
Author: Paripoornan
Bench: K.S. Paripoornan

PETITIONER:
MAFATLAL INDUSTRIES LTD., AHMEDABAD ETC. ETC..

Vs.

RESPONDENT:
UNION OF INDIA ETC. ETC..

DATE OF JUDGMENT: 19/12/1996

BENCH:
K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:

(With C.A. Nos. 3256-3270/84, 660/89, 541/89, 2/91, 2578 80/92, 1794/84, 921/92, 4952/91, 4412/91, 4878/91, 2/86, 6255/90, 289/91, 2966/89, 143/94, 190/95, 5688/89-95, 6094/90, 565/568/86, 4326/95, 77/95, WP(C) Nos. 189/93, 520/92, 521/93, 1122/88. SLP(C) Nos. 10667/91, 15832 33/87, 18955/93, 11440/95, 8724/93, 3321/93, 3332/93, 3325/93 & SLP(C) 25078 CC 15651/92) J U D G M E N T PARIPOORNAN, J.

Common questions of law arise for consideration in this batch of cases. Initially the matter came up before a two- Member Bench. The said Bench felt that the decision of the Constitution Bench comprising 5 Judges in Sales Tax Officer, Benaras & Others vs. Kanhaiya Lal Mukundalal Saraf (AIR 1959 SC 135 = 1959 SCR 1350) requires reconsideration and referred the matter to a larger bench of 7 Judges. When the matter came up before a bench of 7 Judges, it was noticed that Kanhaiya Lal's case (supra) was expressly approved by a bench of 7 Judges in the decision reported in State of Kerala v. Aluminium Industries Ltd. [(1965) 16 STC 689], and so, by order dated 28.7.1993, the said Bench directed that the matter may be placed before the learned Chief Justice for constituting a still larger Bench. That is how this batch of cases came up before a Bench of 9 Judges. We heard, Sri F.S. Nariman, Sri Soli Sorabjee and Sri Harish Salve, Senior Advocates, who appeared for the different assessees (claimants) and Sri K. Parasaran and Sri M. Chandrashekhar, Senior Advocates who appeared for the Union of India.

2. Stated briefly, the controversy centres round the tenability or otherwise of the claim for refund of the amounts paid by way of excise duty under the Central Excises and Salt Act, 1944, now titled as Central Excise Act, 1944 (hereinafter referred to as `the Excise Act' on the ground that it was so done under "mistake of law". it will be convenient to deal with the controversy by adverting to the minimal facts in the main appeal argued before us -- Civil Appeal No.3255 of 1984 - Mafatlal Industries Ltd., Ahmedabad v. Union of India. The appellant is a textile mill situate at Ahmedabad. The appellant and a few other mills manufacture "blended yarn". The said blended yarn was captively consumed by the various mills for manufacture of fabric, popularly known as "art silk" fabric. For the period prior to March 16/17, 1972, the mills paid excise duty on blended yarn manufactured for captive consumption under Tariff Item 18 or 18A of the First Schedule to the Excise Act. In Special Application No.1058/72 filed by M/s. Calico Mills, who manufactured fabrics and was captively consuming blended yarn, produced by it for manufacturing fabric known as "art silk fabric", a Division Bench of the Gujarat High Court by judgment dated 15.1.1976, held that the levy of the excise duty on blended yarn prior to March 16/17, 1972, under tariff Item 18 or 18A was clearly ultra vires. The High Court directed refund of the excise duty levied for 3 years prior to institution of the petition, which was instituted on 6.5.1972. The appellant and other mill-owners stated that as a result of the declaration of the law as aforesaid by the Court, they were not liable to pay excise duty on blended yarn up to March 16/17, 1972 and that they had paid the excise duty on the same upto that date under mistake of law. They requested for refund of the excise duty so paid till March 16/17, 1972, stating that such duty was illegally recovered from hem. The Revenue did not refund the excise duty as claimed. So, the appellant and others filed suits within thee years of the aforesaid judgment (15.1.1976) for refund of excise duty illegally recovered from them, with interest. The trial court decreed the suits. In the appeals filed by the Union of India against the aforesaid decrees passed by the trial court, the High Court of Gujarat allowed the appeals and set aside the decrees passed by the trial courts, by judgment dated 6.4.1984. It was held that in order to successfully sustain the claim of restitution based on Section 72 of the Contract Act, the person claiming restitution should prove "loss or injury" to him, an in the cases before them, the excise duty paid on blended yarn was ultimately passed on to the buyer of the fabric, and so the claim for restitution will not lie. In other words, in cases where an assessee has "passed on" the duty paid by or realised from him, he has suffered no loss or injury, and the action for restitution is unsustainable. The aforesaid statement of the law is seriously disputed by the appellants in Civil Appeal No.3255/84 and others.

3. In the ultimate analysis, the main question that falls for consideration in this batch of cases is, whether in an action claiming refund of excise duty (tax) paid under mistake of law, is it essential for the person claiming such refund, to establish "loss or injury" to him? In other words, in cases where the person from whom the excise duty (tax) is collected, has "passed on" the liability or deemed to have passed on the liability, is it open to him to claim refund of the duty paid by him, placing reliance on Section 72 of the Indian Contract Act? The further question as to whether an action by way of civil suit or a writ petition under Article 226 of the Constitution will lie, in the light of various amendments to the Act, claiming "refund" or "restitution", also arises for consideration.

4. I perused the draft judgment prepared by my learned brother Jeevan Reddy, J., wherein on the main question, he has held that if the person claiming the refund has passed on the burden of duty

to another and has not really suffered any loss or prejudice, there is no question of reimbursing him and he cannot successfully sustain an action for restitution, based on Section 72 of the Indian Contract Act. With great respect, I fully concur with the aforesaid conclusion of my learned brother. But, in view of the importance of the question raised, I would like to record my own reasons for the aforesaid conclusion. I shall separately deal with the maintainability of the action either by way of suit or petition under Article 226 of the Constitution -- the extent to which there is ouster of jurisdiction of Courts.

5. In this batch of cases, the claims by different assessees for refund of excise duty paid by them under mistake of law arise over a period of years, and the claims were made in different proceedings -- before the departmental authorities, by way of civil suits and writ petitions under Article 226 of the Constitution, which are in appeal before us.

Broadly, the basis for the various refund claims can be classified into 3 groups or categories :-

(I) The levy is unconstitutional -- outside the provisions of the Act or not contemplated by the Act.

(II) The levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications: or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure. (III) Mistake of law -- the levy or imposition was unconstitutional or illegal or not eligible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limit ation), e initiated action for refund of the tax paid by him, due to mistake of law.

For the periods during which the refund were claimed, there were different statutory provisions which governed the subject. They are --

(a) Period up to 7.8.1977 -- Rule 11 of the Central Excise Rules, before amendment;

(b) Period from 7.8.1977 to 16.11.80 -- Rule 11 of the Central Excise Rules, as amended.

(c) Period from 16.11.1980 to 19.9.1991 -- Section 11A and Section 11B of the then Central Excises & Salt Act;

(d) Period after 19.9.1991 -- Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991.

The circumstances and grounds on the basis of which the refund can be claimed, the period within which it should be so done, the forum before which the claim should be preferred and whether the decision thereon is subject to the jurisdiction of ordinary courts, vary from period to period. We shall advert to such provisions and their impact on various aspects regarding the claim for refund a little later.

Rule 11 of the Central Excise Rules which dealt with claims for refund of duty as it was in force prior to 7.8.1977, is to the following effect:

> "Rule 11. No refund of duties or charges erroneously paid, unless claimed within three months.-- No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be."

It should be noted that Rule 11 before amendment did not provide for any ouster of jurisdiction of courts. We shall deal with Rule 11-A as amended and Sections 11A and B of the Excise Act a little later. The Revenue states that in view of these later provisions, there is ouster of jurisdiction of courts, relating to claims for refund.

6. The claims by different assessees for refund arose and are/were preferred during different periods. After Rule 11 was amended and Section 11A and B were inserted in the Act, the statute contained provisions making them exclusive for claiming refund. Be that as it may, it is only relevant to state at this juncture that in all cases, irrespective of the relevant statutory provisions in the Excise Act and/or the Rules, the claims for refund were made in different proceedings mainly based on section 72 of the Indian Contract Act. So the main issue, in all the cases, that arises for consideration is, whatever be the nature of the attack regarding the levy, or the basis put forward for claiming refund, r the period for which refund is claimed or the character of the proceedings in which it was so done, or the different nature or character of the statutory provisions either providing or not providing as to how and in what manner the claim should be made, -- whether the claim for refund is tenable in any of the proceedings, for any period, based on Section 72 of the Contract Act, if the assessee has "passed on" the liability to the consumer or third party?

7. The levy under the Excise Act is an indirect tax (duty). A duty of excise is levied on the manufacture or production of goods. Ordinarily, it is levied on the manufacturer or producer of goods. (Since the levy is in relation to or in connection with the manufacture or production of goods, it may be levied even at a point later than manufacture or production of the goods.) The duty levied will form part of the total cost of the manufacturer or producer. The levy being a component of the price for which the goods are sold, is ordinarily passed on the customer. It is a matter of common knowledge that every prudent businessman will adjust his affairs in his best interests and pass on the duty levied or leviable on the commodity to the consumer. That is the presumption in law.

8. The claim for refund in these cases is based upon the plea that excise duty was paid when it was not eligible. It was so done under mistake of law. Refund is claimed basing the action under Section 72 of the Contract Act, which is to the following effect:

> "Liability of person to whom 72. A person to whom money is paid or thing money has been paid, delivered, by mistake or anything or under coercion. delivered, by mistake or under coercion, must repay or return it.
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> Illustrations
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> (a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.
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> (b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive." Chapter V of the Indian Contract Act is styled thus:-

"Of Certain Relations Resembling Those Created By Contract". The Chapter contains five sections -- Sections 68 to 72. The rights and liabilities dealt with in those Sections accrue from relations resembling those created by contract. It is not a real contract, but one implied in law or a quasi-contract.

Law is fairly settled that "Money paid under a mistake or on a consideration which has wholly failed or under duress falls under the general head of money "had and received." An action for money "had and received" is an action "founded on simple contract" which has been called quasi contract or restitution." (See Pollock & Mulla - Indian Contract And Specific Relief Acts (10 the Edition) page 598).

9. The Law of Restitution is founded upon the principle of "unjust enrichment". As stated by the learned authors, Lord Goff of Chieveley and Gareth Jones in the book "The Law of Restitution" (3rd Edn.) 1986, "It presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit. These three subordinate principles are closely interrelated." (page 16). [See also Cheshire Fifoot & Furmston's "Law of Contract" (12th Edn.) 1991, page 649.]

10. The second aspect aforesaid, namely, that the defendant has been enriched "at the plaintiff's expense", has been considered by Peter Birks (Professor of Civil Law, University of Edinburgh) in his book "Introduction to the Law of Restitution" rater elaborately. The principles discernible from the above discussion has been succinctly stated by Endrew Burrows in his book -- The Law of Restitution (1933), at page 16, thus:

> "It is the major theme of Birks' work that this phrase ambiguously conceals two different ideas in the law of restitution. The first, and most natural meaning, is that the defendant's gain represents a loss to the plaintiff: in Birks' terminology a `subtraction from' the plaintiff. The second, and less obvious meaning, is that the

> defendant's gain has been acquired by committing a wrong against the plaintiff."

(Emphasis supplied) The person claiming restitution should have suffered a "loss or injury". In my opinion, in cases where the assessee or the person claiming refund has passed on the incidence of tax to a third person, how can it be said that he has suffered a loss or injury? How is it possible to say that he has got ownership or title to the amount claimed, which he has already recouped from a third party? So, the very basic requirement for a claim of restitution under Section 72 of the Contract Act is that the person claiming restitution should plead and prove a loss or injury to him; in other words, he has not passed on the liability. If it is not so done, the action for restitution or refund, should fail.

11. In this connection, the decision of a three-member Bench of this Court in Mulamchand v. State of Madhya Pradesh (AIR 1968 S.C. 1218), affords some guidance. The appellant in that case, purchase da right to pluck, collect and remove the forest produce from the proprietors. The right was acquired before the propriety rights vested in the State of Madly Pradesh by Act No. 1 of 1951 -- called the Abolition Act. Acting under the Act, in April, 1951 the Deputy Commissioner auctioned the forest produce of villages covered by the purchases of the appellant. Amongst others, the appellant had deposited a sum of Rs.10,000/- towards the right to collect lac from the forest. It turned out that the provisions of Article 299 of the Constitution were not complied with and the contract entered into by the appellant therein with the State of Madly Pradesh was void. The appellant claimed refund on the basis that thee was no valid contract. The trial court as well as the appellate court held that the appellant having worked out the contract by collecting the lac from the jungles in pursuance of the agreement, was no entitled to refund of the amount of deposit. In the appeal filed by the appellant, this Court held that if the money is deposited and the goods are supplied or services rendered in terms of the contract, the provisions of Section 70 of the Contract Act may be applicable and, can be invoked by the aggrieved party to the void contract. This Court further held at pages 1222-23, thus:

> "The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution. In Fibrosa v. Fairbairn, 1943 AC 32 Lord Wright has stated the legal position as follows:
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> ".....any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

(7) In Nelson v. Larholt, (1948) 1 KB 339 Lord Denning has observed as follows:

> " It is no longer appropriate to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action.

> Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires"
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> (Emphasis supplied) This court further stated the law thus: "..... It is well established that a person who seeks restitution has a duty to account to the defendant for what he has received in the transaction from which his right to restitution arises. In other words, an accounting by the plaintiff is a condition of restitution from the defendant (See `Restatement of the Law of Restitution', American Law Institute, 1937 Edn., p. 634)."

(Emphasis supplied) The observations extracted above indisputable point out that a person who seeks restitution, has a duty to disclose or account for what he has received in the transaction. An accounting is a condition precedent in an action for restitution. By way of analogy, it can be stated that in cases where restitution is claimed under Section 72 of the Contract Act, on the ground of payment due to mistake of law, the person claiming restitution, should plead and prove that "he has not passed on" the liability to another. That is the nature of "accounting" in cases falling under Section 72 of the Contract Act. IN my opinion, the High Court was justified in law in holding that since the excise duty paid by the appellant was ultimately passed on to the buyers of the fabric, and that the appellant has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, was unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991).

12. Mr. F.S. Nariman, Senior Counsel for the appellants, contended that in an action for restitution under section 72 of the Contract Act, the question as to where the incidence of duty or tax has been passed on, is an irrelevant factor.There is no such requirement in the Statute. The sheet-anchor of the appellant's case is founded on the decision of the Constitution Bench in Kanhaiya Lal's case (supra), which was followed by a Bench of 7 Judges in Aluminium Industries' case [(1965) 16 STC 689]. It was argued that the decision in Kanhaiya Lal's case was followed subsequently in Tilokchand Motichand & Ors. v. H.B. Munshi & Anr. (1969 (2) SCR 824), D. Cawasji & Co., etc. etc. v. The State of Mysore & Anr. (1975 (2) SCR 511), Dhanyalakshmi Rice Mills Etc. v. The Commissioner of Civil Supplies and Another, (1976 (3) SCR 387) etc. The plea was that the law laid down in Kanhaiya Lal's case has stood the test of time for nearly four decades and there is no requirement either in Section 72 of the Indian Contract Act or in any of the above decisions, holding that in order to claim refund or restitution based on Section 72 of the Contract Act, the liability (duty) should not have been passed on. Our attention was also invited to the decision of House of Lords in Woolwich Building Society v. Inland Revenue Commissioners (No 2) [(1992) 3 All ER 737], of the Canadian Court in Air Canada case, (59 D.L.R. (4th series) 161), (in particular dissenting judgment of Wilson, J.), of the decision of the Australian Court in Commissioner of State Revenue v. Royal Insurance Australia Ltd. [(1994) 69 A.L.J. 51], of the European Economic Committee in San Giorgio S.P.A. Case (1985 (2) C.M.L.R. 658), and the decision of the United States Supreme Court in United States v. Jefferson Electric Manufacturing Co., (78 Lawyers' Edition 859). It was argued that the preponderance of judicial opinion in other jurisdictions also is in favour of the view, that passing

on" of the liability, is an irrelevant factor for consideration in an action for restitution, and at any rate, it cannot form the basis of a valid defence in an action for "restitution". Mr. Parasaran, Senior Counsel for the Union of India contended that the question of "passing on" of the liability never arose for consideration in Kanhaiya Lal's case nor was it decided. The said decision cannot be an authority for the proposition that a person claiming refund of tax on the ground of mistake of law is not obliged to allege and prove that it has not been passed on; on the other hand, it is mandatory for a claimant in such cases to allege and prove that he suffered a loss or detriment. Then and then alone, the Court can grant the equitable relief of restitution. Counsel also contended that the principle in Kanhaiya Lal's case (supra) has not been uniformally followed by this Court subsequently. Counsel also distinguished the various foreign decisions that were brought to our notice and highlighted the fact that those decisions were rendered on their own facts. Counsel further contended that in cases on indirect levy of tax (cess or fee) which was passed on, this Court has negatived the claim for refund in a few cases. Our attention was invited to the following decisions :

Shiv Shanker Dal Mills etc. etc. v. State of Haryana & Ors. etc. [1980 (1) SCR 1170 (1173)], State of Madhya Pradesh v. Vyankatlal & Anr. [1985 (3) SCR 561 (566, 568)], M/s. Amar Nath Om Parkash and Ors. etc. v. State of Punjab and Ors. etc. [1985 (2) SCR 72 (at pp. 96-100)], Indian Aluminium Company Limited v. Thane Municipal Corporation [1992 Supp. (1) SCC 480 (488-489)] and State of Rajasthan & Others v. Novelty Stores etc. (AIR 1995 SC 1132).

13. The main case relied on, Kanhaiya Lal's case (supra) requires a little detailed examination. The respondent, Kanhaiya Lal was a firm. For the assessment years 1948-49, 1949-50 and 1950-51, its forward transactions were brought to tax by the Assessing Authority -- the Sales Tax officer, as per Assessment orders dated 3.1.5.19949, 30.10.1950 and 22.8.1951. On 27.2.1952, the Allahabad High Court in Messrs Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur & Ors., (1952 A.L.J. 332) held that the provisions of the Uttar Pradesh Sales Tax Act, taxing forward contracts were ultra vires the U.P. Legislature. The said judgment was affirmed by this Court on 3.5.1954. The attempts of the assessee to obtain refund of tax basing its claim on Budh Prakash Jai Prakash case before the statutory authorities were futile. Thereafter, the assessee-firm filed a writ petition in the High Court, praying in quash the assessment orders, and for direction for refund of tax illegally collected. By judgment dated 30.11.1956, a learned single Judge of the High Court, allowed the writ petition. In the appeal, the Revenue contended that since the tax was paid under mistake of law, it was not recoverable. Even so, relying on Section 72 of the Contract Act, the Division Bench affirmed the decision of the single Judge. The Revenue took up the matter in appeal before this Court. The pleas of the appellant-Revenue, that the assessee should have followed the procedure prescribed by the U.P. Sales Tax Act and, that the writ petition filed for refund of money would not lie, were not allowed to be urged by this Court. Mainly, two questions arose before this Court for consideration --

(i) Whether the term "mistake" occurring in section 72 of the Contract Act took within its fold "mistake of law" as well as "mistake of fact"?

(ii) Whether the tax paid under mistake of law can be recovered under Section 72 of the Indian Contract Act? This Court held that the word "mistake" occurring in Section 72 of the Contract Act

has been used without any qualification or limitation and, so, it takes within its fold "mistake of law" as well as "mistake of fact". On the second question, this Court held that once it is established that the payment, even though it be a tax, has been made by the party under a mistake of law, the party is entitled to recover the same and a party who received the tax is bound to repay or return it. This Court held that there can be no distinction in a tax liability and any other liability on a plain reading of Section 72 and the plea that tax paid by mistake of law cannot be recovered under Section 72, will not be a proper interpretation of the relevant provisions, but to make a law, adding such words as "otherwise than by way of taxes" after the word "paid". The scope of Section 72 was considered only within a limited sphere. It should be noticed that no question was raised before this Court that in order to claim refund (restitution) of sales tax paid, - (an indirect levy) - under Section 72, the claimant should necessarily prove that he has sustained "a loss or injury". In other words, the tax collected by him has not been passed on to a third party. Dealing with the plea that the position in law obtaining in England, America and Australia that money paid under mistake of law could not be recovered, and that similar considerations should weigh in interpreting Section 72, the Court held that the true meaning and intent of Section 72 should be interpreted on its own terms, divorced from all considerations, as to what was the state of previous law or the law in England or elsewhere. This Court made further observations to the following effect:

> `If it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can, therefore, be made in respect of a tax liability and any other liability on a plain reading of the terms of s. 72 of the Indian Contract Act, even though such a distinction has been made in America vide the passage from willoughby on the Constitution of the United States, Vol. 1, p. 12 op cit. To hold that tax paid by mistake of law cannot be recovered under s. 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" after the word "paid."
>
> (p. 1363) "Voluntary payment of such tax liability was not by itself enough to preclude the respondent from recovering the said amounts, once it was established that the payments were made under a mistake of law. On a true interpretation of s. 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving the same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like. If, once that circumstance is established the party is entitled to the relief claimed."
>
> (p. 1364) "No question of estoppel can ever arise where both the parties, as in the present case, are labouring under the mistake of law and one party is not more to blame than the other."

> (p. 1365) "The other circumstances would be such as would entitle a court of equity to refuse the relief claimed by the plaintiff because on the facts and circumstances of the case it would be inequitable for the court to award the relief to the plaintiff. These are, however, equitable considerations and could scarcely be imported when thee is a clear and unambiguous provision of law which entitles the plaintiff to the relief claimed by him." (p. 1366) "Merely because the State of U.P. had not retained the monies paid by the respondent but had spent them away in the ordinary course of the business of the State would not make any difference to the position and under the plain terms of s. 72 of the Indian Contract Act the respondent would be entitled to recover back the monies paid by it to the State of U.P. under mistake of law." (p. 1367) (Emphasis supplied)

14. It is apparent that in Kanhaiya Lal's case there was no plea by the Revenue that since the assessee has passed on the tax, the claim for refund is unsustainable. Such a question was not posed before this Court for consideration. one of the main aspects to be proved in a claim for restitution, that the person claiming restitution should have suffered a loss or injury in order to sustain an action, was not urged and was not considered. In such a situation the following observations of Lord Halsbury in Quinn v. Leathem (1901 A.C. 495 at p. 506) quoted with approval by a Constitution Bench of this Court in State of Orissa v. Sudhansu Sekhar Misra (1968 (2) SCR 154 at page

162) and again in Orient Paper an Industries Ltd. and Another v. State of Orissa & Others (1991 Supp. (1) SCC 81, at page 96), should govern the matter.

> ".....there are two observations of a general character which I which to make, and one is to repeat what I have very often said before, that ever judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all"

(Emphasis supplied) The above observations should be borne in mind in understanding the scope of the decision in Kanhaiya Lal's case, and the cases following the said case. The said decisions cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution.

It also appears that there is some inconsistency in the Kanhaiya Lal's case. The basis in an action for restitution under Section 72 of the Contract Act, rests upon the equitable doctrine of unjust enrichment. The Court observed on page 1364 that the recovery of the money paid under mistake of law or fact can be recovered "subject however to questions of estoppel, waiver, limitation or the like". Even so, at page 1366, the Court has observed "equitable considerations could scarcely be

imported when there is a clear and unambiguous provision of law which entitled the plaintiff to the relief claimed by him." The very basis of the claim, though statutorily incorporated in Section 72 of the Contract Act, is equitable in nature and if so, how can it be said that equitable considerations should not be applied in adjudicating the claim for restitution (refund)? If an assessee has passed on the tax to the consumer or a third party and sustained no loss or injury, grant of refund to him will result in a windfall to him. Such a person will be unjustly enriched. This will result in the assessee or the claimant obtaining a benefit, which is neither legally nor equitably due to him. In other words, such a person is enabled to obtain "an unjust benefit" at the cost to innumerable persons to whom the liability (tax) has been passed on and to whom really the refund or restitution is due. The above factors certainly disentitle such a person from claiming restitution. If the decision in Kanhaiya Lal's case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect to the learned Judges, who rendered the above decisions, I express my dissent thereto.

15. Shri Nariman and Shri Sorabjee also contended that if the relief of refund is withheld or denied on the ground that the assessee has passed on the tax (liability) to the consumer or third party, it will result in a position where the State is enabled to retain and appropriate the unlawful collection to itself. The plea was that Article 265 of the Constitution of India contains a mandate to the effect that "no tax shall be levied or collected except by authority of law". It was argued that this is a basic feature of the Constitution and cannot be ignored. If no tax can be collected except by authority of law, the same logic would prevail for retention of amounts collected without the authority of law. Reference was made in this connection to the decision of the Madras High Court in Rayalaseema Constructions v. Dy. Commercial Tax Officer [10 STC 345 (355-356)] and affirmed by this Court in Dy. Commercial Tax Officer, Madras v. Rayalaseema Constructions (17 STC 505). The plea urged was that, if the assessee, is denied the refund, the State Government could retain the amount illegally collected, and it would amount to violation of the constitutional mandate enshrined in Article 265 of the Constitution. An equitable principle will not hold good against a constitutional mandate. On the other hand, Counsel for the Union of India, Sri K. Parasaran, brought to our notice the following portion of the Preamble and Article 39

(b) and (c) of the Constitution to contend that Article 265 of the Constitution cannot be construed in the light of the basic principles contained in other parts of the Constitution - viz. - the Preamble and the Directive Principles of State Policy :-

> "Preamble WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political;
>
> xxxxx xxxxxx xxxxx
> Article 39 (b)-(c):
>
> "(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;"

(Emphasis supplied) Mr. Parasaran also urged that it should be borne in mind that excise duty is an indirect levy or tax which could be passed on. Innumerable persons bear the brunt. And it is passed on, ordinarily by prudent businessmen. The decisions in R.C. Jall v. Union of India [1962 suppl. (3) SCR 436 at 451] and The Province of Madras v. M/s. Boddu Paidanna and Sons [1942 F.C.R.90], were referred to. Reference also was made to Section 64A of Sale of Goods Act, 1930 which was substituted later by Act 33 of 1963 to show that the levy could be passed on and so recognised by statute, and in the above background. there is a presumption that excise duty has been passed on. The scope of Article 39(b) of the Constitution, as laid down by this Court in State on Karnataka and Anr. etc. v. Shri Ranganatha Reddy & Anr. etc. [1978 (1) SCR 641 (689)], Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. & Anr. [1983 (1) SCR 1000 (1023-24 & 1026)], State of Tamil Nadu etc. etc. v. L. Abu Kavur Bai & Ors. [AIR 1984 SC 326 (343) = 1984 (1) SCR 725 (759, 761)] was highlighted. Reliance was placed on M/s. Amar Nath Om Parkash and Ors. etc. v. State of Punjab and Ors. etc. [1985 (2) SCR 72, at pp.96, 97, 99, 100)] Shiv Shanker Dal Mills etc. etc. v. State of Haryana & Ors. etc. [1980 (1) SCR 1170 (1173)], and Walaiti Ram Mahabir Prasad v. State of Punjab & Ors. [AIR 1984 (P&H) 120, at p. 124], to stress the point that the persons claiming refund who were only middle-men, should not be unjustly enriched and allowed to make a "fortune" as it were, at the expense of innumerable unidentifiable innocent consumers and that "public interest" requires that such persons claiming refund should not be unduly or unjustly benefited; and, public interest is better served, if the State is allowed to retain the collection of tax, which could be made/spent, for the benefit of the "public".

16. On an evaluation of the rival pleas urged in the matter, I am of the view that the plea of Counsel for Union of India should prevail.

Following the decision in the Province of Madras case (Supra) and other cases, a Constitution Bench of this Court in R.C. Jall v. Union of India (supra) at page 451 stated the nature and character of excise duty, thus:

> "Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It in an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer.

(Emphasis supplied) Section 64A of the Sale of Goods Act after its amendment by Act 33 of 1963, in providing that in contract of sale amount of increased or decreased taxes, may be added or deducted by the seller or by the buyer, in case of increase or decrease or remitted, after the making of the contract for the sale or purchase of such goods, without stipulation as to the payment of tax where a tax was not chargeable at the time of making the contract, expressly states that the pr visions shall apply to any duty of customs or excise and any tax on the sale or purchase of goods. the scope of Article 39(b) of the Constitution which has as its basis the concept of "distributive justice", as explained in three cases referred to in the previous paragraph; Shri Ranganatha Reddy (1978(1) SCR

641), Sanjeev Coke v. Bharat [1983(1) SCR 1000] and L. Abu [AIR 1984 SC 326] go to show that the words "material resources" occurring in Article 39 clause (b) will take in, natural or physical resources and also movable or immovable property and it would include all private and public sources of meeting material needs, and not merely confined to public possessions. So also, the three cases, Shiv Shanker Dal Mills' case [1980 (1) SCR 1170], Amar Nath Om Parkash's case [1985 (2) SCR 72] and Walaiti Ram Mahabir Prasad [AIR 1984 (P&H) 120], emphasis the principle that the persons who have passed on the burden of the levy -- middlemen -- should not be allowed to profiteer by illogtten gains and unjustly enriched. An analysis of the above decisions in detail will point out that if Article 265 of the Constitution is literally interpreted and in isolation, and refund ordered, in cases where excise duty has been passed on, it will result in a mockery, totally ignoring the other salient features of the Constitution and the ground realities. As the Preamble states, the Constitution was enacted by the people, to secure to all the citizens, justice, political, social and economic. It is fairly settled by the decisions of this Court, that the directive principles contained in Part IV of the Constitution are fundamental in the governance of this country and all organs of the State including the judiciary are bound to enforce those directives. In interpreting the various provisions of the Constitution, the courts have to be realistic and should be alive to the needs of the times. There courts have a responsibility to ensure proper and meaningful interpretation of the directive principles and to adjust or harmonise the objectives enshrined in the Preamble -- justice, political, social and economic and the directive principles contained in Part IV, with the individual rights. In the process, it is permissible to restrict, abridge, curtail and in extreme cases, abrogate other rights in the Constitution, if found necessary and expedient, in particular situations. In the light of the above, I hold that Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to the claim of restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto. The observation of a three-Member Bench of this Court in Orissa Cement Ltd. v. State of Orissa [1991 Supp. (1) SCC 430 (498 para 69)], is apposits in this context.

> "We are inclined to accept the view urged on behalf of the State that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the court has, and must be held to have, a certain amount of discretion. It is a well settled proposition that it is open to the court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice."

17. It is open to the Court to deny the equitable remedy of refund (restitution) in such cases. The attempt of persons who have passed on the liability in claiming refund is only to strike at a bargain -- to make a fortune at the expense of innumerable unidentifiable consumers. Such persons have suffered no loss. On the other hand, if the State is allowed to retain the amount, it will be available to the community at large and could be made use of for public purposes. On this basis as well, the denial of refund or restitution is valid. There is nothing abhorrent or against public policy if refund

or restitution is withheld in such a situation. It should also be stated that in cases of indirect levy of tax which was passed on, this Court has negatived the claim for refund in a few cases, mentioned in paragraph 12 (supra); -- Shiv Shanker Dal Mills v. State of Haryana [1980 (1) SCR 1170 (1173)], State of Madhya Pradesh v. Vyankatlal & Anr. [1985 (3) SCR 561 (566, 568)], M/s. Amar Nath Om Parkash and Ors. v. State of Punjab and Ors. [1985 (2) SCR 72 (96-100)], Indian Aluminium Company Limited v. Thane Municipal Corporation [1992 Supp. (1) SCC 480 (488-489)] and State of Rajasthan & Ors. v. Novelty Stores etc. [AIR 1995 SC 1132].

18. It now remains to consider the foreign decisions brought to our notice. The various decisions of foreign courts and their scope have been very exhaustively considered by Jeevan Reddy, J. in this judgment under the heading "Decisions of foreign courts on the subject". I am in broad agreement with my learned brother Jeevan Reddy, J., in the analysis of the various decisions aforesaid. It is unnecessary to cover that ground over again.

19. In this context, it will not be out of place to note that academicians have bestowed great thought and in various articles dealt with the matter in sufficient detail, particularly with reference to the foreign decisions brought to our notice. To mention a few, they are --

(1) "When Money is paid in Pursuance of a void authority ...." -- A duty to repay? by Peter Birks; [Public Law (1992) page 580] (2) "Restitution of taxes, levies and other imposts:

Defining the extent of the Woolwich Principle" - by J.

Beatson. [Law Quarterly Review Vol. 109 (1993) page 401] (3) "Restitution of Overpaid Tax, Discretion and Passing-

on" -- by J. Beatson. [Law Quarterly Review Vol. 111 (1995) page 375 Notes] (4) "Unjust Enrichment" - by Steve Hedley. [Cambridge Law Journal 1995 (578-599)] --

(5) "Unjust Enrichment Claims: A Comparative Overview" - by Brice Dickson [Cambridge Law Journal (1995) (100-126)] (6) "The Law of Taxation is not an Island -- Overpaid Taxes and the Law of Restitution" - by Graham Virgo; [British Tax Review (1993) (442-467)] (7) "Payments of Money under Mistake of Law: A Comparative View" - by Gareth Jones [Cambridge Law Journal (1993) Comment (225)] (8) "Restitution, Misdirected Funds and Change of Position"

> - by Ewan McKendrick, [Modern Law Review (1992) Vol.55 (377-385)] In some of the articles, the defences to a claim for restitution of overpaid taxes, has been dealt with in detail. One of them is the article by Graham Virgo appearing in British Tax Review (1993) (pp. 442-467) titled "The Law of Taxation is not an Island -- Overpaid Taxes and the Law of Restitution". At pages 462 and 463 under the sub-heading "Passing on", the learned author has made the following comment :
>
> "(vii) Passing on 48 Since restitution at common law is based upon the principle of reversing an unjust enrichment, it is important to determine whether the defendant

as actually enriched at the plaintiff's expense. This raises a difficult problem where the Revenue was initially enriched at the taxpayer's expense, by virtue of the receipt of overpaid tax, but the taxpayer did not ultimately suffer a loss because the burden of the payment was passed on to somebody else. This could arise if the taxpayer pays excessive VAT and passes the amount overpaid on to customers 49. As a matter of principle it could be argued that, in such a case, the taxpayer should not be allowed to recover the amount overpaid from the Revenue, because recovery would mean that the taxpayer was unjustly enriched at the

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48. This defence differs from that of change of position because with the latter the issue relates to the conduct of the payee. With the defence of passing on the issue relates to the conduct of the payer.

49. This specifically dealt with by F.A. 1989, s.24(5) discussed infra, which denies the repayment of VAT if it would unjustly enrich the recipient of the payment. expense of those who ultimately bore the burden of the tax.50. A possible solution to this is to allow those who effectively paid the tax to recover from the tax payer, who in turn should recover from the Revenue. However, typically in cases of passing on there are many people who effectively bear the burden of the tax and to encourage actions by them would be impractical and unrealistic. Thus, in such cases the best approach is to allow the Revenue a defence of passing on and enable it to retain the tax and use it for the public benefit. However, it remains uncertain to what extent a defence of passing on exists in English law.51 Such a defence is recognised by European Community law. In Amministrazione delle Finanze dello Stato v. SpA San Giorgio it was held that Community law does not prevent Member States from "disallowing repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients," for example where the unduly levied charges have been

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50. In Moses v. Macferlan (1760) 2 Burr. 1005 at p.1020 Lord Mansfield said that the payee "may defend himself by everything which shews that the plaintiff, ex aequo et bono, is not entitled to the whole of his demand, or to any part of it." This principle suggests that a defence of passing on should exist, for simple reasons of justice.

51. In Woolwich, supra, Lord Goff deferred the issue of the existence of a passing on defence, suggesting (at p.178) that the availability of such a defence may depend on the nature of the tax. It is submitted that the only real relevance of the nature of the tax relates to the case of determining whether the burden of the tax really was passed on.

incorporated in the price of goods and passed on to purchasers. Although this decision is confined to charges levied contrary to the rules of Community law, the very fact that Community law accepts the validity of a defence of passing on and accepts that the rationale of it is to avoid the unjust enrichment of the initial taxpayer, is a good reason for the defence to be adopted generally in English law. It would be odd if there were a divergence of approach between English and Community law on this matter.

However, it must be noted that Community law "does not prevent" Member States from adopting a defence of passing on. The San Giorgio case is not authority for the proposition that Member States must adopt such a defence. There has been some disquiet expressed as to the need for such a defence in theory and how it would work in practice. The defence was rejected in Mason v. New South Wales. The operation of the defence is fraught with difficulties because it is not easy to show that the charge was passed on in the price of gods. For the price of goods is affected by many factors, conditional upon the state of the market. Advocate General Mancini in the San Giorgio case said that the "passing on of charges is not generally relevant because of the innumerable variables which affect price formation in a free market and because of the consequent impossibility of definitively relating any part of the price exclusively to a certain cost." Thus, may be the price of goods was increased in an attempt to recoup the tax paid to the Revenue from the purchasers of goods, but this in turn may have had an impact on sales volume resulting in an overall loss. The burden of the enrichment cannot really be said to have been passed on when the initial taxpayer suffers a net loss.

It is submitted that in principle a defence of passing on should exist, with a burden of proving this being on the Revenue: it unlawfully demanded the taxes and so it should show that repayment would unjustly enrich the taxpayer. It is unlikely that such a defence would operate successfully in practice in many cases because of the difficulty of proving that the tax was actually passed on."

(Emphasis supplied) Similarly, in the article by J. Beatson [(1993) 109 L.Q.R. 401 (427-428)], the learned author has stated regarding passing on, thus:

" "Passing on." The Law Commission raised the question of whether a payer who has "passed on" to others for instance by price increases, the higher cost he has borne because of the overpayment should be precluded from recovering. This defence is permitted by European Community Law so long as it does not have the effect of making the right to recover impossible in practice or excessively difficult to exercise. However, it has been criticised, technically because, inter alia, price increases should mean that less will be sold, and also because of difficulties of proof. These difficulties were noted by Lord Goff, and arguments for a similar limit were not accepted by the High Court of Australia in Mason v. New South Wales. However, the underlying rationale of a "passing on" defence might be achieved by providing, as in the statutes

> on recovery of Value Added Tax and car tax, that recovery should not be allowed if the payee can show that the payer would be unjustly enriched if he recovered the payment. This would be consistent with the basic equitable features that have influenced the development of the action for money had and received. It is also possible that such a limit would achieve the same policy ends as the "reasonable and just" limit in provisions such as section 33 of the Taxes Management Act 1970 and, if so, it might provide a useful method of achieving a measure of rationalisation." (pp.427-428)
>
> 20. Mention may also be made about the Law Commission's Report in England, Law Consultation Paper No.120 "Restitution of Payments made under a mistake of law" --

wherein, after discussing the entire case law of England and other jurisdictions, an observation is made thus:

> "3.85 In principle there would appear to be no reason why such a defence should not apply to cases where the authority can prove on the balance of probabilities that the payer would be unjustly enriched because the charge has been passed on. The views of consultees on the general issue of a "passing on" defence are invited."

In Kanhaiya Lal's case (1959 SCR 1350 at page 1367), this Court was not inclined to accept that defence in mitigation that the State has not retained the amount, but has spent them away in the ordinary course of governmental activities. This plea in defence based on the theory of "Change of Position" has been dealt with by Graham Virgo in his article in British Tax Review (1993) at pages 458-459. See also the views expressed in this behalf by a two-Member Bench of this Court in D. Cawasji & Co. v. State of Mysore [1975 (2) SCR 511].

21. I am of the view that the above academic opinion has got much force. However, it is subject to one aspect, stated hereunder. As held by me earlier, ordinarily, the presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the `duty' element also and/or also as to whether he has passe don the liability since he is in possession of all relevant details. Revenue will not be in a position to have an in depth analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge of the taxpayer, the burden of proving that the liability has not been passed on should lie on him. It is held accordingly.

22. The next important question that falls to be considered is, as to what extent the jurisdiction of the ordinary courts is ousted, regarding claims for refund of tax illegally levied or collected?

According to the Revenue, the Act is a special enactment creating new rights and liabilities and has also made exhaustive provisions, to ventilate the grievances against all illegal and improper assessments by way of appeals, revisions etc. and also to obtain refunds in appropriate cases by following certain procedures and fulfilling some conditions. A hierarchy of tribunals is provided to

afford relief to the assessees. Elaborate alternate remedies provided by the Act, taken along with the specific bar of the jurisdiction of courts provided in Rule 11 (as amended) and Section 11(B) of the Act, and in particular specifying the conditions and procedure for entertaining claims for refund, period of limitation within which the claim should be preferred, etc. will oust/bar the jurisdiction of ordinary courts in that regard. (Attention was also drawn to Sections 11C, 11D and also to Sections 12A to D of the Act, to stress the scheme of the Act.) On the other hand, counsel for the assessees-claimants urged that the provisions in the Act dealing with refund of tax "unconstitutionally" or "illegally" or "unauthorisedly" collected are not exhaustive. Even so, in cases where the levy is unconstitutional or illegal or without jurisdiction, the jurisdiction of the Civil Courts is not barred to annual the levy and/or order refund.

23. As stated by me earlier in paragraph 5 of this judgment, the claims for refund can be classified broadly into 3 groups. They are --

(I) the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act.

(II) the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure.

(III) mistake of law -- the levy or imposition was unconstitutional or illegal or not eligible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment, (within the period of limitation) he initiated action for refund of the tax paid by him, due to mistake of law.

24. The relevant provisions of law that existed during different periods dealing wit the claim for refund ar different in content and scope. They are as follows:

(a) Period up to 7.8.1977 -- Rule 11 of the Central Excise Rules, before amendment;

(b) Period from 7.8.1977 to 16.11.80 -- Rule 11 of the Central Excise Rules, as amended;

(c) Period from 16.11.1980 to 19.9.1991 -- Section 11A and Section 11B of the Central Excises & Salt Act; and

(d) Period after 19.9.1991 -- Section 11A read along with Section 11B of the Act, as amended by Act 40 of 1991. Rule 11 of the Central Excise Rules which was in force prior to 7.8.1977, has been quoted in paragraph 5 of this judgment. It contains no specific provision relating to outster of jurisdiction of the courts.

25. Rule 11 of the Central Excise Rules as amended, Section 11A and Section 11B before Amendment Act 40 of 1991 and Section 11B, as amended by Act 40 of 1991, will be more important to consider the question of ouster of jurisdiction of courts. Sections 11C, 11D as also Sections 12A to D of the Act,

will throw light on the scheme of the Act as amended. They are as follows (insofar as they are relevant in the instant cases):-

Rule 11 as amended "Rule 11. Claim for refund of duty.--

(1) Any person claiming refund of any duty paid by him may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty.

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation.-- Where any duty is paid provisionally under these rules on the basis of the value or the rate of duty, the period of six months shall e computed from the date on which the duty is adjusted after final determination of the value or the rate of duty, as the case may be.

(2) If on receipt of any such application the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under these rules no claim for refund of any duty shall be entertained.

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     Explanation.   --    For   the
purposes  of  this  rule,  `refund'
includes  rebate   referred  to  in
Rules 12 and 12A."
           SECTION 11-A
"11A.     Recovery  of  duties  not
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levied or not paid or short-levied or short-paid or erroneously refunded. --(1) When any duty of excise has not been levied or paid or has been short-levied or short paid or erroneously refunded, a Central Excise Officer may, within six months from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or

any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, as if, for the words `six months', the words `five years' were substituted.

Explanation.-- .....

(ii) `relevant date' means, --

(a) in the case of excisable goods on which duty of excise has not been levied or paid or has been short-levied or short-paid .....

(c) in any other case, the date on which the duty is to be paid under this Act or the rules made thereunder;"

SECTION 11-B BEFORE AMENDMENT BY ACT 40/1991 "11B. Claim for refund of duty.-- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date: Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Whereas a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf. (4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

Explanation. -- For the purpose of this section ..... (B) 'relevant date' means--

(f) in any other case, the date of payment of duty."

SECTIONS 11B, 11D AND 12A TO D, AS AMENDED BY ACT 40/1991 "11B. Claim for refund of duty.-- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise

before the expiry of six months from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act:

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to--

(a) rebate of duty of excise on excisable goods experted out of India or on excisable material used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order of direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2). Explanation.-- For the purposes of this section, ... (B) `relevant date' means --

(f) in any other case, the date of payment of duty."

(Emphasis supplied) Section 11C deals with the power of Central Government to dispense with recovery of excise duty in certain specified cases, which is not necessary for our discussion. Section 11D and Section 12A to D highlight the new scheme of the Act, relating to refund and they are as follows:- 11D. Duties of excise collected from the buyer to be deposited with the Central Government (1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the rules made thereunder, every person who has collected any amount from the buyer of any goods in any manner as representing duty of excise, shall forthwith day the amount so collected to the credit of the Central Government.

(2) The amount paid to the credit of the Central Government under sub-section (1) shall be adjusted against duty of excise payable by the person on the finalisation of assessment and where any surplus is left after such adjustment, the amount of such surplus shall either be credited to the Fund or, as the case may be, refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B and the relevant date for making an application under that section in such cases shall be the date of the public notice to be issued by the Assistant Commissioner of Central Excise." "12A Price of goods to indicate the amount of duty paid thereon Notwithstanding anything contained in this Act or any other law for the time being in force, every person who liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sale invoice and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. 12B. Presumption that incidence of duty has been passed on to the buyer Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

12C. Consumer welfare fund (1) There shall be established by the Central Government a fund, to be called the Consumer Welfare Fund. (2) Thee shall be credited to the Fund, in such manner as may be prescribed, --

(a) the amount of duty of excise referred to in sub-section (2) of section 11B or sub-section (2) of section 11C or sub-section (2) of section 11D;

(b) the amount of duty of customs referred to in sub-

section (2) of section 27 or sub-section (2) of section 28A, or sub-section 92) of section 28B of the Customs Act, 1962 (52 of 1962);

(c) any income from investment of the amount credited to the Fund any other monies received by the Central Government for the purposes of this Fund.

12D. Utilisation of the Fund (1) Any money credited to the Fund shall be utilised by the Central Government for the welfare of the consumers in accordance with such rules as that Government may make in this behalf.

(2) The Central Government shall maintain or, if it thinks fits, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India."

It is evident that Rule 11, before amendment, provided a time limit to apply for refund. Rule 11(4) as amended, Section 11B clauses (4) and (5) before amendment and Section 11B clause (3) after amendment, specifically oust the jurisdiction of the ordinary courts. Detailed provisions are also provided to ventilate the grievances and making such provisions exclusive. Other ancillary or incidental provisions are specified in Sections 11D and 12A to D -- Section 11D provides that every person, who collects excise duty from the buyer, should deposit the same with the Central Government. It will be adjusted against the duty of excise payable by the person concerned on finalisation of the assessment. Section 11D requires clarification. Excise duty is, ordinarily paid or payable at the time of clearance of the goods. The sale of the goods may be later. So, if excise duty due is already paid by the manufacturer, and later collected by him when the goods are sold, such collection, need not be paid to the government. Only if the duty has not been paid already or if any excess is collected over and above the duty already paid, then only an occasion arises for payment of the duty collected or excess collected

-- and this is the purport of Section 11D. The said section (Section 11D) should be understood in the above practical and business sense. Section 12A provides that the price of the goods sold should indicate the amount of duty, which will form part of the price. Section 12B states that the person, who has paid the duty of excise on any goods under the Act, shall be deemed to have passed on the incidence of such duty to the buyer of such goods. It is a rebuttable presumption. Section 12C creates the "Consumer Welfare Fund". The amount of duty referred to in Sections 11B(2), 11C(2) and 11D(2) shall be credited in the said Fund. Section 12D provides that the Fund shall be utilised for the welfare of the consumers.

26. The question that falls to be considered is as to how far or to what extent the jurisdiction of the ordinary courts is barred, in view of the alternate remedies provided by the Act by way of appeals, revisions, claims for refund and the period of limitation provided therefor, etc. and specifically excluding the jurisdiction of the civil courts for claiming refund? In discussing this aspect, one has to bear in mind the content of Article 265 also. It will apply where the statute is unconstitutional or invalid and also where the collection is unauthorised/illegal, i.e.., without "authority of law".

27. It is settled law that exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. There are a few decisions of Judicial Committee of the Privy Council and innumerable decisions of this Court which have dealt with the matter in detail. I propose to deal, only with the landmark decisions on the subject. In Secretary of State v. Mask & Co. (AIR 1940 P.C. 105 at page 110), the Judicial Committee laid down the law thus:

> ".....It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

(Emphasis supplied) The scope of the above observation has been explained by & Constitution Bench of this Court, in Firm of Illuri Subbayya Chetty and Sons v. State o Andhra Pradesh (AIR 1964 SC. 322). The minimal facts in this case will be relevant to understand the scope of the decision. The case arose under the Madras General Sales Tax Act, 1939. Section 18A of the Act provided that no suit or other proceeding shall except expressly provided in the Act, be instituted in any court to set aside or modify any assessment made under the Act. The Act also contained provisions by way of appeals, revisions and further revision to the High Court. The levy under the Act was only on "purchase" of `ground-nuts', but the sales Tax authorities brought to tax the "sales" turnover and collected tax. The assessee contended that levy of tax on the sales turnover as distinguished from the purchase turnover is illegal, and filed a suit for recovery of the amount so collected. It should be noticed that the assessee himself voluntarily made a return and paid the tax. In such circumstances, the question arose, whether the suit so filed is maintainable in view of the adequate alternate remedies provided by the Act and the ouster of jurisdiction of the courts expressly contained in Section 18A of the Act? On the facts of the case, it was held that the suit was barred. In considering the question of exclusion of jurisdiction of the civil courts to entertain civil actions by virtue of specific provisions contained in the special statute, reference was made to the decision of the judicial Committee in Secretary of State v. Mask & Co. (supra). After referring to the observations of the judicial Committee quoted hereinabove, this Court in Firm of Illuri Subbayya Chetty and sons v. State of Andhra Pradesh (AIR 1964 SC 322 at pages 325 and 326) explained the said observation thus:

> ".....It is necessary to add that these observation, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under the provisions of the relevant taxing statute, its validity can be challenged by a suit on the ground that it is incorrect on the merits and as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation

> of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps by invoked in support of the plea that the civil can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute. In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant that on the merits, the decision of the assessing authority was wrong, cannot be the subject- matter of a suit because S.18-A clearly bars such a claim in the civil courts.

(Emphasis supplied) In this case, the relevant Act contained detailed and specific provisions by way of appeal, revision etc. to ventilate the grievances of the assessees. In addition thereto, there was specific provision ousting the jurisdiction of the courts. Even so, the court did not hold that the principles laid down in Mask & Co. case are inapplicable. The principles in Mask & Co. case were affirmed and explained.

28. The decision of the Privy Council in Mask & Co. case (supra), and other decisions of the Privy Council and of this Court, were surveyed in detail by a Constitution Bench of this court in Dulabhai etc. v. State of Madhya Pradesh & Anr. (AIR 1969 SC 78). In that case, the assessees filed a suit for refund of the tax on the ground that it was illegally collected from them being against the constitutional prohibition contained in Article 301 of the Constitution of India and not saved in Article 304 (a) the Constitution. Section 17 of the relevant Act was pleaded in defence as a bar to the maintainability of the suit. Section 17 provided that no assessment made and no order passed under the Act or the Rules by any of the statutory authorities, shall be called in question in any case. The court held that notwithstanding, the alternate remedies by way of appeal, revision, rectification and reference to the High Court, the tax therein was levied without a complete charging section and this affected the jurisdiction of the tax authorities, and so, the suit was maintainable, and decreed the suit. After referring to the relevant decisions and in particular, Secretary of State v. Mask & Co. (AIR 1940 P.C. 105), Firm of Illuri Subbayya Chetty and sons v. State of Andhra Pradesh (AIR 1964 SC. 322), this Court held in paragraph 28 of the judgment, thus:

> "The Constitution Bench, however went on to examine the rulings of the Judicial Committee in Mask and Co.'s and Raleigh Investment Co.'s cases, 67 Ind App 222 = (AIR 1940 PC 105) and 74 Ind App 50 = (AIR 1947 PC 78). Dealing with the former case, this Court pointed out that non-compliance with the provisions of the statute meant non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction.....

Emphasis supplied) Referring to the facts of Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh (AIR 1964 SC.

322), it was further observed:-

> "The case of Firm of Illuri Subayya, 1961-1 SCR 752 = (AIR 1964 SC 322) may be said to be decided on special facts with additional reference to the addition of Section 18-A excluding the jurisdiction of civil court and the special remedies provided in Section 12-A to 12-D by which the matter could be taken to the highest civil court in the State.

(Emphasis supplied) This Court also considered the facts and the actual decision of the Special Bench of 7-Judges in Kamala Mills Ltd. vs. State of Bombay (AIR 1965 SC 1942) in detail, with reference to Section 20 of the Bombay Sales Tax Act, 1946, and observed thus:

> "The Special Bench refrained from either accepting the dictum of Mask Co.'s case, 67 Ind App 222 = (AIR 1940 PC 105) or rejecting it, to the effect that even if jurisdiction is it, to the effect that even if jurisdiction is excluded by a provision making the decision of the authorities final, the civil courts have jurisdiction to examine into cases where the provisions of the particular Act are not complied with.

It is evident from the above, that the Principle laid down in Mask & Co. case, though explained, was not questioned, or departed from, either in Illuri Subbayya Chetty's case or Kamala Mills case. In a subsequent decision

- Ram Swarup v. Shikar Chand (AIR 1996 SC 893), a Constitution Bench of this Court again considered the scope of the decisions in Mask & Co.'s case (supra) and Kamala Mills' case (supra). Ram Swarup's case arose under the U.P. (Temporary) Control of Rent and Eviction Act. Section 3(4) of the Act provided that the order passed by the designated authority shall be final and Section 16 thereof further provided that the order passed by the State Government or the District Magistrate, shall not be called in question in any court. In other words, the jurisdiction of civil courts was excluded in relation to the matters covered by orders included within the provisions of Sections 3(4) and 16 of the said Act. The Constitution Bench approached the matter thus:-

> "One of the points which is often treated as relevant in dealing with the question about the exclusion of civil Courts' jurisdiction, is whether the special statute which, it is urged, excludes such jurisdiction, has used clear and unambiguous words indicating that intention. Another test which is applied is: does the said statute provide for an adequate and satisfactory alternative remedy to a party that may be aggrieved by the relevant order under its material provisions? Applying these two tests, it does appear that the words used in S.3(4) and S. 16 are clear. Section 16 in terms provides that the order made under this Act to which the said section applies shall not be called in question in any Court. This is an express provision excluding the civil courts' jurisdiction. Section 3(4) does not expressly exclude the jurisdiction of the civil Courts, but, in the context, the inference that the civil Courts jurisdiction is intended to be excluded, appears to be inescapable. Therefore, we are satisfied that Mr. Goyal is right in contending that the jurisdiction of the civil Courts is excluded in

> relation to matters covered by the orders included within the provisions of S.3(4) and S. 16.

(Emphasis supplied) Even so, this Court proceeded to state in paragraph 13 at page 896, to the following effect:-

> "This conclusion, however, does not necessarily mean that the plea against the validity of the order passed by the District Magistrate, or the Commissioner, or the State Government, can never by raised in a civil Court. In our opinion, the bar created by the relevant provisions of the Act excluding the jurisdiction of the civil Courts cannot operate in cases where the plea raised before the civil Court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity.

(Emphasis supplied) This Court referred to the decisions of the judicial committee, in Secretary of State v. Jatindra Nath Choudhry (AIR 1924 PC 175) and the decision in Mask & Co, and also quoted the observations in the latter case which have been quoted hereinbefore (para 27 - supra) and concluded thus:-

> "In M/s. Kamla Mills Ltd. v. The State of Bombay, C.A. No. 481 of 1963, dated 23-4-1965: (AIR 1965 SC 1942), while dealing with a similar point, this Court has considered the effect of the two decisions f the Privy council, one in the case of Mask and Co., 67 Ind app 222. (AIR 1940 PC 105) (supra), and the other in raleigh Investment Co.
>
> Ltd. v. Governor-General in Council, 74 Ind App 50 at pp.62-63: (AIR 1947 PC 78 at pp. 80-81). The conclusion reached by this Court in M/s. Kamla Mill's case, C.A. No. 481 of 1963 dated 23-4-1965: (AIR 1965 SC 1942), (supra) also supports the view which we are taking in the present appeal.

(Emphasis supplied) It is evident that in Ram Swarup's case, this Court expressed the view that the decision in Kamla Mills' case is in accord with Mask & Co.'s case, and the bar of jurisdiction of civil courts cannot operate in cases where the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is nullity -- in other works, where the order or proceeding is attached as one passed without jurisdiction. Again, the principle laid down in Mask & Co.'s case was only reiterated and observations were made that the decision in Kamala Mills' case was in accord with the decision in Mask & Co.'s case. It is important to notice that Gajendragadkar, C.J., spoke for the Bench in all the three decisions: Illuri Subayya Chetty (AIR 1964 SC 322), Kamala Mill (AIR 1965 SC 942) and Ram Swarup (AIR 1966 SC

893).

In considering Mask & Co. (AIR 1940 PC 105), and Kamala Mills (AIR 1965 SC 1942) the Constitution Bench in Ram Swarup's case (AIR 1966 SC 893) held that if the proceeding assailed is

totally invalid and a nullity or without jurisdiction, the jurisdiction of the civil courts is not barred. Again, the principle laid down in Mask & Co. (supra) was only affirmed.

On an analysis of the various decisions, this Court laid down the law in paragraph 32 at page 89, thus (Dulabhai's case):

> "Neither of the two cases of Firm of Illuri Subayya, 1964-1 SCR 752 = (AIR 1964 SC 322) or Kamla Mills, 1966 1 SCR 64 = (AIR 1965 SC 1942) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows: (1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to Find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.
>
> (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals. (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit. (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.
>
> (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.
>
> (7) An exclusion f the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

(Emphasis supplied) Dulabhai's case (supra) has been consistently followed by this Court later -- see: Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Guru v. The State of Andhra Pradesh and others (AIR 1971 SC 71) and other cases. (29) Applying the law laid down in the decisions aforesaid, it is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc. as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No.(1), (3), (4) and (5) in Dulabhai's case, as explained hereinabove, a one passed outside the Act and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by the specific statute will have no application. [Collector of Central Excise, Chandigarh v. M/s. Doaba Co-operative Sugar Mills Ltd.. Jalandhar (1988 Supp. SCC 683); Escorts Ltd. v. Union of India & Ors. (1994 Supp. (3) SCC 86)]. Rule 11 before and after amendment, or S. 11B, cannot affect S.72 of the Contract Act or the provisions of Limitation Act in such situations. My answer to the claims for refund broadly falling under the three groups or categories enumerated in paragraph 5 of this judgment is as follows:

Category (I) where the levy is unconstitutional - outside the provisions of the Act or not contemplated by the Act:-

In such cases, the jurisdiction of the civil courts is not barred. The aggrieved party can invoke Section 72 of the Contract Act, file a suit of a petition under Article 226 of the Constitution, and pray for appropriate relief inclusive of refund within the period of limitation provided by the appropriate law. [Dulabhai's case (supra) - para 32 - Clauses (3) and (4)] Category (II) where the levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the Fundamental Principles of judicial procedure:-

Under this category, every error of fact or law committed by the statutory authority or Tribunal, irrespective of its gravity, or nature of infirmity, will not be covered. It is confined to exceptional cases, "where the provisions of a particular Act have not been complied with or the statutory tribunal has not acted in conformity with fundamental principles of judicial procedure" as stated in Mask & Co.'s case (supra) and in Dulabhai's case (supra). The scope of the above dicta, should be understood in the background of/in accord with the observations of the earlier constitution Bench of this Court in Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh (AIR 1964 SC. 322 at page 326), to the following effect;

"....Non-compliance with the provisions of the statute, to which reference is made by the Privy Council must, we think, be non-

compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction.

Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void...

[Dulabhai's case (supra) -- para 32 Clause (1)] (Emphasis supplied) Here also, the appropriate action should be laid within the period of limitation provided by the appropriate law and also can invoke Section 72 of the contract Act, as the case may be.

Category (III) - Mistake of law -- the levy or imposition was unconstitutional or illegal or not eligible in law (i.e. without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee, either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment, (within the period of limitation) he initiated action for refund of the tax paid by him, due to mistake of law:-

In this category, assessees who initiated proceedings and impugned the assessments/claimed refund, for any reason, either by way of suit or petition under Article 226 of the Constitution, and the action was dismissed on merits, they cannot maintain an action over again. He who fights and runs away, cannot have another day. If the levy or imposition was held to be unconstitutional or illegal or not exigible in law, in a similar case filed by some other person, the assessee who had already lost the battle in a proceeding initiated by him or has otherwise abandoned the claim cannot, take advantage of the subsequent declaration rendered in another case where the levy is held to be unconstitutional, illegal or not exigible in law. The claim will be unsustainable and barred by res judicata. [M/s. Tilokchand Motichand and Ors. v. H.B. Munshi, commissioner of Sales Tax, Bombay and another (AIR 1970 SC 898)]. (This will be confined to the period for which action was laid and lost).

Subject to the above, if a levy or imposition of tax is held to be unconstitutional or illegal or not exigible in law i.e. without jurisdiction, it is open to the assessee to take advantage of the declaration of the law so make, and pray for appropriate relief inclusive of refund on the ground that tax was paid due to mistake of law, provided he initiates action within the period of limitation prescribed under the Limitation Act. Such assessee should prove the necessary ingredients to enable him to claim the benefit under Section 72 of the Contract Act read with Section 17 of the Limitation Act. [Dulabhai's case (supra) - para 32 - clauses (4) and (5)].

30. It should be borne in mind, that in all the three categories of cases, the assessee should prove the fundamental factor that he has not "passed on" the tax to the consumer or third party and that he suffered a loss or injury. This aspect should not be lost sight of, in whatever manner, the proceeding is initiated -- suit, Article 226, etc.

31. As observed earlier, proposition No.(1) of clause No. (1), enunciated in Dulabhai's case (supra) should be understood in the background of or in accord with the observations of the earlier Constitution Bench in Illuri Subbayya Chetty's case - [AIR 1964 SC 322 (at pp. 325-326)] as quoted

in para 27 (supra) -- (see para 29 of this judgment).

Opinions may differ as to when it can be said that in the "public law" domain, the entire proceeding before the appropriate authority is illegal and without jurisdiction or the defect or infirmity in the order goes to the root of the matter and makes it in law invalid or void (Referred to in Illuri Subbayya Chetty's case and approved in Dulabhai case). The matter may have to be considered in the light of the provisions of the particular statute in question and the fact situation obtaining , in each case. It is difficult to visualise all situations hypothetically and provide an answer. Be that as it may, the question that frequently arises for consideration, is, in what situation/cases the non-compliance or error or mistake, committed by the statutory authority or Tribunal, makes the decision rendered ultra-vires or a nullity or one without jurisdiction? If the decision is without jurisdiction, notwithstanding the provisions for obtaining reliefs contained in the Act and the "ouster clauses", the jurisdiction of the ordinary court is not excluded. So, the matter assumes significance. Since the landmark decision in Anisminic Ltd. vs. Foreign compensation commission [1969 (2) AC 147 = 1969 (1) All ER 208 (H.L.)], the legal world seems to have accepted that any "jurisdictional error" as understood in the liberal or modern approach, laid down therein, makes a decision ultra vires or a nullity or without jurisdiction and the "ouster clauses", are construed restrictively, and such provisions whatever their stringent language be, have been held, not to prevent challenge on the ground that the decision is ultra vires and being a complete nullity, it is not a decision within the meaning of the Act. The concept of jurisdiction has acquired "new dimensions". The original or pure theory of jurisdiction means, "the authority to decide", and it is determinable at the commencement, and not at the conclusion of the inquiry. The said approach has been given a go bye in Anisminic case, as we shall see from the discussion hereinafter [see De Smith, Woolf and Jowel] - Judicial Review of administrative Action (1995 edn.) p. 238; Halsburry's Laws of England (4th edn.) p.114 - para 67 - foot note (9)]. As Sir William Wade observes in his book, Administrative Law (7th edn.), 1994, at p. 299, "The tribunal must not only have jurisdiction at the outset, but must retain it unimpaired until it has discharged its task". The decision in Anisminic case has been cited with approval in a number of cases by this Court: Citation of few such cases; Union of India vs. Tarachand Gupta & Bros. [AIR 1971 SC 1558 (at 1565)], A.R. Antulay v. R.S. Nayak and another [1988 (2) SCC 602 (650)], M/s. R.B. Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT) and another [1989 (1) SCC 628 (634)], N. Parthasarathy etc. etc. v. Controller of Capital Issues & anr. etc. etc. [1991 (3) SCC 153 (at 195), Associated Engineering Co. vs. Government of Andhra Pradesh and anr. [AIR 1992 SC 232], Shiv Kumar Chadha v. Municipal Corporation of Delhi and others [1993 (3) SCC 161 (173)]. Delivering the judgment of a two-member Bench in Shri M.L. Sethi v. Shri R.P. Kapur (AIR 1972 SC 2379) Methew, J. in paragraphs 10 and 11 of the judgment explained the legal position after Anisminic case to the following effect:

> "The word "jurisdiction" is verbal cast of many colours. Jurisdiction originally seems to have had the meaning which Lord Baid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an inquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Denman

in R. v. Bolton (1841) 1 QB 66. He said that the question of jurisdiction is determinable of the enquiry. In Anisminic Ltd., (1969) 2 AC 147 Lord Reid said:

But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has hone or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. i do not intend this list to be exhaustive."

In the same case, Lord Pearce said:

Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity.

11. The dicta of the majority of the House of Lords, in the above case would show the extent to which `lack' and `excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away form the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. That comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or addressing themselves to a wrong question". The Majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the Court is prepared to allow....."

In a subsequent constitution Bench decision, Hari Prasad Mulshankar Trivedi v. V.B. Raju anothers (AIR 1973 SC 2602), delivering the judgment of the Bench, Mathew, J., in para 27 at page 2608 of the judgment, stated thus:

> ".....Though the dividing line between lack of jurisdiction or power and erroneous exercise of it has become thin with the decision of the House of Lords in the Anisminic Case, (1967) 3 W.L.R.
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> 382, we do not think that the distinction between the two has been completely wiped out. We are aware of the difficulty in formulating an exhaustive rule to tell when there is lack of power and when there is an erroneous exercise of it. The difficulty has arisen because the word "jurisdiction" is an expression which is used in variety of senses and takes its colour from its context, (see Per Diplock, J. at p. 394 in the Anisminic Case). Whereas the `pure' theory of jurisdiction would reduce jurisdictional control to a vanishing point, the adoption of a narrower meaning might result in a more useful legal concept even though the formal structure of law may lose something of its logical symmetry. "At bottom the problem of defining the concept of jurisdiction for purpose of judicial review has been one of public policy rather than one of logic". (S.A.De Smith, "Judicial Review of Administrative Action".

2nd Edn., p. 98.) (1988 edition) (emphasis supplied) The observation of the learned author, (S.A. De Smith) was continued in its third edition (1973) at page 98 and in its fourth edition (1980) at page 112 of the book. The observation aforesaid was based on the then prevailing academic opinion only as is seen from the foot notes. it should be stated that the said observation is omitted from the latest edition of the book De Smith, Woolf and Jowel] - Judicial Review of administrative Action - 5th edition (1995) as is evident from page 229; probably due to later developments in the law and the academic opinion that has emerged due to the change in the perspective.

32. After 1980, the decision in Anisminic case came up for further consideration before the House of Lords, Privy council and other courts. The three leading decisions of the House of Lords wherein anisminic principle, was followed and explained, are the following:- In re: Racal Communications Ltd. [1981 AC 374], O'Reilly & ors. vs. Mackman & ors. [1983 (2) AC 237], Regina vs. Hull University Visitor [1993 AC 682]. It should be noted that In re Racal's case, the Anisminic Principle was held to be inapplicable in the case of (superior) court where the decision of the court is made final and conclusive by the statute. (The superior court referred to in this decision is the High Court) [1981 AC 374 (383, 384, 386, 391)]. In the meanwhile, the House of Lords in Council for Civil Service Unions & ors. vs. Minister For the Civil Service [1985 (1) AC 374] enunciated three broad grounds for judicial review, as "legality", "procedural Propriety" and "rationality" and this decision had its impact in the development of the law in post-Anisminic period. In the light of the above four important decisions of the House of Lords, other decisions of the court of appeal, Privy council, etc. and the later academic opinion in the matter the entire case law on the subject has been reviewed in leading text books. In the latest edition of De Smith on "Judicial Review of Administrative Action" - edited by Lord Woolf and Jowel], Q.C. [(Professor of Public Law) (Fifth edition) - (1995)], in Chapter 5, titled as "Jurisdiction, Vires, Law and Fact" (pp. 223-294), there is exhaustive analysis

about the concept, "Jurisdiction", and its ramifications. The authors have discussed the pure theory of jurisdiction, the innovative decision in "Anisminic" case [1969 (2) AC 147], the development of the law in the post Anisminic period, the scope of the "finality" clauses (exclusion of jurisdiction of courts) in the Statutes, and have laid down a few propositions at pages 250-256 which could be advanced on the subject. The authors have concluded the discussion thus at page 256:

> "After Anisminic virtually every error of law is a jurisdictional error, and the only place left for non-jurisdictional error is where the components of the decision made by the inferior body included matters of fact and policy as well as law, or where the error was evidential (concerning for example the burden of proof or admission of evidence). Perhaps the most precise indication of jurisdictional error is that advanced by Lord Diplock in Racal Communications, when he suggested that a tribunal is entitled to make an error when the matter "involves, as many do inter- related questions of law, fact and degree". Thus it was for the county court judge in Pearlman to decide whether the installation of central heating in a dwelling amounted to a "structural alteration extension or addition". This was a typical question of mixed law, fact and degree which only a scholiast would think it appropriate to dissect into two separate questions, one for decision by the superior court, viz. the meaning of these words, a question which must entail considerations of degree, and the other for decision by a county court, viz. the application of words to the particular installation, a question which also entails considerations of degree." It is, however, doubtful whether any test of jurisdictional error will prove satisfactory. The distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand. Much of the superstructure has already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative action should be, simply, lawful, whether or not jurisdictionally lawful." (Emphasis supplied)

33. The jurisdictional control exercised by superior courts over subordinate courts, tribunals or other statutory bodies and the scope and content of such power has been pithly stated in Halsbury Laws of England - 4th edition (Reissue), 1989, volume 1(1), p. 113 to the following effect :-

> "The inferior court or tribunal lacks jurisdiction if it has no power to enter upon an inquiry into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an inquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure, or by making an order or taking action outside its limited area of competence. Not every error committed by an inferior court or tribunal or other body, however, goes to jurisdiction. Jurisdiction to decide a matter imports a limited power to decide that matter incorrectly."
>
> "A tribunal lacks jurisdiction if (I) it is improperly constituted, or (2) the proceedings have been improperly instituted, or (3) authority to decide has been delegated to it unlawfully, or (4) it is without competence to deal with a matter by reason of the

parties, the area in which the issue arose, the nature of the subject matter, the value of that subject matter, or the non- existence of any other prerequisite of a valid adjudication. Excess of jurisdiction is not materially distinguishable from lack of jurisdiction and the expressions may be used interchangeably." "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue, or as jurisdictional." (p.

114) "There is a presumption in construing statutes which confer jurisdiction or discretionary powers on a body, that if that body makes an error of law while purporting to act within that jurisdiction or in exercising those powers, its decision or action will exceed the jurisdiction conferred and will be quashed. The error must be one on which the decision or action depends. An error of law going to jurisdiction may be committed by a body which fails to follow the proper procedure required by law, which takes legally irrelevant considerations into account, or which fails to take relevant considerations into account, or which asks itself and answers the wrong question. (pp. 119-120) The presumption that error of law goes to jurisdiction may be rebutted on the construction of a particular statute, so that the relevant body will not exceed its jurisdiction by going wrong in law. Previously, the courts were more likely to find that errors of law were within jurisdiction; but with the modern approach errors of law will be held to fall within a body's jurisdiction only in exceptional cases. The courts will generally assume that their expertise in determining the principles of law applicable in any case has not been excluded by Parliament." (p. 120) "Errors of law include misinterpretation of a statute or any other legal document or a rule of common law; asking on self and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the acts; admitting inadmissible evidence or rejecting admissible and relevant evidence;

exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons, and misdirecting oneself as to the burden of proof." (pp. 121-122) (Emphasis supplied)

34. H.W.R. Wade and C.F. Forsyth in their book - Administrative Law, Seventh Edition, (1994) - discuss the subject regarding the jurisdiction of superior courts over subordinate courts and tribunals under the head "jurisdiction over Fact and Law" in Chapter 9, pages 284 to

320. The decisions before Anisminic and those in the post Anisminic period have been discussed in detail. At pages 319-320, the authors give the Summary of Rules thus:-

"Jurisdiction over fact and law: Summary At the end of a chapter which is top-heavy with obsolescent material it may be useful to summarise the position as shortly as possible. the overall picture is of an expanding system struggling to free itself from

the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long- established rules together with the simpler and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows:

Errors of fact Old rule The court would quash only if the erroneous fact was jurisdictional New rule The court will quash if an erroneous and decisive fact was

(a) jurisdictional

(b) found on the basis of no evidence; or

(c) wrong, misunderstood or ignored.

Errors of law Old rule The court would quash only if the error was

(a) jurisdictional; or

(b) on the face of the record.

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New rule  The court  will quash for
any  decisive  error,  because  all
errors    of     law    are     now
jurisdictional."
     (emphasis supplied)
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35. The scope of the exclusionary clauses contained in the statutes has been considered in great detail with reference to the decisions of the superior courts in England and also the decisions of the Supreme Court of India by Justice G.P.

Singh (former Chief Justice, M.P. High Court) in "Principles of Statutory Interpretation", 6th edition, (1996) at page

475. The law is stated thus:-

"A review of the relevant authorities on the point leads to the following conclusions :

"(1) An Exclusionary Clause using the formula`an order of the tribunal under this Act shall not be called in question in any Court' is ineffective to prevent the calling in question of an order of the tribunal if the order is really not an order under the Act but a nullity.

(2) Cases of nullity may arise when there is lack of jurisdiction at the stage of commencement of enquiry e.g., when (a) authority is assumed under an ultra vires statute; (b) the tribunal is not

properly constituted, or is disqualified to act; (c) the subject-matter or the parties are such inquire; and (d) there is want of essential preliminaries prescribed by the law for commencement of the inquiry.

(3) Cases of nullity may also arise during the course or at the conclusion of the inquiry. These cases are also cases of want of jurisdiction if the word `jurisdiction' is understood in a wide sense. Some examples of these cases are: (a) when the tribunal has wrongly determined a jurisdictional question of fact or law; (b) when it has failed to follow the fundamental principles of judicial procedure, e.g., has passed the order without giving an opportunity of hearing to the party affected; (c) when it has violated the fundamental provisions of the Act, e.g., when it fails to take into account matters which it is required to take into account or when it takes into account extraneous and irrelevant matters;

(d) when it has acted in bad faith;

and (e) when it grants a relief or makes an order which it has no authority to grant or make; "as also (f) when by misapplication of the law it has asked itself the wrong question."

With great respect to the learned author, I would adopt the above statement of law, as my own.

I would conclude this aspect by holding that the jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the three categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra).

36. Two decisions of this Court rendered after Section 11B of the Act was amended in 1991, deserve mention. They are -- Union of India and others v. Jain Spinners Limited and another [1992 (4) SCC 389], Union of India and others v. ITC Ltd. [1993 Supp. (4) SCC 326]. In Jain Spinners case, the application for refund itself was filed before the concerned statutory authority (Assistant Collector, Central Excise). While the said application was pending, Section 11B of the Act came into force. There was an earlier interim order passed by the High Court directing the deposit of the duty levied with a liberty to the Revenue to withdraw it, subject to the condition that the amount will be refunded if the assessee succeeded ultimately. The Assistant Collector applying the amendments effected in 1991, declined to order refund, holding that the assessee had passed on the incidence of duty to others. it was upheld by this Court notwithstanding the interim orders and other proceedings of the High Court. Basically, the application for refund was filed before the concerned statutory authority, who negatived the claim by giving effect to the provisions of the Amendment Act. There was no attack in the above case, that the levy or collection as one unauthorised or unconstitutional or without jurisdiction or illegal. In Union of India v. ITC Ltd., the Jain spinners case (supra) was followed. The main aspect that arose for consideration in the latter case was, whether the assessee had passed on the incidence of duty to the consumers or other persons. In spite of the repeated orders of this Court, the assessee failed to establish that the burden of excess excise duty was borne by it and was not passed on to any other person. The assessee had filed five applications for refund. Three of them were allowed by the statutory authorities in the appeals. Only

two refund applications were rejected which were assailed in the High Court. The High Court allowed the said applications, directing the Revenue to refund the amounts due as per the two refund applications. In Appeal, this Court stressed the fact that the assessee was not able to substantiate that the burden of excess excise duty was borne by it and was not passed on to any other person. incidentally, this Court also referred to the amended provisions of the Act (11B, 12B etc.) and held that the amended provisions would apply when the matter regarding refund was still pending for adjudication in this Court. In this case also the levy or collection was not assailed as unconstitutional or illegal or without jurisdiction and, in consequence refund was called for. The above two cases did not deal with the maintainability of action in the ordinary courts where the levy or collection is assailed on the ground that it is unconstitutional, illegal or without jurisdiction.

37. The changes brought about by the Central Excise and Customs Laws (Amendment) Act, 1991 (w.e.f. 20.9.1991) regarding refund and the scope of Section 11B read with Section 12B was the subject of great controversy before us. The Amendment Act 1991, is also attacked as unconstitutional, illegal, invalid and unreasonable and as a "device" to deny refund legitimately due. The relevant statutory provisions have been extracted earlier in this judgment. Briefly stated the position is this. Clause (3) of Section 11B provides that notwithstanding any judgment, decree or order of the appellate tribunal or any court etc. no refund shall be made except as provided in sub-section (2). In other words, the procedure to obtain refund is made exclusive as per Section 11B(3) of the Act. The application, therefore, shall be made under Section 11B(1) and dealt with by the concerned authority under Section 11(2) of the Act. These provisions mandate amongst other things that the person claiming refund should substantiate that the incidence of duty has not been passed on by him to any other person. The application should also be filed within the time prescribed in the said sub-section. Section 11B(2) and Section 11B(3) go together. Under Section 11B(2), in certain specified cases, the duty paid will be refunded to the applicant. One such case is, the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person and substantiates the same. In cases not falling within the proviso to Section 11B(2) of the Act the duty collected will be credited to the Consumer Welfare Fund and the said Fund will be utilised as per Section 12D of the Act.

38. As stated, Section 11B(2) and Section 11B(3) go together. The applications for refund made before the commencement of the Amendment Act, 1991, shall be deemed to have been made under Section 11B(1) of the Act as amended and it shall be dealt with in accordance with Section 11B(2) of the Act. The Section contemplates disposal of the applications pending on the date of the Amendment Act as also fresh applications filed after the Amendment Act, 1991, as per the amended provisions. Counsel for the assessees urged that the provisions relating to refund and, in particular, Section 11B(2) and (3) as amended in 1991 cannot apply to :-

1. Refund' made or due as per orders passed by Courts, in a suit or in a petition under Article 226 of the Constitution of India, which have become final.

2. refunds ordered by the statutory authority concerned which have become final.

It is obvious that in such cases no application can or will be deemed to be pending on the date of the commencement of the Amendment Act. No application praying for refund is to be filed in such cases, either. No further probe, regarding the requisites for obtaining refund specified in the Amendment Act, 1991, is called for in such cases. The above aspects are fairly clear. Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1), (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. I am of the opinion, that if the said provisions are held applicable, even to matter concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances. It is not so herein. [Shri Prithvi Cotton Mills Ltd. & Anr. vs. Broach Borough Municipality & ors. (1970 (1) SCR 388) and Madan Mohan Pathak vs. Union of India & ors. etc. (1978 (3) SCR 334)]. See also Comorin Match Industries (P) Ltd. v. State of Tamil Nadu [JT 1996(5) SC 167]. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, mush be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases. It need hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply only to (1) refund applications made before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the commencement of the Amendment Act, 1991. (Cases dealt with in paras 5 and 29 of this judgment will not be covered by the above, to the extent stated therein).

39. Excise duty is an indirect levy. It is intended or presumed to be passed on. This is so under the ordinary law. Section 12B of the Act only provides a statutory rebuttable presumption in that regard. If it turns out that the levy is not exigible, it is refundable to the person who had borne the liability. Ordinarily, in the case of indirect taxes, such persons will be innumerable and cannot be easily identified or located. If the duty, which is not exigible, is refunded to the person who had not borne the liability, it will result in an unjust benefit to him. So the Act has provided in Section 11B(2), that in such cases where the duty is refundable, it will be credited to the Consumer Welfare Fund (Section 12C). However, the proviso to Section 11B(2) provides that the duty of excise will be refunded in few specified cases, subject to certain conditions -- one of them is the manufacturer -- in cases, where he has not passed on the incidence to any other person [Clause (d)]. Those provisions will apply only for refunds to be made under the Act. In the totality of the factual situation, t cannot be said that the provisions ushered in by Amendment Act, 1991 -- and the scheme formulated in Sections 11B and 12A to D -- are, a "device" or invalid or arbitrary or unreasonable (except to the extent stated in para 38 supra) or in any way constitutionally infirm. (Of course, the cases dealt with in paras 5 and 29 are excluded to the extent stated therein). Brother Jeevan Reddy, J. has dealt with this matter rather elaborately and thee is no need to elaborate the matter any further. In the matter of taxation laws, the court permits a great latitude to the discretion of the legislature. The State is

allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. The courts view the laws relating to economic activities with greater latitude than other matters. [See Collector of Customs. Madras v. Nathella Sampathu Chetty and another (1962 (3) SCR 786); Khyerbari Tea Company and anr. v. State of Assam & Ors. (AIR 1964 SC

925); R.K. Garg v. Union of India & Ors. (AIR 1981 SC 2138); Gaurishanker & ors. v. Union of India & ors. (1994 (6) SCC

349): Union of India & anr. etc. etc. vs. A. Sanyasi Rao & ors. etc. etc. (AIR 1996 SC 1219), etc.]

40. Before closing I should specifically deal with two important aspects. In this judgment I have dealt with cases where duty is paid on items which are consumed as such. Due to paucity of details, the case of captive consumption has not been dealt with. It is made clear that whatever is stated in this judgment will not apply in the cases of goods which are captively consumed.

Chapter II-A of the Act was inserted by way of amendment in 1991. The establishment, working, administration and utilisation to the Consumer Welfare Fund is in its state of infancy. The scheme or set-up envisaged by Sections 12C and 12D and its working will require an in depth evaluation by the appropriate authorities in order to vouchsafe that the scheme is not rendered a mere ritual or illusory, but is meaningful and effective. For the present, I do not want to deal with that aspect in detail.

41. For the sake of convenience. I shall summarise my conclusions as here-under :- (in case of doubt, the body of the judgment should be looked into).

A) If the excise duty paid by the assessee was ultimately passed on to the buyers or any other person, and that the assessee has suffered no loss or injury, the action for restitution based on Section 72 of the Contract Act, is unsustainable. (This is the legal position even under general law, without reference to Section 11B of Central Excises & Salt Act as amended by Act 40/1991). B) The decision in Kanhaiya Lal's case, and the cases following the same, cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution.

If the decision in Kanhaiya Lal's case (supra) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect to the learned Judges, who rendered the above decisions, I express my dissent thereto. In this context, the observations in para 29 - clause III shall be borne in mind.

C) Article 265 should be read along with the Preamble and Article 39(b) and (c) of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto.

D) The presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the `duty' element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an in depth analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge of the taxpayer, the burden of proving that the liability has not been passed on should lie on him. E) It is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax, can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc., as the case may be), and an action by way of suit or writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by propositions No.(1), (3), (4) and (5) in Dulabhai's case, as one passed outside the Act, and ultra vires. Such action will be governed by the general law and the procedure and period of limitation provided by he specific statute will have no application.

F) The attack against the illegal or unauthorised levy as also the relief of refund may fall ordinarily within the three categories specified in paragraph 29 of the judgment. An action by way of suit or writ petition under Article 226 of the Constitution of India will lie in the cases, and subject to the conditions stated in paragraphs 29 and 30 of the judgment.

G) The jurisdiction of civil courts is not barred in entirety regarding the attack against the levy and/or claim for refund; in those cases, coming within the there categories mentioned in paras 5 and 29 of this judgment, the jurisdiction of the ordinary courts will not be ousted, in the circumstances and subject to the conditions stated therein and in para 30 (supra). H) Section 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities, which have become final. It follows from a plain reading of Section 11B, Clauses (1), (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law, to obtain a refund, after the Amendment Act comes into force. If the said provisions are held applicable, even to matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. Alternatively, it may be stated that duty paid in cases, which finally ended in orders or decrees or judgments of courts, must be deemed to have been paid under protest and the procedure and limitation etc. stated in Section 11B(2) read with Section 11B(3) will not apply to such cases. I) It read hardly be stated, that Section 11B(1), the proviso thereto, Section 11B(2) and Section 11B(3) read together will apply, only to (1) refund applications made under the statute and filed before the Amendment of the Act and still pending on the date of commencement of Amendment Act, 1991 and (2) applications contemplated under law to obtain refund and filed after the commencement of the Amendment Act, 1991. (Cases dealt with in paras 5 and 29 of this judgment will not be covered by the above to the extent stated therein).

J) The proviso to Section 11B(2), provides, that the duty of excise will be refunded in few specified cases, subject to certain conditions -- one of them is the manufacturer - in cases, where he has not passed on the incidence to any other person [Clause (d)]. Those provisions will apply only for refunds to be made under the Act. In the totality of the factual situation, it cannot be said, that the provisions ushered in by Amendment Act, 1991 -- and the scheme formulated in Section 11B and 12A to D -- (in the light of the clarifications made in the body of the judgment, and more particularly in paras 25 and 40 above) are, a "device" or invalid or arbitrary or unreasonable (except to the extent stated in para 38 supra) or in any way constitutionally infirm. (Of course, the cases dealt with in paras 5 and 29 are excluded to the extent stated therein).

42. The principles laid down in this judgment should be applied to the fact situation obtaining in individual cases and should be disposed of accordingly.

The matters may be placed before My Lord the Chief justice for appropriate orders in this behalf.
HANSARIA, J.

The conclusions arrived at by learned brother paripoornan, J. and the reasons given in support thereof, have my respectful concurrence. I have nothing useful to add. The time at my disposal does not really permit me to do so, as the draft of this judgment reached my hands on the night of 15th instant; indeed, the first draft judgment of the case got me in the evening of 13th of this month.