Dhrangadhra Municipality vs Dhrangadhra Chemical Works Ltd. (F.A. ... on 6 July, 1987

Equivalent citations: [1988]174ITR77(GUJ)

JUDGMENT

S. B. MAJMUDAR J. -

* * * * * Introductory facts :- In order to appreciate the contours of controversy between the parties, relevant introductory facts are required to be noted at the outset. The appellant in First Appeal No. 48 of 1974 is Dhrangadhra Municipality which is at present functioning under the Gujarat Municipalities Act, but which was earlier a district municipality under the Bombay District Municipal Act, 1901. The respondent in the first appeal is Dhrangadhra Chemical Works. Dhrangadhra Municipality was the original defendant while Dhrangadhra Chemical Works was the original plaintiff in Civil Jurisdiction Suit No. 76 of 1963 which was filed in the Court of the Civil Judge (S.D.), Surendranagar, to recover Rs. 6,29,066.97 on the ground that the said amount was illegally collected and retained by the defendant municipality from the plaintiff towards octroi. Special Civil Application No. 1729 of 1977 has been moved by the plaintiff directly in this court against the State of Gujarat and the defendant-municipality challenging the vires of the Gujarat Act No. 6 of 1978, viz., Dhrangadhra Municipality (Imposition of Tax) Validation Act, 1977. For the sake of convenience, we shall refer to Dhrangadhra Municipality as the defendant and Dhrangadhra Chemical Works as the plaintiff in the latter part of this judgment.

The plaintiff alleged in its aforesaid suit that the defendant had no authority to levy or recover octroi from the plaintiff and that the action of the defendant in recovering and retaining octroi from the plaintiff was illegal and ultra vires. The plaintiffs case was that it is a company registered under the Indian Companies Act and is carrying on the business of manufacturing soda ash and other chemicals. For that purpose, it is having its factory within the municipal limits of the defendant municipality at Dhrangadhra town in Surendranagar district. The Bombay District Municipal Act, 1901, was applied to the merged territories of Saurashtra from July 1, 1949, and the defendant municipality has been constituted as a district municipality under the said Act from 1949. It is the case of the plaintiff that by Ordinance dated August 27, 1949, published in the Saurashtra Government Gazette, Part I, Section I, the then Raj Pramukh had issued the Saurashtra Terminal Tax and Octroi Ordinance. Under the said Ordinance, it was only the Government which can impose octroi in the cities and towns specified in Schedule I of the Ordinance. Dhrangadhra town was one of the towns listed. Octroi on the goods entering the limits of Dhrangadhra town can be levied by the State and not by the municipality. The plaintiff raised various other contentions in the plaint for supporting its case, viz., that the defendant municipality had no power to levy octroi on the goods brought by the plaintiff within the municipal limits and, therefore, the said levy and collection of octroi were ultra vires the provisions of the Ordinance as well as the Bombay District Municipal Act, 1901. For the purpose of the present proceedings, it is not necessary to refer in detail to diverse contentions centering round the levy of octroi by the defendant municipality from the plaintiff. As

will be seen hereafter, these proceedings can be disposed of on a short point which will become obvious from the discussion in the later part of this judgment. It appears that earlier, the plaintiff had filed a writ petition, being Special Civil Application No. 769 of 1962, in this court against the defendant municipality challenging the right of the defendant to recover octroi and that petition was dismissed by this court. However, the plaintiff preferred an appeal, viz., Appeal No. 1103 of 1967 in the Supreme Court. That appeal came to be allowed by the Supreme Court, the decision whereof is reported in AIR 1973 SC 1041 (Dhrangadhra Chemical Works Ltd. v. State of Gujarat).

It is the further case of the plaintiff that earlier, various amounts were paid as deposits under protest to the defendant and these deposits were ultimately appropriated towards octroi dues by the defendant-municipality on September 27, 1960, and that various amounts appropriated by the defendant towards ooctroi dues as collectedfrom the plaintiff totally amounted to Rs. 6,29,066.97 for the entire period from 1953 to September 30, 1960. A decree for the said amount along with interest and costs was prayed for by the plaintiff against the defendant on the aforesaid grounds.

* * * * * When this appeal and the companion special civil application reached final hearing before us, Mr. Raval, for the defendant, vehemently contended that the suit, as filed by the plaintiff, does not disclose any cause of action and suffers from a fatal flaw and only on this short ground, the suit is liable to be dismissed and the decree passed against the defendant is liable to be set aside. According to Mr. Raval, the suit, as filed by the plaintiff, is based on the ground that the defendant had no authority to collect octroi dues from the plaintiff and various amounts realised by the defendant towards octroi were allegedly illegally realised and retained and these dues are liable to be refunded to the plaintiff. This suit, therefore, submitted Mr. Raval, squarely falls, if at all, within the four corners of section 72 of the Indian Contract Act. That the basic ingredients for succeeding in the suit under section 72 of the said Act have to be pleaded and proved by the plaintiff and in the facts of the present case, neither is there such pleading nor is there any proof offered by the plaintiff to entitle it to succeed under section 72 of the Contract Act. Only on this short ground, the suit is liable to fail. Mr. Raval further submitted that the plaintiff has never pleaded nor proved that because of the payment of the amounts of octroi, it had suffered any legal injury or prejudice and that it had not passed on the burden of amount of octroi paid by it to the consumers and that, therefore, the defendant would be unjustly enriched if the decree is not passed in favour of the plaintiff, and, on the other hand, the plaintiff will suffer serious legal injury and prejudice if the suit is not decreed and that in the absence of such pleadings and proof, the suit, as framed, is liable to fail on the ground that it does not disclose any completed cause of action. In support of this aforesaid contention, Raval heavily relied upon the three Division Bench judgments of this court in (1) the case of Union of India v. Bharat Vijay Mills Co. Ltd. [1984] 25 (2) GLR 1111; (2) Union of India v. New India Industries Ltd. [1983] 24 (2) GLR 1108 and (3) Union of India v. Tata Chemicals Ltd. [1983] (3) GLH 985 and also on a decision of the Supreme Court in State of Madhya Pradesh v. Vyankatlal, AIR 1985 SC 901; [1987] 64 STC 6.

On the other hand, the learned advocate for the plaintiff submitted that such contention was not raised by the defendant in its written statement nor was it canvassed before the trial court. No issue was sought on this Point and hence this contention should not be permitted to be raised for the first time in appeal. It was next contended that in any case, this is a suit for refund of deposited amount

and, therefore, it will not fall within the four corners of section 72 of the Contract Act. That, if at all, it fell under section 148 of the Indian Contract Act or section 70 of the Act and if that is so, the legal requirements of pleading and proof, so far as the suit under section 72 of the said Act are concerned, would not apply to the facts of the present case. It was next contended that the agreement, exhibit 126, entered into between the parties pending the first litigation up to the Supreme Court, cannot be of any avail to the defendant as the said agreement was contrary to law and in any case, the plaintiff can always show that despite this agreement, entitling the municipality to appropriate the deposited amounts over the years, towards its octroi dues, as the defendant was not entitled to recover octroi, such appropriation was bad in law and, therefore, the deposited amount was required to be refunded to the depositor, viz, the plaintiff. It was ultimately contended that the decisions of the three Division Benches of this court in the cases of Bharat Vijay Mills CO. [1984] 25(2) GLR 1111, New India Industries Ltd. [1983] 24(2) GLR 11O8 and Tata Chemicals Ltd. [1983] (3) GLH 985 were required to be reconsidered in view of the fact that they were contrary to the decisions of the other High Courts to which our attention was invited and to which we will make a detailed reference hereafter. Reliance was also placed on two decisions of the Supreme Court in the cases of CST v. Auraiya Chamber of Commerce [1987] 167 ITR 458 and State of Kerala v. Aluminium Industries Ltd. [1965] 16 STC 689. It was submitted that the Division Bench judgments of this court require reconsideration at least the light of the aforesaid Supreme Court decisions.

We shall now proceed to deal with the aforesaid controversy posed our consideration in the present proceedings and the efficacy of the rival versions centering round this controversy.

So far as the submission of the learned advocate for the plaintiff the no plea was taken in the written statement by the defendant that the plaintiffs suit was not maintainable for non-compliance with the mandate provisions of section 72 of the Contract Act, and that no such issue was raised or argument was canvassed before the trial court is concerned, it. true that this is so. However, the plea which has been raised before us and which is squarely covered by the ratio of the three Division Bench judgments of this court is a plea which goes to the root of the matter. It is a pure question of law centering round the maintainability of the suit and based on the question whether the suit as framed discloses any completed cause of action or not. Such a plea which is to be answered in the light of the main averments in the plaint cannot be said to be one which raises any mixed question of law or fact. It raises a pure question of law am such plea about the maintainability of the suit, therefore, can obviously raised at any stage of the proceedings even though it may not have been raised in the suit before the trial court. If any authority were needed to buttress this position, it is furnished by the decision of the Supreme Court in the case of State of Rajasthan v. Kalyan Singh, AIR 1971 SC 2018. Hegde J., speaking for the Supreme Court in the aforesaid case, held that the plea of non-maintainability of the suit is a legal plea and can be accepted although no specific plea was taken or no precise issue framed. In this connection, it is observed that the plea of maintainability of the suit is essentially a legal plea. If the suit on the face of it is not maintainable, the fact that no specific pleas were taken or no precise issues were framed is of little consequence. The preliminary objection raised on behalf of the plaintiff in this connection has, therefore, to be rejected.

Now, turning to the merits of the contentions raised on behalf of the defendant about the maintainability of the suit, it is necessary to look at the main averments in the plaint with a view to

finding out the true nature and scope of the plaint. In paras 2 and 3 of the plaint, the history of the various legislations which were holding the field in connection with the impost of octroi in that area has been traced. In para 4, it has been pointed out how the then Saurashtra Government purported to act under section 4 of the Ordinance and framed rules for collection of octroi under the said Ordinance. In para 5 of the plaint, it has been averred that under the provisions of the Bombay District Municipal Act, 1901, the Government has no authority and the defendant municipality cannot derive such authority directly from the Government for levying and collecting octroi, as from the date of the said Municipal Act. Then follows para 6 which recites that from July 1, 1963, the rate of octroi on different goods which was raised by the defendant to 1 1/2 times was also without following the prescribed procedure and without complying with the necessary preliminaries under Chapter VII of the Bombay District Municipal Act, 1901. In para 7, it has been averred that the defendant had no right to amend the schedule of rates and if the schedule of rates was purported to have been revised under Ordinance No. 47 of 1949, it could be done only by the Government and not by the municipality. Having made these relevant averments which naturally impinged upon the power and authority of the defendant-municipality to collect octroi dues from the plaintiff, para 8 of the plaint is introduced and on which strong reliance was placed by the learned advocate for the plaintiff for supporting his contention that this is not a suit for refund of octroi duty illegally collected but it is a suit for return of the deposit. Before we deal with that point, it would be profitable to extract the averments in para. 8 in extenso. Para. 8 reads as under :

> "8. The plaintiff, having realised the illegal nature of the octroi collected by the defendant, had stopped payment thereof and had given the defendant a statutory notice dated 31st August, 1962, in so far as the recovery of the alleged dues of Rs. 58,000 was concerned, and thereafter, since the defendant did not propose to refrain from taking any action during the period of statutory notice, the plaintiff had to file a petition under article 226 of the Constitution against the defendant in the Gujarat High Court being Special C.A. No. 769 of 1962. The said petition, however, is confined to the prayer for quashing or setting aside the notice of demand of the defendant dated 16th September and restraining the defendant from recovering octroi dues and from levying and collecting octroi. It may be noticed that up to September 26, 1960, the amount of octroi duty was only paid as a deposit and under protest and the amounts till then deposited by the plaintiff were appropriated by defendant illegally and wrongfully as octroi duty only on that date and the said amount as well as the further amounts recovered from the plaintiff illegally and wrongfully by the defendant as octroi duty totalling a sum of Rs. 6,29,066.97 as on 30th September, 1961, the defendant is liable to pay back to the plaintiff."

After para. 8 follows para. 9 which relates to service of statutory notice to the president and chief officer of the municipality on November 25, 1962, and then follows para. 10 which is the cause of action para. It is useful to reproduce para 10 fully. It reads as under :

> "10. That the cause of action for the suit has arisen on or about September 27, 1960, when the amounts deposited with the defendant municipality were illegally and wrongfully appropriated by the defendant as octroi and on or about November 25,

> 1962, when the plaintiff gave the statutory notice to the defendant to which the defendant has neither replied nor complied."

After these relevant paras in the plaint, follows the prayer clause which is also required to be extracted in extenso as under :

> "The plaintiff, therefore, prays :
>
> (a) It be declared that the defendant has no authority to levy or recover octroi from the plaintiff and that the action of the defendant in levying and collecting octroi is illegal, void and ultra vires and a decree be made against the defendant for Rs. 6,29,066.97 (rupees six lakhs twenty-nine thousand sixty-six and paise ninety-seven) being the amount of octroi illegally collected by them from the plaintiff up to the period ending with September 31, 1961.
>
> (b) the recovery of the cost of the suit from the defendant.
>
> (c) any other relief that the honourable court deems fit to be granted."

On a combined reading of these relevant paras in the plaint, no doubt is left in our mind that this suit is essentially a suit for refund of various octroi dues recovered by the defendant from the plaintiff and which, according to the plaintiff, have been illegally recovered and/or retained by the defendant-municipality. If any doubt was left, it is set at rest by the express wording of the prayer clause which seeks a declaration that the action of the defendant in levying and collecting octroi is illegal, void and ultra vires and a consequential decree against the defendant for Rs. 6,29,066.97 on the basis that this amount of octroi is illegally collected by the defendant from the plaintiff for the period ending September 30, 1960. These clear averments in the prayer clause leave no room for doubt that the plaintiff sought refund of octroi amount recovered by the defendant from the plaintiff over the years as octroi dues which, according to the plaintiff, were illegally recovered. It is true as stated in para 8 of the plaint, that it was the case of the plaintiff that up to September 26, 1960, the amount of octroi duty was paid as a deposit and under protest, but all the same, these amounts paid up to September 26, 1960, are never alleged to have been paid as deposits simpliciter as, ordinarily, a depositor will deposit of his own free will the concerned amount refundable with interest or without interest by the depositee on demand by the depositor The plaintiffs case appears to be one of paying various amounts up to September 26, 1960, on account towards the octroi claim of the defendant, but under protest. That is how the term "deposit" has been used but that does not mean that it was a case of simpliciter voluntary deposit of money by a creditor with the debtor and which deposited amount is sought to be recalled by the creditor on demand It is, therefore, impossible to agree with the contention of the learned advocate for the plaintiff that this is a suit for return of the deposit, filed by the creditor against the debtor. All the paras or the plaint, read as a whole, in the light of the clear-cut averments in the prayer clause, completely rule out such type of claim. There is not even a whisper in the entire plaint about the suit being for the refund of the deposited amount from the debtor-depositee to the creditor-depositor. We fail to appreciate how section 148 of the Indian Contract Act comes to the assistance of the plaintiff. Section 148 of the Act occurs in Chapter

IX and it deals with bailment. It recites that a bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The Person to whom they are delivered is called the bailee. On the express pleadings contained in various paras of the plaint to which we have made reference, it must be stated that nowhere, by a remotest implication, a case of return of bailed goods from the defendant is pleaded by the plaintiff. It is not the case of the plaintiff that it had bailed various amounts with the defendant, even assuming that cash amount can be made the subject-matter of bailment and that it was done for a specific purpose which is now over and, that therefore, the bailor demands back the bailed goods from the bailee. On the express language of the plaint and especially in the light of the prayer clause, such case is totally ruled out. Reliance placed by the learned advocate for the plaintiff on the decision of the Supreme Court in the case of Shanti Prasad Jain v. Director of Enforcement, AIR 1962 SC 1764, is also of no avail to the plaintiff. In that case, the question before the Constitutional Bench of the Supreme Court was whether the appellant, Shanti Prasad, before the Supreme Court, could be said to have contravened the provisions of section 23(1)(a) read with section 23D of the Foreign Exchange Regulation Act, 1947, on the ground that he had received some amount from a certain German firm which had made entries in its account books in that connection. The Supreme Court noted the fact that the German firm had agreed to pay certain amounts to the appellant by way of final settlement of his claim for compensation in respect of certain contracts for supply of machinery from Germany. An account was opened in the name of the appellant in a bank in Germany and the amounts settled were credited to that account on certain conditions, viz., that the amounts were to be repaid only to the firm as price of new machineries to be supplied by them on production by the appellant of an import licence from the Indian Government and the appellant was not to operate it except for that purpose. In the background of these facts, the Supreme Court held that the appellant had only a contingent right to the amounts standing in credit to his account in the German bank and there was no debt due to him in present because the contingency on which his title to the amounts in deposit would arise, viz., the grant of import licence by the Government of India, was one the fulfilment of which was wholly beyond his control. In these circumstances, the deposits were made in the bank not in the normal course of banking business but under a special arrangement which constituted the bank a bailee or a stake-holder and not a debtor or trustee Consequently, there was no lending of those amounts to the bank by the appellant within the meaning of section 4(1) of the Act and, therefore, the order imposing a fine on him under section 23(1)(a) was illegal. We fail to appreciate how the ratio of this decision can at all be pressed into service on the facts of the present case. It is not the case of the plaintiff that the various amounts paid by it to the defendant over the years and which were paid as deposit towards octroi dues of the defendant, were paid under any contingency or that they were to be returned to the plaintiff as deposit amounts. On the contrary, it is the case of the plaintiff that whatever might have been the historical background of the deposits on the octroi account till September 26, 1960, at least from that day onwards, the entire amount which was standing in the account of the plaintiff was appropriated towards octroi dues and, subsequently also, the defendant went on charging octroi and the suit, as filed, was for refund of the entire amount on the ground that the defendant had no authority to appropriate this amount as octroi dues. The suit was filed on April 9, 1963. By that time, admittedly, as stated in the plaint, the entire amount collected over the years were got appropriated towards octroi dues and was credited in the books of

account of the defendant as octroi recovered from the plaintiff. It is that amount which is sought to be recovered from the defendant on the ground that the defendant had no power to levy octroi during the relevant time. Consequently, the suit, as filed, must necessarily be held to be one for refund of octroi amount collected and retained by the defendant from the plaintiff which, according to the plaintiff, the defendant had no right to recover and collect as octroi. In that view of the matter, the decision of the Supreme Court in Shanti Prasads case, AIR 1962 SC 1764, cannot be of any avail to the plaintiff.

* * * * * It was next contended that in any case, the suit may fall under section 70 of the Contract Act. This contention also cannot be of any assistance to the learned advocate for the plaintiff for the simple reason that all that section 70 enjoins is that where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. In order to bring the suit within the frame work of section 70, the plaintiff must plead and prove, if necessary, that it had lawfully done something for the benefit of the defendant or had delivered anything to the defendant not intending to do so gratuitously and the other person had got the benefit thereof. Thus, the plaintiff must voluntarily, but not ex gratia, do something for the defendant, and the benefit thereof must be enjoyed by the defendant and in view of such a fact-situation, the defendant would become liable to make adequate compensation for the benefit received by him from the plaintiff. Such a quasi-contract is spelt out from the provision of section 70. But this is not a case in which the plaintiff even whispers that it had voluntarily and of its own free will done something for the defendant, meaning thereby that it had paid various amounts to the defendant towards octroi duty voluntarily and out of its own sweet will. On the contrary, on the express averments in para 8 of the plaint, it becomes clear that the plaintiff had paid various amounts up to September 26, 1960, by way of octroi duty only as deposit under protest. If the amount is paid under protest, it can never be urged that it was paid voluntarily and lawfully and that the other side having obtained the benefit thereof must pay compensation for the same. On the express language of section 70, therefore, the present suit cannot be said to be one contemplated by it. It is totally de hors the basic requirements of section 70. Consequently, it is not possible to agree with the submission of the learned advocate for the plaintiff that this suit falls within section 70 of the Act. As discussed earlier, a comprehensive reading of the plaint leaves no room for doubt that this is a suit filed by the plaintiff for refund of octroi amounts paid by it under protest over a period of time to the defendant on the ground that the defendant had no right to collect such octroi dues from the plaintiff. It is a suit simpliciter for refund of octroi amount allegedly illegally collected by the defendant from the plaintiff over a period of time. If this is so, section 72 of the Contract Act is the only legal foundation on which the suit can be rested, if at all. Section 72 reads as under :

> "72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

A mere reading of this section shows that before the plaintiff can hope to succeed in such a suit, it must be pleaded and then, if necessary, proved that the money has been paid by the plaintiff to the defendant under a mistake or under coercion. Unless this pleading is put forward, the basic

requirement of section 72 would not be satisfied. It is nowhere pleaded in the plaint that either under a mistake or under coercion, the plaintiff had paid various amounts to the defendant on account towards octroi dues claimed by the defendant from the plaintiff for the relevant period. Learned advocate for the plaintiff also did not make any effort to submit that any such case was pleaded, much less proved, but as we have indicated above, his effort was to walk out of section 72 and to bring the suit within the sweep of section 70 or section 148 of the Contract Act. Once that effort is demonstrated to be abortive, the conclusion is inevitable that the suit which otherwise falls under section 72 does not disclose the basic ingredients of section 72 for the purpose of completing the cause of action as required for such suit. It must be kept in view that though section 72, on its express language, lays down the nature of the pleading and proof by the plaintiff about payment of money under a mistake or under coercion, one additional requirement of this provision which lies embedded by necessary implication is that the plaintiff must be entitled in law to receive back from the defendant the amount of money or anything delivered by mistake or under coercion. If the plaintiff has no legal right to receive that amount from the defendant, then also the suit, though under section 72, may fail even if a mistake or coercion underlying initial payment is pleaded and proved. It is now well settled by a series of decisions of the Supreme Court that mistake as contemplated by section 72 is a mutual mistake by both the sides, viz., the plaintiff and the defendant. No such case is obviously pleaded, much less proved, by the plaintiff. So far as the plaintiff s legal right to receive the amount from the defendant is concerned, as we have discussed earlier, though section 72, by its express language, does not indicate any such ingredients, implicit in the said section is this requirement. In this connection, it would be profitable to have a look at the commentary on Ansons Law of Contract, 25th edition, published in 1979 by Oxford University Press. We find in Chapter 21 thereof a discussion about restitution. Relationships creating quasi-contracts wherein one party is bound to restitute the other party in certain circumstances are discussed in that chapter. It has been mentioned therein that "circumstances must occur under any system of law in which it becomes necessary to hold one person to be accountable to another, without any agreement on the part of the former to be so accountable, on the ground that otherwise, he would be retaining money or some other benefit which has come into his hands to which the law regards the other person as better entitled, or on the ground that without such accountability, the other would unjustly suffer loss. The law of restitution exists to provide remedies in circumstances of this kind". It becomes obvious that section 72 of the Contract Act is ipso facto based on the principle of restitution. So far as the principle of restitution is concerned, the principle of unjust enrichment of the defendant at the cost of the plaintiff entitling the plaintiff to get restitution through the court process is highlighted at page 649 of the above book, wherein the following observations are worth noting :

> "The principle of unjust enrichment presupposes three things : first, that the defendant has been enriched by the receipt of a benefit; secondly, that such enrichment has occurred at the expense of the plaintiff; thirdly, that it would be unjust for the defendant to retain that benefit. There is no accepted classification of situations where a claim to restitution will arise on the ground of unjust enrichment."

It becomes, therefore, obvious that for basing the claim against the defendant on the bed-rock of quasi-contract, it has to be shown, of necessity, that the defendant has got enriched by receipt or

that benefit from the plaintiff which it would be unjust to allow him to retain and that such enrichment must have occurred at the expense of the plaintiff. It has, therefore, to be shown that the plaintiff has a better right to receive that amount or to be refunded that benefit, meaning thereby, that but for that, the plaintiff would suffer legal injury or prejudice. Similar observations are also found in the first volume of Chitty on Contracts, 25th edition, Sweet and Maxwell, 1983. In para 1942, the topic of the principle of unjust enrichment is discussed. It has been stated in that connection :

> "The principle of unjust enrichment requires, first, that the defendant has been enriched by the receipt of benefit secondly that this enrichment is at the expense of the plaintiff and thirdly that the retention of the enrichment is unjust."

It, therefore, becomes necessary, in an action based on quasi-contract claiming restitution from the defendant to show that refusal of relief to the plaintiff would amount to unjust enrichment of the defendant and that too at the cost of the plaintiff, meaning thereby, that the plaintiff would suffer legal injury or prejudice if restitution is not granted. As we have already discussed above, the thrust of section 72 of the Act which also projects a type of quasi-contract is that apart from the pleading and then later proving that the plaintiff had paid money or anything to the defendant under a mistake or under coercion, the plaintiff must further plead and prove that he would suffer legal injury or prejudice if return of the amount is not ordered. Once this conclusion is reached, on the construction of section 72, it becomes obvious that when the plaintiff seeks to recover from the defendant tax amount on the ground that the tax was illegally collected out of necessity, it is to be pleaded and then proved, that the amount was paid under a mistake or under coercion and that if it is not returned or repaid, the plaintiff would suffer legal injury or prejudice. It also becomes obvious that in cases where the plaintiff who has paid alleged illegal tax, has himself not suffered the incidence thereof but has passed it on to the consumers, he cannot legitimately contend that refusal of his request for restitution would result in any prejudice to him. This is axiomatic because so far as the plaintiff is concerned, even assuming that tax was illegally recovered from him, he has paid the tax after collecting it from the consumers. So, it is the consumer to whom the tax is passed on and who has really paid the tax through the hands of the plaintiff who is only a collection instrumentality. If, ultimately, it is found that tax is illegally recovered by the defendant, then it should go back to the real taxpayer and the real taxpayer is not the plaintiff but the consumer who has borne the burden of the tax. It must logically follow that no collecting instrumentality can claim any refund of money because such intermediary is not out of pocket in any manner. The entire burden of tax rests on the shoulders of the real taxpayer, viz., the consumer. Under these circumstances, when the tax is passed on to the consumer, no case for any restitution to the intermediary would ever survive. Such intermediary suing as plaintiff can never be permitted to get restitution from the defendants as, for them, it would be a windfall and an unjust enrichment at the cost of the proper claimants for restitution, namely, the consumer -real taxpayer. In such cases, the real plaintiffs should be those who have actually suffered the burden of tax. They would be the persons to whom restitution has to be made, if at all, and they would be the persons who would suffer legal injury if the restitution is denied and not the intermediaries like the traders and manufacturers who have merely passed on the burden of tax to the consumers and who themselves have suffered no burden thereof. Consequently, it must be held that for completing the cause of

action under section 72 of the Act, the following three basic requirements of the section have to be pleaded and then proved by the plaintiff against the defendant, (i) that the amount was paid under a mistake by the plaintiff to the defendant and that at the time of payment, both the plaintiff as well as the defendant were labouring under a mutual mistake, meaning thereby, that the plaintiff thought that the amount was legally due by the plaintiff to the defendant. The defendant was also under the same impression but ultimately, it is found out that it was not so; (ii) and/or the amount was paid by the plaintiff under coercion, compulsion or pressure to the defendant; (iii) that if restitution is not granted to the plaintiff, the plaintiff would suffer legal injury or prejudice. Implicit in the three ingredients will be the necessity for pleading, in the case of claims for refund of tax collected by the defendant from the plaintiff, that the plaintiff has not passed on the burden of such tax to anybody else and that the entire burden of tax rested on the shoulders of the plaintiff and that had pricked the pocket of the plaintiff wherein the tax burden had finally reposed. If such pleading is not put forward, the three basic requirements of section 72 would remain uncomplied with and the cause of action under section 72 for filing such a suit would remain otiose, inchoate and incomplete and such suit will have to be treated as a still-born suit which would fail on its own as disclosing no completed cause of action. It is this grievance of the defendant based on the pleading of the plaintiff that has been put forward in the forefront by Mr. Raval for defeating the case of the plaintiff. As observed above, in the light of the legal requirements of section 72, relevant averments in the plaint as considered in detail by us, fall far short of the requirements of section 72 and as these basic requirements are not pleaded, there is absolutely no cause of action in favour of the plaintiff for maintaining the present suit and this suit must be held to be incompetent as disclosing no cause of action. In fact, it was liable to be rejected under Order 7, rule 11 of the Civil Procedure Code, which enjoins the court to reject the plaint which does not disclose any cause of action. In the light of the averments found in the plaint, therefore, it must be held that it does not disclose any completed cause of action under section 72 of the Act and, therefore, such a plaint was liable to be rejected even at the threshold. Merely because the trial had gone on and a decree came to be passed, though partially in favour of the plaintiff, it would not improve the situation for the plaintiff as the plaint which was inherently defective from its inception, being a still-born one, has got to be rejected whenever it is brought to the courts notice at any stage of the proceedings that it was vitally defective at the time it was presented in court. In this connection, we may also profitably refer to a decision of the Supreme Court in Union of India v. Sita Ram, AIR 1977 SC 329. In that case, the Supreme Court was concerned with the nature of pleadings in a suit under section 70 of the Contract Act which also deals with a type of quasi-contract. The Supreme Court considered as to what were the legal requirements of such a suit and what was required to be pleaded and proved and what would be the effect on the suit if such pleadings were not incorporated in the plaint. Ray C.J., in that connection, observed as under (headnote) :

> "The three ingredients to support the cause of action under section 70 are these. First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered not intending to do so gratuitously. Third, the person to whom the goods are delivered enjoys the benefit thereof. It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under section 70 of the Act.

> Where the plaintiff merely alleged that the goods were not supplied gratuitously, since the other two essential features to constitute a cause of action are lacking, the court commits an error in allowing the plaintiff to go to trial with a claim under section 70."

The aforesaid decision of the Supreme Court on parallel reasoning would squarely get attracted in connection with the nature of pleadings in a suit under section 72. The basic requirements of section 72 which contemplated another type of quasi-contract and which is found in the same Chapter V of the Contract Act dealing with certain relations resembling those created by contract, have therefore, of necessity, to be pleaded and proved by the plaintiff and in the absence of such pleadings, no cause of action under section 72 would remain complete and would not entitle such a defective plaint to be processed further and tried. As we have already observed earlier, the basic requirements of section 72 have not been pleaded, much less proved, by the plaintiff. Such a defective plaint makes the plaintiff liable to be non-suited.

It is argued that article 265 of the Constitution of India provides that no tax shall be levied or collected except by authority of law. Therefore, it is submitted that once it is shown that the imposition and/or levy of tax is illegal, the amount collected by way of tax should be refunded to the person from whom it is collected. This argument requires closer scrutiny.

When a direct tax like the income-tax, wealth-tax, etc., is imposed, the person who pays and from whom the amount of tax is collected bears the burden of tax. While in the case of indirect taxes, which are, in economic jargon, called commodity taxes, it is the individual who ultimately consumes the commodity that bears the burden of tax. The commodity carries the burden of tax with it. The person who collects the amount of tax and pays it to the Government, or to the appropriate authority, happens to be at the particular stage where it is administratively convenient to collect the amount of tax and pass it on to the Government. In the case of excise duty, the factory gate is ordinarily a convenient stage where the amount of excise duty is levied. But it may be that in a given case, excise duty may be levied even from the consumer of the commodity. Coal Production Fund Ordinance, 1944, provided for levy of excise duty from the consignee and not from the consignor or from the owner of the collieries. Even so, the Supreme Court in the case of R. C. Jall v. Union of India, AIR 1962 SC 1281, held that duty was that of excise and no other tax. In the case of customs duty, at the time when the commodity enters into or goes out from the boundaries of the country, the duty is levied. Similarly, octroi duty is levied when the commodity enters into the octroi limits of the local authority concerned. In the case of sales tax, the tax is to be levied when the event of sale takes place. Thus, it is an accident of administration that tax is collected at a particular stage. At whatever point of time or stage the amount of commodity tax may be collected, the burden of tax always remains on the commodity. No prudent businessman will bear the burden of this tax. Therefore, the majority of the persons who, in reality, pay and bear the burden of such commodity taxes are people like cart-pullers, cobblers, rickshaw drivers, blacksmiths, hutment-dwellers, petty businessmen, workers in farms and factories, clerks and "gumastas" working in offices or business firms, etc. If properly examined, it would be evident that even a beggar, when he drinks a cup of coffee or puffs a "beedi", after making payment from his meagre collections at the end of the day, bears the burden of such commodity tax. It is not the person who collects the tax and pays the same

to the appropriate authority that bears the burden.

Even in the case of direct taxes, for administrative convenience, suitable methods have been devised by which the persons to whom the income belongs do not pay the tax. But "the person responsible for paying "is required to deduct the amount of tax from the prescribed income and pay the same to the credit of the Central Government. This is clear if one refers to the provisions of the Income-tax Act, 1961, sections 192 to 194(d)." The person responsible for paying" collects the amount of tax and pays it to the Government. But this person never bears the burden of the tax. Because "the person responsible for paying" does not bear the burden of the tax, he can never claim refund of the amount of tax even if it is held that the recovery of the tax was illegal or the same was on account of mistake of law. Such a claim can be made only by the person to whom the income belonged and from whose income the amount of tax was deducted at the source.

Having regard to the aforesaid realities of the commercial and economic world, the question as regards the applicability of article 265 of the Constitution of India can be determined. It is trite knowledge to say that no provision of the Constitution of India can be interpreted or implemented in isolation. Just as every statute is to be read as a whole, the Constitution is also required to be read as a whole for correct interpretation and/or application of certain provisions contained therein. Preamble to the Constitution of India indicates the basic ideal and objective of the Constitution of India, which is to establish an egalitarian society based on socialistic principles. Similarly, the fundamental principles in the governance of the country require the State (the term "State" occurring in article 12 of the Constitution of India also includes judiciary) to direct its policy towards securing the ownership and control of the material resources of the community to be distributed so as to subserve the common good in the best manner (article 39B). Article 39A of the Constitution of India enjoins upon the State to secure that the operation of the legal system promotes justice on the basis of equal opportunity. It also enjoins a duty upon the State to see that no citizen, by reason of economic or other disabilities, is denied justice.

After realising that in the case of commodity taxes, ultimately, the innumerable unidentifiable consumers bear the burden of tax and that they are the real sufferers, if the court passes an order of refund of the amount of such tax in favour of someone who does not suffer the burden of the tax, the court would be acting against the basic ideal or object of the Constitution and also against the fundamental principles for governance of the country enshrined in the Constitution itself. Without having regard to the economic and commercial realities of life, no order of refund of a commodity tax can be legitimately passed by the court. To pass such an order of refund in favour of the collecting instrumentality from whose hand the amount of tax has reached the coffers of the Government, would amount to denying justice to innumerable unidentifiable citizens. Courts cannot be oblivious of, or indifferent to, the interests of these people simply because they suffer by reason of economic and other disabilities and they are not able to assert their claims. Moreover, grant of refund of such amount to the collecting instrumentality would also amount to deprivation of the property of millions of unidentifiable people otherwise than by authority of law. These people actually bear the burden of tax and it is their property which they are deprived of otherwise than in accordance with law. Therefore, the court cannot direct that some one else be paid the refund simply because the people whose property is unlawfully deprived are innumerable and unidentifiable and

are not coming forward before the court. To do so would amount to nullifying the provisions of article 300A of the Constitution of India and also the provisions of the preamble to the Constitution as well as the provision regarding directive principles.

Therefore, the only way to resolve this conflict is that even in cases where the imposition and levy of indirect tax is held to be illegal, the authority concerned may be recommended or directed by the court to utilise the amount so collected in the best interest of the society at large, instead of refunding it to the persons unauthorized or ineligible to receive the same.

It is now time for us to have a look at the three decisions of the Division Benches of this court which had occasion to consider the nature of the case which the plaintiff, seeking for refund of tax amount allegedly illegally collected by the defendant has to plead and prove. In the case of Tata Chemicals Ltd. 1983 (3) GLH 985, the Division Bench of this court consisting of V. V. Bedarkar J. (as he then was) and one of us, A. P. Ravani J., had to consider the moot question whether the plaintiff company which had filed the suit for recovery of an amount of Rs. 1,02,46,701.52 on the ground that this amount representing excise duty was illegally collected from the plaintiff company was entitled to maintain such a suit. It becomes obvious that this was also a suit under section 72 of the Indian Contract Act. Whether the plaintiff company which had by itself not borne the burden of tax but which had collected the tax from the consumers could maintain such a suit and claim any decree from the Department on the basis of the alleged recovery of excise tax, the following observations were made by Bedarkar J., speaking for the Division Bench, in para 18 of the report.

> "Now a word or two about the claim made by the plaintiff company in the suit. It is an admitted position that the plaintiff company has passed on the incidence of the tax to the consumer (see para 19 of the deposition of Harjivandas, exhibit 43 P.W. 1). The company claims refund of this amount of excise duty which is more than a crore of rupees on the ground that it paid the amount of excise duty in question under a mistake of law. According to the plaintiff-company, the mistake was discovered after the judgment of this court in the case of Alembic Glass Industries some time in January, 1980, and, hence, the claim was made for refund of the duty as paid on the value of packing materials commencing from October 1, 1975, to June 30, 1980. The plaintiff-company reserved its right to claim such refund for the period subsequent thereto. Admittedly, the consumer has been made to suffer the heavy burden of about a little over a crore of rupees by way of excise duty. What the consumer was made to pay should now be refunded to whom ? Not to the consumer but to the company ? Why ? Because it collected the same under a mi, take of law. What is the fault of the consumer and why is he made to suffer the burden of such a heavy duty ? We confess, we are unaware of any judicial system which tolerates a situation wherein a consumer is allowed to be robbed of and the intermediary who collected the tax is allowed to be benefited by a windfall, an unjust enrichment. One who suffers injury is not awarded compensation but compensation is awarded to one who became an instrument in inflicting injury upon the consumer. X (i.e., the company, which has collected the excise duty from the consumer) has not suffered the wrong but claims compensation for the wrong done to Y (i.e., the consumer, on whom the burden of excise duty is

> passed on). The position in the foremost leading capitalist countries of the world, that is, England, America and Australia, is quite different. There, a taxpayer has no right to ask for the refund of the amount of tax paid under a mistake of law. This is understandable since the amount of tax collected is intended for the immediate expenditure for the common good. Therefore, it would be unjust and unfair to require the State to make its repayment after a number of years."

It is also interesting to reproduce what is stated in para 19 of the report in the light of the decision of the Supreme Court in S. P. Gupta v. President of India, AIR 1982 SC 149 :

> "In S. P. Gupta v. President of India, AIR 1982 SC 149, D. A. Desai J., in his separate judgment, in para 735, inter alia, said that a class which has benefited enormously by this Justice delivery system has come into existence, and then rightly. remarked that both the judges and the lawyers failed to, suitably revise the system to suit the needs of a republican form of Government and egalitarian society with emphasis on socio-economic justice. One wonders and poses a question as to whether the framers of the Constitution would have ever conceived even in their wildest possible imagination that in free India, through the justice delivery system, it should be possible for the fortunate few (i e., manufacturers) to commit a mistake, and for that mistake, hard pressed middle class citizens and under privileged, half-clad starving poor millions of the country should be made to suffer. Since that question does not arise in this case, we do not propose to deal with the same in detail."

In the light of the aforesaid observations in that case, the Division Bench took the view that the appeal filed by the defendant, Union of India, representing the Excise Department was required to be allowed and the judgment and decree of the trial court granting restitution of various amounts to the plaintiff, Tata Chemicals, were required to be set aside. It is true that in that case, it has been found that it was an admitted position on the record of the case that the burden of tax was passed on to the consumers. But, in the present case, the situation is much worse for the plaintiff. In this case, the plaintiff never whispers even in the plaint that it had borne the burden of tax and not passed on the same to the consumer. If the plaintiff does not plead such a case, there would arise no occasion for the defendant to meet such a case nor would there remain any need to frame an issue on the point. In fact, such a question would not form part of any controversy between the parties. It is further interesting to note that apart from the absence of pleading on this issue, the plaintiff, in the present case, has led no evidence whatsoever and it is only the defendant which has examined witnesses. The plaintiff had sat tight on its pleading and stacked its case only on the allegation that collection of octroi was illegal and to prove only this case, led documentary evidence. The documentary evidence has revealed that from time to time, various amounts were paid by the plaintiff to the defendant under protest as deposit towards octroi dues. The defendant had maintained a separate account, crediting various amounts received from the plaintiff as deposits towards octroi. Yet ultimately, this account was squared off and on September 26, 1960, all these amounts standing in the deposit account were appropriated by the municipality towards octroi dues and the plaintiffs account was debited accordingly. It is, therefore, obvious that various amounts which the plaintiff might have paid over the years under protest as deposits were admittedly

towards alleged octroi dues of the defendant and the appropriation was also done by the defendant of the entire amount standing at the foot of the deposit account as octroi dues of the defendant. In this connection we may state that the plaintiff had produced the entire bunch of documents showing various amounts remitted by the plaintiff to the defendant towards dues of the defendant, though of course under protest over the years to be kept as deposits with the defendants till the controversy between the parties which was pending before the Supreme Court was resolved These documents are from exhibits 177 to 296. They show various amounts remitted from time to time by the plaintiff to the defendant towards octroi dues. By way of a specimen, we may refer to exhibit 288 which shows that an amount of Rs. 4,221.59 was sent by cheque by the plaintiff to the defendant in respect of demand of octroi dues from the plaintiff for the month of September, 1956. It is seen that prior to September 26, 1960, the plaintiff used to send from time to time to the defendant various amounts by cheques towards the octroi claim of the defendant Merely because they were kept in a separate account, it cannot be said that payments were not made towards the octroi claim of the defendant It is also interesting to note that neither before the trial court nor before this court, even a faint suggestion was made that the entire burden of tax amount paid by the plaintiff to the defendant towards alleged claim of octroi dues of the defendant over the years was not passed on by the plaintiff, which is a manufacturer, to its customers and that the entire burden was suffered by the plaintiff alone. When such a case is not pleaded nor proved and when the plaintiff has not ventured to open its mouth even to remotely suggest such a possibility, it must be held that this is a case in which the plaintiff cannot dare suggest that it has not passed on the burden of octroi duty to the customers and that over the years it had suffered the burden by itself. Consequently, it must be held that in the present case, the plaintiff has not suffered any incidence of tax meaning thereby, it had passed it on the whole hog to the customers and, therefore, what was the admitted position before. the Division Bench in the case of Tata Chemicals [1983] (3) GLH 985, remains an uncontroverted one in the present proceedings as the plaintiff has not tried to challenge that position at all. But, even apart from that, when the basic requirements of section 72 are not pleaded by the plaintiff, the suit of the plaintiff is liable to be rejected even at the threshold as it has no completed cause of action.

The second decision of the Division Bench of this court to which our attention was drawn by the learned advocate for the defendant is rendered in the case of New India Industries [1983] 24(2) GLR 1108. The very Division Bench which decided the case of Tata Chemicals Ltd. [1983] (3) GLH 985 had once again to consider this question. The question before the Division Bench in New India Industries case [1983] 24(2) GLR 1108 was whether the plaintiff, New India Industries, which had claimed refund of excise duty paid to the Excise Department by filing a suit under section 72 of the Indian Contract Act, was entitled to the same and whether the said suit could be decreed in the absence of proper pleading and proof which were the basic requirements of section 72 of the said Act. The Division Bench, speaking through one of us, A. P. Ravani J., squarely posed a question with which we are concerned in the present proceedings, viz., whether the court can decree the suit under section 72 when the plaintiff has not pleaded or proved any legal injury on account of the payment of alleged illegal tax, when the burden of tax is passed on to the consumers and not borne by the plaintiff. In this connection, it has been observed in para 31 of the report as under (at p. 1129) :

> "It is really difficult to conceive of any civilised system of law which would permit pick-pocketing under the cover of law. To put it plainly, the questions which are posed and required to be answered are : Is our system of laws such that it renders the court helpless and powerless and compels it to become an indifferent spectator to the fleecing of the pockets of the people ? Not only that, does it further compel the court to sanction and protect the imperceptible manner of pick-pocketing of numerous unidentifiable consumers ?"

Having observed as aforesaid, the court proceeded to deal with the basic requirements of section 72 as found in Chapter V of the Contract Act and observed as under (at p. 1129) :

> "In cases falling under this Chapter, the basis of the obligation which may arise is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution"

The English law on the subject was then discussed and having quoted observations in two such decisions, it was observed (at p. 1130) :

> "From this, it should be clear that the underlying object of section 72 is that a person cannot retain the money of, or some benefit derived from, another which legitimately does not belong to him and which it would be unconscionable to allow him to retain the same. Therefore, the basic idea is that there should be restitution of the money or the benefit, derived on account of mistake or coercion and the person who has been deprived of the money or benefit should be restored the same, and that there should not be unjust enrichment."

Thereafter, in para 36, it has been observed as under (at p. 1130) :

> "It is trite knowledge that the substantial portion of the public revenue is recovered through indirect taxes. The amount collected by the Central and State Governments and even local authorities every year through indirect taxes run into several thousand crores of rupees. The half-clad, half-fed, under privileged teeming millions of this country and the middle class citizens who are hardpressed on account of the continuous rise in cost of living pay the taxes on the commodities and articles of day-to-day consumption not for purposes of being retained by the manufacturers and the businessmen nor do they pay the taxes so that the amounts once collected from them be refunded to the businessmen or the manufacturers in the event of the recovery of the tax being declared unlawful."

In para 37 of the report, it is observed as under (at p. 1131) :

> "While resolving this question of prevention of unjust enrichment either that of the State or that of manufacturers and/or businessmen, this socio-economic perspective has got to be kept in mind by the court. The courts cannot be oblivious of the

> socio-economic consequence of its decision and cannot ignore the socio-economic realities of the life of the nation. The judiciary is also an organ of the State machinery and, therefore, it has also to look at the provisions contained in Chapter IV of the Constitution."

Under these circumstances, it was held that the plaintiff company which had not shown that it had passed on the incidence of alleged illegal dues to the consumers, was not entitled to claim restitution from the Department and the claim for refund of tax could not be decreed.

The same view has been further reiterated by another Division Bench of this court in the case of Bharat Vijay Mills Co. Ltd. [1984] 25(2) GLR 1111, consisting of R. C. Mankad and A. S. Qureshi JJ. In that case also, the Division Bench, speaking through R. C. Mankad J., had to consider the question whether the suit filed by the mill company demanding repayment of excise duty paid by them to the Union of India can be maintained, when it was not shown that the burden of tax was borne by the mill company and that burden was not passed on to the consumers. In this connection, section 72 of the Contract Act was considered by the Division Bench and it was observed that the term "mistake" has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. It was further observed that the juristic basis of the obligation under section 72 is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution. The object with which section 72 is enacted is on the one hand to prevent unjust enrichment of persons to whom money is paid or thing delivered by mistake or under coercion and on the other to restore money or a thing to its real or proper owner. In other words, the object of section 72 is restoration of money or thing to the real or proper owner or reparation of injury or making good any loss which might have been occasioned to the person making payment or delivering thing on account of money or delivery of thing by mistake or under coercion.No one can be allowed to enrich himself unjustly at the cost or the expense of another. And it is with this object in view that section 72 is enacted. The Division Bench then considered what would be the basic requirements of pleadings for supporting the case under section 72 of the Act and made the following pertinent observations in this connection in para 18 of the report (at p. 1127) :

> "It was urged on behalf of some of the mills that sometimes the manufacturer has to sell his goods at a price which may be less than the cost. In such cases, the burden of excise duty may not be passed on to the buyer or customer of the goods. It would, therefore, not be correct to say that in no case, the manufacturer would be entitled to refund of the excise duty. We are not concerned with hypothetical cases. But in any case, we are not suggesting that in no case, the manufacturer can receive the refund of excise duty. It would depend upon the facts of each case whether or not the manufacturer would be entitled to refund of excise duty. It is, therefore, that we have emphasised that in order to claim restitution, the person claiming restitution has to prove loss or injury to him. If he proves loss or injury, he would be entitled to restitution to the extent of loss or injury suffered by him. However, it is absolutely essential to plead and prove loss or injury to successfully claim restitution under section 72 of the Contract Act. In the cases before us, it is not disputed that the burden of excise duty has been passed on to the buyers of the fabrics. It is not the

> case of the mills that they were required to sell the fabric at a price less than its cost. No case of any loss or injury has been pleaded or proved by any of the mills. The sole basis of the claim is that the excise duty which was not legally recoverable was paid on blended yarn and, therefore, they are entitled to refund of the excise duty paid by them. It is not the case of the mills that any part of the burden of the excise duty was borne by them. In a given case, it may be open to a manufacturer to himself claim refund of excise duty, but such would be the case where either wholly or partly the burden of excise duty has fallen on his shoulders."

It is in these circumstances that the Division Bench came to then conclusion that the plaintiff companies were not entitled to claim refund of the excise duty and the appeals of the Union of India were allowed and decrees granting restitution, as passed by the trial court, were set aside. We may state that the ratio of the aforesaid decision gets directly attracted to the facts of the present case. Here also, the plaintiff has not pleaded and proved that it has borne the entire burden of octroi duty paid by it to the defendant over the years. It has been nowhere even whispered in the plaint that the octroi duty amount was not passed on to the consumers or the customers who had purchased the articles manufactured by the plaintiff. It is obvious that as a prudent businessman, the plaintiff which is a manufacturing concern would, while fixing the price of its commodity, take into account the octroi duty paid on the raw material imported by it within the municipal limit which would go into the making of the finished manufactured product. It also cannot be disputed and it was rightly not disputed that the octroi duty paid on the raw material from which finished products are manufactured entered the cost structure of the plaintiffs finished products and that the same was shifted on to the purchasers of the plaintiffs products. It is easy to visualise that, in normal circumstances, this duty amount would naturally be passed on to the consumers by way of fixing of price charged from them. If there is any exception to this normal situation, then it has to be expressly pleaded and then proved by the plaintiff who will be having special knowledge about it. The burden to prove this fact will be on the plaintiff under section 106 of the Evidence Act. The plaintiff made no effort in that direction. Therefore, it must take the consequence of such a stand on its part. The suit, as filed by the plaintiff, has, therefore, to be held to be disclosing no cause of action.

Mr. Raval, for the defendant, in support of his contention, also heavily leaned on two later decisions of the Supreme Court. In the case of State of Madhya Pradesh v. Vyankatlal, AIR 1985 SC 901; [1987] 64 STC 6, the Division Bench of the Supreme Court consisting of S. Murtaza Fazal Ali and R. B. Misra JJ. (as they then were), had to decide the question whether refund of sugar levy amounts can be legally claimed by the plaintiff in that case when the said mill had not suffered the burden of the levy but had passed on the same to the consumers. The trial court had decreed the suit against the State of Madhya Pradesh. Allowing the appeal by the defendant, State of Madhya Pradesh, the Division Bench, speaking through Misra J., made the following pertinent observations (at p. 905) :

> "... in the present case also, the respondents had not to pay the amount from their coffers. The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. Only the persons on whom lay the ultimate burden to pay the amount would be

> entitled to get a refund of the same. The amount deposited towards the fund was to be utilised for the development of sugarcane. If it is not possible to identify the persons on whom had the burden been placed for payment towards the fund, the amount of the fund can be utilised by the Government for the purpose for which the fund was created, namely, development of sugarcane. There is no question of refunding the amount to the respondents who had not eventually paid the amount towards the fund. Doing so would virtually amount to allowing the respondents unjust enrichment."

Though section 72 is not expressly mentioned, the aforesaid Supreme Court decision squarely rests on the principle underlying restitution which, in its turn, is the foundation of section 72. Therefore, it must be held that before the plaintiff who claims refund of any amount paid to the defendant can succeed, it must be shown by the plaintiff that the plaintiff itself had borne the entire burden of the payment and refusing such relief would amount to unjust enrichment of the defendant at the cost of the plaintiff. This reasoning of the Supreme Court in the aforesaid decision which, by necessary implication, supports the ratio of the three Division Bench judgments of this court, puts beyond any pale of controversy, the question posed for our consideration in the present proceedings. We must, therefore, hold that in the present case, the suit, as filed by the plaintiff, did not disclose any cause of action and was liable to be rejected and dismissed as the basic requirements of section 72 are neither pleaded nor proved by the plaintiff. As the Supreme Court decision in State of Madhya Pradesh, AIR 1985 SC 901, has taken the same view which was taken by the three Division Bench decisions of this court. there remains no occasion for us to consider the request of the learned advocate for the plaintiff to refer this question to a larger Bench of this court. Even otherwise, we respectfully concur with the ratio of the decisions of the three Division Benches of this court (supra) and we do not entertain any doubt about the correctness of these decisions.

However, a valiant effort was made by the learned advocate for the plaintiff to salvage the situation by submitting that various other High Courts have taken a contrary view and that even the Supreme Court, in some decisions, had spoken on the point which clearly indicated that the decisions of this court are required to be reconsidered.

We will briefly refer to the said decisions of other High Courts as well as the Supreme Court with a view to indicating that the ratio of the decisions of the Division Benches of this court are in no way in conflict with any of the decisions of the Supreme Court and that the contrary view expressed by other High Courts on the point, with respect, cannot be accepted.

We may first refer to the two Supreme Court decisions on which great store was laid by the learned advocate for the plaintiff. We must, at the outset, state that the decisions of the Supreme Court on which reliance was placed by the learned advocate for the plaintiff to draw a line of dissent from the ratio of the three Division Bench decisions of this court, have already been considered by two of the Division Bench decisions of this court in the cases of New India Industries [1983] 24 (2) GLR 1108 and Bharat Vijay Mills Co. Ltd. [1984] 25 (2) GLR 1111 and these Supreme Court decisions have been explained and distinguished. We respectfully concur with the said approach of the two Division Benches of this court and we see no reason to take a contrary view. However, we may deal with the

Supreme Court decisions on our own as the learned advocate for the plaintiff vehemently contended that these decisions have definitely spoken on the point in a contrary tone.

Reliance is placed by the learned advocate for the plaintiff on the decision of the Supreme Court in the case Sales Tax Officer v. Kanhaiya Lal, [1958] 9 STC 747; AIR 1959 SC 135, and on the decision of the Supreme Court in the case of D. Cawasji and Co. v. State of Mysore, AIR 1975 SC 813. Before discussing the aforesaid two decisions of the Supreme Court, it would be proper to have a look at the judgment of the Supreme Court in the case of Dalbir Singh v. State of Punjab, AIR 1979 SC 1384, wherein guidelines are provided as to how the judgment of the Supreme Court is to be read, understood and applied. In this decision, Sen J. has observed as follows (p. 1390) :

> "According to the well settled theory of precedents, every decision contains three basic ingredients :
>
> (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the judge draws from the direct or perceptible facts;
>
> (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and
>
> (iii) Judgment based on the combined effect of (i) and (iii) above.

For the purposes of the parties themselves and their privies, ingredient No. (iii) is the material element in the decision, for it determines finally their rights and liabilities in relation to the subject matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purposes of the doctrine of precedents, ingredient No. (ii) is the vital element in the decision. This, indeed, is the ratio decidendi. It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judges decision binding a party is the principle upon which the case is decided, and for this reason it is important to analyse a decision and isolate from it the ratio decidendi."

The aforesaid observations have been adopted by a Full Bench of this court in the case of Ahmedabad Mfg. and. Calico Printing Co. Ltd. v. Union of India [1983] 24(1) GLR 1. After referring to the aforesaid decision of the Supreme Court and two other decisions of the Supreme Court (in the case of Madhav Rao Jaivaji Rao Scindia v. Union of India, AIR 1971 SC 530, and in the case of Addl. Dist. Magistrate, Jabalpur v. S. Shukla, AIR 1976 SC 1207), the Full Bench has observed that the court must, of necessity, examine the precise question or the precise issue which arose before the court and identify the principle of law, applied by the court in resolving the issue and make further efforts to find out what is the proposition of law which emerges from the decision of the court. Recently, in the case of Ambica Quarry Works v. State of Gujarat, AIR 1987 SC 1073, the Supreme Court has observed as under (pp. 1077, 1078) :

> "The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually

> decides, and not what logically follows from it. (See Lord Halsbury in Quinn v. Leathem [1901] AC 495 (HL))".

In the light of the aforesaid discussion and observations made by the Supreme Court itself, the decision in the case of Kanhaiya Lal, AIR 1959 SC 135, and D. Cawasji and Co., AIR 1975 SC 813, are required to be read and understood. In the case of Kanhaiya Lal, AIR 1959 SC 135, the precise question which arose before the Supreme Court is referred to in paras 5 and 7 of the judgment. The question before the Supreme Court was as to whether section 72 of the Indian Contract Act applies to the facts and circumstances of the case and as to whether the term mistake" occurring in section 72 of the Contract Act covered "mistake of facts as well as mistake of law" also. In para 24 of the judgment, the Supreme Court answered the question and held that the word "mistake" occurring in section 72 of the Indian Contract Act was wide enough to cover not only a mistake of fact but also a mistake of law In that case, before the Supreme Court, the question never arose as to what were the ingredients required to be proved before the claim based under the provisions of section 72 of the Act can be said to have been established. In view of the Full Bench decision of this court and various decisions of the Supreme Court referred to hereinabove, nothing more can be read. In the decision of the Supreme Court in the case of Kanhaiya Lal, AIR 1959 SC 135, except the correct meaning of the term "mistake" occurring in section 72 of the Indian Contract Act, the Supreme Court has laid down the principle of law that the term "mistake" occurring in section 72 of the Indian Contract Act takes within its sweep "mistake" of facts as well as "mistake" of law. To read anything more in this decision would be doing something which is not permitted by the Supreme Court itself. This conclusion of ours becomes apparent when we have a close look at the judgment of the Constitution Bench of the Supreme Court in Sales Tax Officer v. Kanhaiyalal, AIR 1959 SC 135. The limited question before the Supreme Court in that case was as to whether the suit for refund of sales tax allegedly illegally collected from the plaintiff by the defendant was maintainable. Analysing section 72 of the Contract Act N. H. Bhagwati J. (as he then was), speaking for the Supreme Court, made the following observations (headnote, p. 136) :

> "Where 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 be made in respect of a tax liability and any other liability on a plain reading of the terms of section 72 of the Contract Act. To hold that tax paid by mistake of law cannot be recovered under section 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".

It was further observed (headnote) :

> "Merely because the State has not retained the monies paid as sales tax by the assessee but has spent them away in the ordinary course of the business of the State will not make any difference to the position and under the plain terms of section 72 of the Contract Act, the assessee will be entitled to recover back the monies said by it to the State under mistake of law"

It becomes at once clear that the Constitution Bench was concerned with only one ingredient of section 72, viz., payment of tax under mistake of law. The taxing authority contended that the term "mistake" as employed by section 72 will not include mistake of law. It is this contention which was examined by the Supreme Court and repelled and it was stated that the term "mistake" as employed by section 72 includes not only mistake of fact but also mistake of law. It is interesting to note that the decision of the Supreme Court was not invited on the further question as to whether the plaintiff in a suit under section 72 was entitled to succeed even though he had not suffered any prejudice or legal injury. As that contention was not canvassed, it obviously was not considered nor was it decided. It is trite to say that the ratio of a decision is to be culled from what is actually considered and what is pronounced upon by the court. When a point is never canvassed before the court, it can never be assumed that the court had spoken on it though it was never canvassed before it. The Constitution Bench decision, therefore, is not an authority for the proposition that even though in a suit under section 72, the plaintiff does not plead and prove that he has suffered any legal injury or prejudice, his suit can be decreed and restitution can be granted to him. As such a question was never canvassed for consideration before the Supreme Court, the aforesaid decision cannot be of any avail to the plaintiff for supporting its contention that in the absence of any pleading and proof also, such a suit can be decreed and such is the ratio of the decision of the Constitution Bench of the Supreme Court. in our view, there is no such ratio of the Constitution Bench decision of the Supreme Court. It is interesting to note that on the point with which we are concerned, there is a direct decision of the Supreme Court in the case of State of Madhya Pradesh v. Vyankatlal, AIR 1985 SC 901; [1987] 64 STC 6, where, it has been held that unless the plaintiff shows that non-granting of refund of duty would amount to unjust enrichment to the defendant, the suit cannot be decreed. That decision has also considered the Constitution Bench decision of the Supreme Court in Sales Tax Officer v. Kanhaiya Lal, AIR 1959 SC 135. In that view of the matter, it would not be open to the plaintiff to contend before us that Kanhaiya Lals case takes a view which is in favour of the plaintiff on the facts of this case.

Our attention was then invited to the decision of a two-member Bench of the Supreme Court in the case of D. Cawasji and Co. v. State of Mysore, AIR 1975 SC 813. In that case, a writ petition was moved in the High Court of Mysore under article 226 by D. Cawasji & Co. for a declaration that the Mysore Elementary Education Act, 1941, and the amendments to it by the Mysore Elementary Education (Amendment) Act (XII of 1955) providing for levy and collection of education cess on items on which education cess was being levied as prescribed in the schedules of the respective Acts were beyond the competence of the Mysore State Legislature and for refund of the educational cess paid during 1951-52 to 1955-56 on shop rentals and tree tax in respect of toddy and duty of excise in respect of arrack and special liquor. The High Court of Mysore had dismissed the writ petitions by a common judgment That gave rise to further appeals before the Supreme Court which came up for final hearing before the Bench of K. K. Mathew and A. Alagiriswami JJ (as they then were). It becomes clear that the Supreme Court, in that decision, was not concerned with the maintainability of a civil suit under section 72 of the Contract Act nor was it concerned with the further inquiry as to what would be the basic requirements for such a suit which would entitle the plaintiff to succeed. The only contention canvassed before the Supreme Court was whether the High Court of Mysore was justified in rejecting the claim of refund on the ground that there was delay in filing the writ petitions. In para 4 of the report, this point is referred to and this is the only point which was to be

decided by the Supreme Court. This point was considered by the Supreme Court and in that connection, in para 8 of the report, Mathew J. observed (p. 815) :

> "Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed, i.e., within 3 years of the knowledge of the mistake, would also lie."

Thus, the short question about maintainability of the legal proceedings for refund of tax within permissible time limit and the further question whether there was any undue delay on the part of the writ petitioners in putting forward their claims were the only questions which were examined by the Supreme Court. It was observed (p. 815) :

> "If any writ petition is filed beyond three years after that date, it will almost always be proper for the court to consider that it is unreasonable to entertain that petition, though, even in cases where it is filed within three years, the court has a discretion, having regard to the facts and circumstances of each case, not to entertain the application."

Then follows the observations in paras 9 and 10 on which great reliance was placed by the learned advocate for the plaintiff. We, therefore, deem it fit to extract the entire paras 9 and 10 of the report (at p. 815) :

> "9. We are aware that the result of this view would be to enable a person to recover the amount paid as tax even after several years of the date of payment, if some other party would successfully challenge the validity of the law under which the payment was made and if only a suit or writ petition is filed for refund by the person within three years from the date of declaration of the invalidity of the law. That might both be inexpedient and unjust so far as the State is concerned.
>
> 10. A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in hole or in part expended, which would often be the case, if the suit or application could be brought at any time within three years of a court declaring the law under which it was paid to be invalid, be it a hundred years after the date of payment. Nor is there any provision under which the court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason it is impracticable to do so."

Observations in the portion in para 10 were strongly relied upon by the learned advocate for the plaintiff. Now, it must be kept in view that the aforesaid observations were made by Mathew J. while considering the question of undue delay in filing a writ petition for refund of tax. In that decision, the Supreme Court was never posed with the question whether under section 72, the plaintiff can straightaway be given refund of tax even if the plaintiff has passed on the burden of tax to the consumers and has not suffered any burden thereof and whether it would amount to unjust

enrichment of the defendant at the cost of the plaintiff if such a suit is not decreed. The underlined observations in para 10, therefore, cannot be considered to be laying down any ratio on this point nor can they be considered to be even obiter observations on the point, because that point was not indirectly or even remotely considered by the Supreme Court even though it directly did not arise for consideration. Consequently, it must be held that the question of maintainability of the suit under section 72 of the Contract Act by the plaintiff for refund of tax illegally alleged to have been recovered from the plaintiff and the requirements of pleadings and proof in such cases were not adjudicated upon by the Supreme Court in D. Cawasjis case, AIR 1975 SC 813, directly or even indirectly. Therefore, that decision is not of any avail to the plaintiff. In fact as seen earlier, there is a direct decision of the two member-Bench of the Supreme Court in the case of State of Madhya Pradesh v. Vyankatlal AIR 1985 SC 901 [1987] 64 STC 6, which squarely pronounces upon the question of maintainability of the said suit. But even assuming that there are any obiter observations on the point in D. Cawasjis case, AIR 1975 SC 813, if there is any conflict between the obiter observations of the two-member Bench of the Supreme Court in D. Cawasjis case, AIR 1975 SC 813, and the direct ratio of the decision of the Bench of equal strength in State of Madhya Pradesh v. Vyankatlal, AIR 1985 SC 901, the ratio of the later decision has to prevail and will remain binding under article 141 of the Constitution of India.

As seen above, in D. Cawasjis case, AIR 1975 SC 813, the controversy between the parties was with regard to the period of limitation within which the petition under article 226 of the Constitution of India should have been filed. After referring to the provisions of section 17 (1) (c) of the Limitation Act, 1963, the Supreme Court has observed in para 8 of the judgment to the effect that a writ petition for refund of the tax within the period of limitation prescribed, that is, three years from the date of the knowledge of the mistake would also lie. The Supreme Court also observed that if any writ petition is filed beyond a period of three years, it would always be proper for the court to consider that it is unreasonable to entertain that petition, though, even in cases where it is filed within three years. the court has a discretion having regard to the facts and circumstances of each case, not to entertain the petition.

Thereafter, what is observed in paragraphs 9, 10, 11 and 12 of the judgment was with a view to focussing the attention of the Legislature to the present defective state of law in the country. What is stated and observed in these paragraphs does not pertain to the actual controversy before the court and the same cannot be said to be the principles of law laid down by the Supreme Court. It must, therefore, be held that in that case, the Supreme Court has laid down the principles as regards the period of limitation within which a petition under article 226 of the Constitution of India for refund should be filed. Other observations made by the Supreme Court do not form part of the ratio of the judgment.

We may now turn to the other decisions of the Supreme Court on which reliance was placed by the learned advocate for the plaintiff. In the case of CST v. Auraiya Chamber of Commerce [1987] 167 ITR 458, a Division Bench of the Supreme Court, consisting of Sabyasachi Mukharji and K. N. Singh JJ., had to examine the question whether an application moved for refund of sales tax paid under a mistake was maintainable before the Sales tax Officer and whether such application can be rejected on the ground of limitation. It is this limited question which was examined by the Supreme Court. It

becomes at once clear that it was a case of refund by a statutory authority under the hierarchy prescribed by the Act. It was held that when the judgment declaring the provisions of the Act ultra vires came to be known in 1954, the assessee who moved an application in 1955, cannot be said to have filed the application beyond time. We fail to appreciate how this decision can at all be pressed into service in support of the plaintiffs case. It is not an authority for the proposition that a suit for refund of tax illegally recovered by the defendant can be maintained under section 72 of the Act de hors its basic ingredients and without even pleading them and proving the same. In para 23 of the report, section 72 of the Act has been referred to. Mukharji J. has considered section 72 of the Act and has observed in that connection as under (p. 466) :

> "Section 72 of the Indian Contract Act, 1872, recognised that a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. In this case, it is not disputed that mistake of law is also a mi stake covered by the provisions of section 72 of the Indian Contract Act. If the law declared by this court in Budh Prakash Jai Prakashs case [1954] 5 STC 193 (SC) is correct, as it must be, then the payment of tax by the dealer, the respondent herein, was under a mistake of law and realisation by the revenue authorities was also under a mistake. Therefore, such sum should be refunded. This is recognised in the provisions of the Act as we have noted before. The principle of section 72 of the Indian Contract Act has been recognised."

It is obvious that the liability of the authorities who might have collected tax under a mistake of law to refund the same has been found to be flowing from section 72, but the further question whether the dealer who was claiming such refund under section 72 can maintain his claim without pleading and proving further ingredients of section 72, viz., that he had suffered legal injury and prejudice and had borne the burden of tax which entitled him to claim refund from the authorities, was never canvassed before the Supreme Court for consideration nor was it in fact considered by the Supreme Court. The Supreme Court, in the aforesaid decision, considered one aspect only under section 72, viz., liability of the authorities who have collected the tax to refund the same, but the question to whom it should be refunded and who are the persons who will be entitled to such refund was never posed for consideration before the Supreme Court and, therefore, the Supreme Court had no occasion to pronounce upon the same. In fact, it was assumed that the dealer was entitled to such refund. No contention was raised on this aspect. Consequently, even that decision cannot be of any avail to the plaintiff. The decision of the Supreme Court in the case of State of Kerala v. Aluminium Industries Ltd. [1965] 16 STC 689, also is of no avail to the plaintiff for the simple reason that, as observed by the Supreme Court in the case of CST v. Auraiya Chamber of Commerce [1987] 167 ITR 458, the said decision only reiterated that money paid under a mistake of law comes within the term "mistake" in section 72 of the Indian. Contract Act and that there was no question of estoppel when the mistake of law was common to both the assessee and the taxing authority. There is no dispute on this aspect. It is now well settled by a catena of decisions of the Supreme Court that when both the sides are labouring under a mistake of law or fact, claim for restitution under section 72 of the Act lies. However, the further question as to who is entitled to restitution was not considered either in the case of State of Kerala v. Aluminium Industries Ltd. [1965] 16 STC 689 (SC) or in CST v. Auraiya Chamber of Commerce [1987] 167 ITR 458 (SC) and, hence, these decisions cannot be of any

assistance to the learned advocate for the plaintiff in the present case.

It is now time for us to refer to the judgments of other High Courts on which strong reliance was placed by the learned advocate for the plaintiff. Our attention was invited to two judgments of the Bombay High Court. In the case of Rapidur (India) Ltd. v. Union India [1987] 27 ELT 222 (Bom); 65 STC 400, a Division Bench of the Bombay High Court (Panaji Bench), relying upon the Supreme Court decision in D. Cawasjis case, AIR 1975 SC 813, took the view that the said decision was an authority for the proposition that if tax is paid under a mistake of law or is collected without authority of law, the same has, in all cases, to be refunded to the party irrespective of the time when the tax was paid and that there is no provision under which the court could deny refund of tax even if the person who paid it had collected it from his customers and has no subsisting liability or intention to refund it or for any reason, it is impracticable to do so. The Division Bench of the Bombay High Court, speaking through Dr.Couto J., read in the decision of the Supreme Court in D. Cawasjis case, AIR 1975 SC 813, a binding ratio to the aforesaid effect which, according to the learned judge of the High Court, was the law declared by the Supreme Court under article 141 of the Constitution and even on the assumption that the observations in D. Cawasjis case, AIR 1975 SC 813, were obiter in nature, they were held to be binding on the High Court. Now, we have already shown earlier while discussing D. Cawasjis case, AIR 1975 SC 813, that the said decision of the Supreme Court does not contain any ratio to the effect that whether the burden of tax is passed on to the consumers or not, once it is shown that it was illegally collected by the taxing authority, it had to be refunded to the person from whom the tax was collected. We have shown that the said decision did not consider the question whether the tax had got to be refunded to the party from which it was collected even without showing that the party who claims refund had suffered any legal injury or not within the meaning of section 72 of the Contract Act. We have also shown that D. Cawasjis case, AIR 1975 SC 813, did not contain any obiter dicta on this aspect. In that view of the matter, reliance placed by the Division Bench of the Bombay High Court (Panaji Bench) on the aforesaid decision in D. Cawasjis case, AIR 1975 SC 813, cannot be of any assistance to the learned advocate for the plaintiff. With respect, we cannot agree with the observations of the Bombay High Court in the aforesaid report at para 14 where it is stated that the Supreme Court has already dealt with this question in D. Cawasjis case, AIR 1975 SC 813 and has laid down the law on the point.

With utmost respect, we are of the opinion that while deciding the case of Rapidur (India) Ltd. v. Union of India [1987] 27 ELT 222, the Division Bench of the Bombay High Court (Panaji Bench) has not read the judgment of the Supreme Court in the case of D. Cawasji, AIR 1975 SC 813, as per the guidelines laid down by the Supreme Court itself.

In the case of ITC Ltd. v. M. K. Chipkar [1985] 22 ELT 334 (Bom), there was a difference of opinion between Lentin and Sawant JJ. and thereafter the matter was placed before P. S. Shah J. who concurred with Lentin J. and took the view that a petition under article 226 of the Constitution for refund of excise duty paid under a mistake of law was maintainable and the question whether the tax was collected by the claimant from his customers or not was irrelevant for the purpose. For coming to this conclusion, Shah, J. in para 39 of the report took the view that unjust enrichment is not a valid defence to the claim for restitution in respect of the excise duty collected by the Department without the authority of law. This question, according to Shah, J., was squarely

answered by the observations of the Supreme Court in D. Cawasjis case, AIR 1975 SC 813. We have already seen that D. Cawasjis case does not lay down this proposition. Consequently, even this Bombay decision can be of no avail to the learned advocate for the plaintiff. It is pertinent to note that in para 56 of the said decision, the learned judge has mentioned that there were many decisions of High Courts including Delhi, Gujarat, Andhra Pradesh and Allahabad where the refund of excise duty was ordered to be returned for the benefit of, and payment to, ultimate consumers. However, in view of the learned judge, as the Supreme Court had ruled in D. Cawasjis case, AIR 1975 SC 813 that such refund cannot be refused, it had to be granted and the petitioner cannot be denied refund solely on the ground of unjust enrichment. We have discussed in detail earlier, the ratio of the decisions of the three Division Benches of this court which have, after elaborate consideration of various aspects of the matter, centering round the legal requirements of section 72 of the Contract Act, have taken the view that unless the concerned plaintiff shows that it has suffered legal injury or prejudice, it cannot, merely on the ground that tax alleged to have been recovered is shown to be illegally recovered, maintain a suit for refund under section 72 of the Contract Act. As such, the judgment of Shah J. in the aforesaid decision concurring with Lentin J. also cannot be of any assistance to the learned advocate for the plaintiff. Various decisions of High Courts taking a contrary view as listed in para 56 of the report were just mentioned by the learned judge without discussing their ratio in detail and without considering how and why these decisions of the other High Courts taking a contrary view were not acceptable to the learned judge who decided the aforesaid case. In our view, therefore, the above Bombay High Court decision cannot be of any avail to the learned advocate for the plaintiff and in any case, we are not inclined to follow the reasoning of the Bombay High Court judgments when they are based on a misreading of the ratio of the decision of the Supreme Court in D. Cawasjis case, AIR 1975 SC 813, and when they run counter to the ratio of the decisions of the three Division Benches of this court which are binding on us and even otherwise with which we respectfully concur as discussed earlier. It must, therefore, be held that in the case of ITC Ltd. v. M. K. Chipkar [1985] 22 ELT 334, the Bombay High Court has not correctly interpreted the ratio of the Supreme Court decision in the case of D. Cawasji, AIR 1975 SC 813. Nothing more can be read in both the aforesaid judgments of the Supreme Court (D. Cawasjis case, AIR 1975 SC 813, and STO v. Kanhaiyalal, AIR 1959 SC 135) than what is precisely decided by the Supreme Court. The question as regards the ingredients to be provided for establishing a claim under section 72 of the Contract Act never arose in either of the aforesaid two cases decided by the Supreme Court. The Supreme Court never considered whether a plaintiff or petitioner in order to establish such a claim was required to prove loss or injury suffered by him. This was precisely the question at issue in the case of State of Madhya Pradesh v. Vyankatlal, AIR 1985 SC 901. We cannot distinguish this decision of the Supreme Court on the ground that specific provisions of section 72 of the Contract Act have not been referred to therein. In the case of State of Madhya Pradesh v. Vyankatlal, AIR 1985 SC 901, the Supreme Court has, in terms, dealt with this question and has answered the same holding that when the burden of duty imposed was transferred to the purchasers, the claim made by the factory owner cannot be entertained. It is further held that only the persons on whom lay the ultimate burden to pay the amount of duty would be entitled to get the refund of the same.

Our attention was then invited to the case of Delhi Cloth and General Mills v. Union of India [1986] 26 ELT 294 (Delhi) and the case of Gonterman Peipars (India) Ltd. v. Addl. Secretary to

Government of India [1986] 26 ELT 471 (Cal). It is true that the aforesaid decisions have taken the view that even though the tax amount is recovered from the consumers by the manufacturer, he can maintain a claim for refund only by showing that the recovery was illegal. These decisions have also proceeded, with respect, on a misreading of the decision of the Supreme Court in D. Cawasjis case, AIR 1975 SC 813, and more is read therein than what actually emerges from it, as discussed earlier. Consequently, these judgments also cannot be of any assistance to the learned advocate for the plaintiff as they fall in line with the Bombay decisions which, as we have shown earlier, cannot advance the case of the plaintiff.

As a result of the aforesaid discussion, it becomes clear that the suit, as filed by the plaintiff, was ex facie not maintainable and did not disclose a completed cause of action and was liable to fail. The plaintiff, having not pleaded and proved the requisite requirements of section 72 of the Contract Act, was required to be non-suited.

* * * * * OPEN