

**Union of India Vs. New India Industries Ltd., Baroda**

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**Court :** Gujarat

**Decided On :** Feb-21-1983

**Reported in :** 1984(3)ECC25; 1983(14)ELT1763(Guj); (1983)2GLR1108

**Judge :** A.P. Ravani and; V.V. Bedarkar, JJ.

**Acts :** Indian Contract Act - Sections 15 and 72; Sales of goods Act - Sections 64(A); [Central Excise Act, 1944](#) - Sections 3, 4, 35, 36 and 40

**Appeal No. :** First Appeal No. 72 of 1980

**Appellant :** Union of India

**Respondent :** New India Industries Ltd., Baroda

**Advocate for Def. :** S.N. Shelat and; K.H. Kaji, Adv.

**Advocate for Pet/Ap. :** H.M. Mehta, Adv.

**Judgement :**

Ravani J.

1. When the tax is paid with full knowledge of facts and law, without any compulsion or undue influence or fraud, would it be open to the tax payers to claim refund of the amount of tax so paid simply on the ground that the tax recovered is either found or declared to be unlawful Moreover, if the tax payer does not plead or prove that the amount of tax in question was paid either under a mistake or

under coercion, even then, will he be entitled to get refund of the amount of tax only because later on it is discovered that the recovery of the tax in question was unlawful Further question which has arisen in this matter is : That which is considered unjust and importer by the court while sitting in Court Room No. W. (i.e., while exercising writ jurisdiction), will the court be compelled to do the same thing because it is sitting in Court Room No. A (i.e., while deciding appeal against a decree in a suit) The question is when the court finds that a party is likely to be unjustly enriched, the court may refuse relief in writ jurisdiction and there is no dispute that the court has discretion to refuse relief while deciding a writ petition. But on the same facts under almost similar circumstances, while deciding an appeal against a decree passed in a suit, will the court have no power to refuse the relief prayed for and/or to mould the relief in appropriate form so as to prevent unjust enrichment and secure restitution

2. These are some of the questions which arise in this appeal filed by the Union of India against the judgment and decree passed by the 3rd Jt. Civil Judge (SD), Vadodara, on May 5, 1979, in Special Civil Suit No. 121 of 1974. The trial Court granted the declaration to the effect that the decision and action of the excise officers in levying and charging excise duty from the plaintiff-company on the value at which the products, i.e., cameras, were sold by the plaintiff's distributors to their customers and also on the packing cost was illegal, ultra vires, arbitrary and outside the powers and jurisdiction of the defendant. The trial Court further ordered that the plaintiff-company do recover Rs. 5,21,260 from the defendant with cost of the suit.

3. The plaintiff-company is a public limited company incorporated under the Companies Act, 1956, having its registered office at Vadodara. The company is manufacturing photographic cameras and sells the same through its distributors M/s. Agfa Gavaert India Ltd., Bombay.

4. The plaintiff-company averred that as per the provisions of Sections 3 and 4 of the Central Excises and Salt Act, 1944 ('the Act', for short), the excise duty was leviable and was chargeable as per the determination of value prescribed under Section 4 of the Act. It was the case of the plaintiff that the price at which the

photographic cameras were sold in wholesale to the distributors would be the basis for the levy of excise duty and not the price charged by the plaintiff's distributors from their customers. The plaintiff averred that the excise authorities were insisting on the plaintiff-company to declare the price charged by its distributors from customers and it had no other alternative but to declare the price charged by the distributors from their customers. The plaintiff-company also contended that the duty could be levied only on the finished product and not on the cost of packing. In support of its case the plaintiff-company relied upon the decision of the Supreme Court in the case of A.K. Roy and another v. Voltas Ltd., reported in : 1973ECR60(SC) . It was further contended by the plaintiff-company that the excise authorities had accepted the legal position that the price at which the plaintiff-company sold its products to its distributors should be taken as the basis for the determination of the assessable value of the excisable articles (cameras in this case) and yet they refused to refund the amount of excise duty paid on the excess value so determined by the authorities. Therefore, the plaintiff-company filed the suit on May 4, 1974 for the recovery of the amount of difference of duty between sale price charged by the plaintiff-company from its distributors, for the period commencing from June 1, 1971 to December 31, 1973. The plaintiff-company also prayed for refund of the amount of Rs. 13,778 alleged to have been illegally collected by including the cost of packing materials in the assessable value for the period commencing from March 1, 1973 to December 1973. On the aforesaid premises, the plaintiff-company prayed for a declaration that the decision and action of the excise authorities in levying and charging excise duty from the plaintiff-company on the value at which the products are sold by its distributors to their customers and also on the cost of packing materials are illegal, ultra vires, arbitrary and outside the powers of their jurisdiction and also in contravention of the provisions of the Act and prayed for a decree against the defendant for payment of Rs. 5,21,260.

5. The Union of India filed its written statement on October 30, 1974 and resisted the suit on facts as well as on law points. Several contentions with regard to jurisdiction of the civil court and limitation were also raised. The trial court framed issues at Exhibit 15. Over and above the issues regarding bar of limitation, maintainability of the suit and the jurisdiction of the civil court, the issues raised

were pertaining to the legality and validity of the determination of the assessable value of the excisable commodity and the inclusion of cost of packing materials in the assessable value of the goods. In short the controversy was as to which price should have been taken as the basis for the determination of assessable value : the price at which the article was sold by the plaintiff-company to its distributors or the price at which the distributors sold the article in question to the customers Further, whether inclusion of cost of packing materials in the assessable value of the article was legal and valid

6. Judgment of the trial court has proceeded entirely on the footing that as per the decision of the Supreme Court in Voltas' case (supra), the price charged by the manufacturer from its distributors (i.e., the first wholesale price) can be the basis for determination of the assessable value of the article for levy of excise duty and not the price charged by the distributor from its customers. The trial court proceeded only on the footing that the recovery of the excise duty on the basis of the distributors' price from their customers was not in accordance with law and therefore granted declaration and passed the decree for the amount claimed by the plaintiff. The trial court also allowed the claim of the plaintiff based on the contention that the cost of packing materials could not have been included in the assessable value of the article in question. The trial court did not examine the question as to whether the payment was made under mistake of law or under coercion. In this behalf no issue was sought and raised. On this point there is no finding or discussion in the judgment of the trial court. After holding that the plaintiff-company was entitled to the declaration sought for, the decree as stated above, has straightway been passed.

7. The counsel for the appellant-Union of India, first submitted that the suit was not maintainable since it was filed beyond the prescribed period of limitation provided under Section 40 of the Act. While advancing this contention reliance was placed upon the provisions of Section 40 as it stood prior to its amendment by Act 22 of 1973. During the course of arguments, it transpired that the new section came into force from May 19, 1973. The suit was filed on May 4, 1974. In the facts and circumstances of the case, it would not be seriously disputed that the provisions of newly amended section which came into force from May 19, 1973 were applicable

to the present case. The newly inserted section 40 read as follows :-

'Protection of action taken under the Act :- (1) No suit, prosecution or legal proceeding shall lie against the Central Government or any officer of the Central Government or a State Government for anything which is done or intended to be done; in good faith, in pursuance of this Act or any rule made thereunder.

(2) No proceeding, other than a suit, shall be commenced against the Central Government or any officer of the Central Government a State Government for anything done or purported to have been done in pursuance of this Act or any rule made thereunder, without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the case thereof or after the expiration of three months the accrual of such cause.'

Mere reading of the section makes it clear that there is radical change in the new provision inasmuch as the proceeding by way of suit has been taken out of the purview of sub-section 2 of Section 40 of the Act and hence the question of bar of limitation raised by the counsel for the Central Government does not survive. Therefore this contention has got to be rejected.

8. The counsel for the Central Government submitted that civil court will have no jurisdiction to entertain the claim made by the plaintiff-company and therefore the decree should be set aside. This contention is based only on the provisions of sub-section 1 of Section 40 of the Act. Both the sides have cited several authorities on this point. But in view of the authoritative pronouncement of law by the Supreme Court in the case of *The Provincial Government of Madras v. J. S. Basappa*, reported in : [1964]5SCR517 , it is not necessary to refer to other decisions. The section which came up for interpretation before the Supreme Court was Section 18 of the Madras General Sales Tax Act (9 of 1839) which read as follows :

'No suit shall be instituted against the Government and no suit, prosecution or other proceeding shall be instituted against any Officer or servant of the State Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of.'

The Supreme Court held therein that this section applies to suits for damages and compensation in respect of act under the Act. It is worded in familiar language by which authorities, including Government, are protected and indemnified in respect of bona fide acts done or purporting to have been done under powers conferred by the statute. Therefore this provision cannot be pressed into service in support of the contention that the civil Court had no jurisdiction to entertain the suit. It may be stated that the counsel for the appellant Union of India relied upon certain other decisions also, but they pertained to the provisions of some other Act, language of which is quite different and hence we do not propose to refer to them.

9. In view of our aforesaid reasons the contention with regard to the jurisdiction of the civil court raised by the counsel for the Central Government has got to be rejected.

10. On behalf of the Central Government, it was contended that in this case on decree for recovery of the amount alleged to have been paid as excess amount of excise duty could have been passed inasmuch as no legal basis for claiming such a decree is established in the case. The counsel, for the respondent-plaintiff submitted that the suit of the plaintiff-company was based on the provisions of Section 72 of the Contract Act. According to him the payment of excise duty, now sought to be recovered, was made under a mistake of law and alternatively under coercion.

11. However, in the plaint there is no averment regarding the payment having been made under a mistake of law or under coercion. No basis whatsoever is laid in the pleadings for invoking the provisions of Section 72 of the Contract Act. On the basis of the pleadings, trial Court framed issues. First three issues related to the maintainability of the suit, limitation and jurisdiction of the civil Court to entertain and decide the suit. Rest of the six issues related to the legality of the assessment made on the basis of price charged by the distributors of the plaintiff-company from their customers and also related to the inclusion of cost of packing materials while determining the assessable value of the article. The controversy between the parties centred round the question as to whether the action taken by the excise authorities while determining the assessable value of article was legal and valid or

not, and if not, whether the plaintiff-company was entitled to claim refund of the amount of excise duty calculated on the basis of difference between two prices - price at which the article was sold by the distributors to the customers and the price at which the plaintiff-company sold the articles to its distributors. In view of this position there is no discussion whatsoever in the entire judgment of the trial Court as to whether the payment was made under a mistake of law or under coercion. Realising this position the counsel for the plaintiff-company submitted that the mistake of law should be culled out from the pleadings as they are. He drew our attention to the averments in paragraphs 3 and 4 of the plaint. In paragraph 3, after referring to Sections 3 and 4 of the Act it is stated :

'The plaintiff says that the prices at which excisable goods manufactured by it viz., the cameras are sold to its distributors is in law the wholesale cash price ex-factory and on which the excise duty is leviable. In spite of this legal position, the defendant and the Excise authorities at Baroda allowed clearance of the products of the plaintiff only after assessing and collecting duty on the price charged by the plaintiff's distributors to their customers and not on the wholesale cash price of the plaintiff's ex-factory to its distributors as stated above.'

In the same paragraph the plaintiff further stated that since the excise authorities insisted, it had no other alternative but to declare the price charged by its distributors as the assessable value of the article in question. In paragraph 4 of the plaint reference to the decision of the Supreme Court in 'Voltas' case (supra) is made and then it is stated :

'The plaintiff, therefore, again represented the matter to the Excise authorities at Baroda by filing a revised price list and asking them to approve the price at which it was selling its products to its distributors ex-factory vide its covering letter No. 868 dt. 1-2-73 enclosing the revised price list.

Reading of the plaint on the contrary makes it clear that the plaintiff-company all the while was never under a mistake of law. It appears from the pleadings that the plaintiff right from the beginning asserted as to what was the correct legal position. According to the plaintiff the correct legal position was that the wholesale cash price ex-factory can be the basis for the levy of the excise duty and not the price

charged by the distributors from their customers. The plaintiff made further representation after the judgment of the Supreme Court in Voltas' case (supra) and the underlined sentences make it abundantly clear that the plaintiff was never under a mistake of law. The plaintiff after the judgment of the Supreme Court asserted that what was its belief as regards the position of law was now even confirmed by the Supreme Court. In view of this state of pleadings, it cannot be said that the plaintiff has pleaded that the payments were made under a mistake of law.

12. What is a mistake 'Mistake' lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitled the party paying the money to recover it back from the party receiving the same. Therefore, the payment which may not be legally due, and which could not have been enforced at law, if made under a mistaken belief, that alone can be said to have been made under a mistake of law. Here the reading of the plaint makes it clear that as far as the plaintiff-company was concerned, it was never under any mistaken thinking and there was no mistaken belief in its mind. It is the case of the plaintiff-company that right from the beginning it asserted that wholesale cash price ex-factory was the only correct basis for determination of assessable value of the goods. The thinking of the plaintiff-company was clear. There were no misgivings on this score as far as the plaintiff was concerned. This is what we find in the pleadings.

13. Let us now examine the evidence. We have been taken through the evidence of the plaintiff's sole witness B. P. Parikh, examined at Exhibit 22. In his entire deposition, nowhere it is stated that the payment of excise duty in question was made under a mistaken belief. If the payment of excise duty is proved to have been made under a mistake, then only the question of repayment of excise duty so recovered may arise. If a person makes the payment of tax with full knowledge of facts as well as law, such a person cannot have recourse to the provisions of Section 72 of the Contract Act. In such cases, mistake, if any, should be common to both. In the instant case, it is not even the case of the plaintiff-company that at any stage it was labouring under any mistaken belief of law. The plaintiff-company knew as to what was the correct position of law. The plaintiff also asserted the correct position of law. But till the decision of the Supreme Court in Voltas' case

(supra) the excise authorities did not concede to the request made by the plaintiff company.

In view of this position of pleadings as well as evidence, it cannot be said that the plaintiff was labouring under a mistake of law and the payments were made under mistake of law. Therefore, the contention that the decree passed by the trial court should be confirmed on this ground cannot be sustained.

14. The counsel for the plaintiff-company then relied upon the second plank of the provisions of Section 72 of the Contract Act and submitted that the payment should be held to have been made under coercion. Again the counsel relied upon the same averments made in paragraphs 3 and 4 of the plaint which have been referred to hereinabove. Reliance was particularly placed on the averments to the effect that the defendant and their officers insisted upon the plaintiff to declare the price of the distributors and the plaintiff had no other alternative but to declare the price charged by the distributors as the assessable value of the excisable article. In the evidence of the plaintiff's sole witness Mr. B. P. Parikh, it is only stated that they were forced to pay the duty as charged as otherwise the goods could not have been cleared without paying the duty for the price sold by the distributors to their customers and on the value of packing charges. This is the only basis to spell out the coercion. Be it realised that no issue is framed on this point. No issue has been sought by the plaintiff in this behalf. In the absence of specific and unambiguous pleadings, other side had no opportunity to meet with the case based on the allegation that the payment of excise duty in question was made under mistake or coercion. Despite this position, since the argument has been advanced on this score, we have not prevented the counsel from making submission in this behalf for the first time at this stage.

15. It is true that meaning of 'coercion' as defined under Section 15 of the Contract Act cannot be imported while interpreting the provisions of Section 72 of the Contract Act. But, that does not mean that no element of compulsion is required to be pleaded and proved by the plaintiff while invoking the provisions of Section 72 of the Contract Act. In this connection reference may be made to the observations of the Supreme Court in the case of Sales Tax Officer v. Kanhaiya Lal, reported in

: [1959]1SCR1350 at page 143 in para 27 :

'On a true interpretation of S. 72 of the Indian Contract Act the only two circumstances there indicated as entitling the party to recover the money back are that the monies must have been paid by mistake or under coercion. If mistake either of law or of fact is established, he is entitled to recover the monies and the party receiving same is bound to repay or return them irrespective of any consideration whether the monies had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like. If once that circumstance is established the party is entitled to the relief claimed. If, on the other hand, neither mistake of law nor of fact is established, the party may rely upon the fact of the monies having been paid under coercion in order to entitle him to the relief claimed and it is in that position that it becomes relevant to consider whether the payment has been a voluntary payment or a payment under coercion. The latter position has been elaborated in English law in the manner following in *Twyford v. Manchester Corporation*, 1946 Ch 236 at p. 241 where Romer J. observed :

'Even so, however, I respectfully agree with the rest of Walton J.'s judgment particularly with his statement that a general rule applies, namely, the rule, that, if money is paid voluntarily, without compulsion, extortion, or undue influence without fraud by the person to whom it is paid and with full knowledge of all the facts, it cannot be recovered, although paid without consideration, or in discharge of a claim which was not due or which might have been successfully resisted.'

The aforesaid observations were made by the Supreme Court in a case where the recovery of sales tax was challenged and the amount collected by way of sales tax was sought to be recovered. The Supreme Court approvingly cited the observations made by Romer J. and the words, 'if money is paid voluntarily, without compulsion, extortion or undue influence, without fraud' etc., are important. In the instant case, it is not shown by evidence that a particular excise officer insisted upon or compelled the plaintiff-company to file the price list indicting the price charged by the distributors of the company from their customers. Mere vague statement in the plaint that the excise officers insisted upon to declare the price of the distributors cannot be treated as sufficient pleading to spell out compulsion.

Even the plaintiff did not consider this much pleading to be sufficient and did not seek any issue on the point. In the evidence, the plaintiff's witnesses stated that they were forced to pay because, otherwise they would not have been able to clear the goods. From this statement in the evidence, it was sought to be argued that the very provision of law is such that the plaintiff was under compulsion to make the payment and therefore coercion and compulsion should be inferred and believed. We are afraid, this is not the position of law. In the instant case, it is not the case of the plaintiff that at any time, any protest was registered against the charging of the excise duty on the basis of the price charged by the distributors from their customers. There is not even a semblance of evidence of compulsion. There is only a vague statement in the pleadings that excise authorities insisted that the plaintiff should declare the price charged by its distributors as the assessable value of the article. Evidence is only to the effect that they were forced to pay, otherwise they would not have been able to clear the goods. Because the provision of law is that the goods manufactured by a manufacturer cannot be cleared without the payment of excise duty, it cannot be inferred that the manufacturer was under compulsion to make the payment of duty as charged. In paragraph 26 of the aforesaid judgment of the Supreme Court, it has been in terms held that while interpreting Section 72 of the Contract Act, no distinction can be made in respect of tax liability or any other liability and therefore it is clear that whenever the provisions of Section 72 of the Contract Act are sought to be relied upon, the party must prove the mistake of law or coercion like any other fact.

16. Provisions of Rules 9(A), 9(B) and 173(B) of the Excise Rules make it clear that a party could have made payment under protest and could have sought the remedy or provisional assessment being made and the duty being paid on the basis of the provisional assessment. In the Act and the Rules, the contemporaneous remedy is provided where the assessee can lodge protest and if necessary, can insist on provisional assessment being made and make the payment on provisional basis. Thereafter when the decision is taken by the concerned officer, the same decision is subject to challenge and appeal under section 35 and it is further subject to revision under section 36 of the Act. Had there been any compulsion whatsoever, the plaintiff-company would have lodged protest and would have insisted for provisional assessment and adduced further

evidence and sought adjudication and decision of the authority concerned. At any rate the plaintiff-company would have been in a position to point out with specific details as to which of the officers compelled it to file the price list of the price charged by its distributors from their customers. In absence of any such evidence, compulsion cannot be inferred.

17. In the instant case, it is not stated nor it is the case of the plaintiff that the plaintiff ever protested and thereafter requested the excise authorities to make provisional assessment and that such request was also turned down by the excise authorities. Be it noted that the plaintiff is a public limited company having vast resources at its command and having Agfa Gavaert India Ltd., Bombay, as its sole distributor. It is also in evidence that the company has its dealing in collaboration with foreign company Agfa Gavaert. This is not case of a person hailing from rural area not knowing the position of law and likely to be easily threatened even by a show of coercive action or expression of such words. The company knew the legal position right from the beginning and made payment on the basis of the price charged by the distributors from their customers. Thus the payments were made with full knowledge of facts and the position of law. Such payments cannot be said to have been made under compulsion. Had there been a case of compulsion, the plaintiff-company would have pointed out the name of the officer concerned who insisted to file the price list of the distributors of the company. The plaintiff would have written a protest letter to the concerned officer or to the superior officer. The Company's office is situated at Vadodara and the Headquarters of the Excise Collector are also at Vadodara. The company could have drawn the attention of the superior officer about the compulsion having been made by some inferior officers. No such evidence is there. Therefore, from the state of evidence, we hold that the Company made payment with full knowledge of facts and from the evidence on record it cannot be said that the plaintiff company made the payments in question under coercion.

18. The counsel for the plaintiff-company cited various authorities to show that 'coercion' as defined under section 15 of the Contract Act is not necessary to be proved while invoking the provisions of Section 72 of the Contract Act and also cited some authorities to canvass the proposition that once the tax paid is held to

be illegal, the payment of any amount in lieu of such tax should be held to be coercive recovery. As far as the first proposition is concerned, we agree that there should be some element of compulsion and coercion should not be understood as defined in Section 15 of the Contract Act. But as discussed hereinabove, in this case necessary compulsion is neither pleaded nor proved. In support of the other proposition - that once the tax is held to be illegal, the recovery of such tax itself should be held to be coercive - the number of cases decided by various High Courts have been cited. We do not propose to discuss these authorities for the simple reason that in *Kanhaiya Lal's case* (Supra), the Supreme Court has in terms held that there cannot be any distinction between the tax liability and other liabilities. Therefore, the plaintiff to succeed in a claim for refund of tax amount, must prove that the payment was made under mistake of law or under coercion. If the plaintiff fails to prove either of the two, the claim of the plaintiff must fail.

19. In fact in the instant case it cannot be said that there was any force or compulsion whatsoever. Like all other manufacturers of excisable articles, the plaintiff company was also under legal obligation to pay the excise duty before the removal of the goods from factory premises. The plaintiff-company knew that the basis of determination of assessable value of excisable article in question for the purpose of levy of excise duty was not correct and was not in conformity with the provisions of law. In such a situation, like all other manufacturers, plaintiff had two courses left open to it - file objection, register protest, make payment under protest, seek provisional assessment, get the matter adjudicated, carry the matter in appeal and then in revision before the Central Government - a complete legitimate course which could have been adopted by the plaintiff-company, as laid down under the provisions of the Act and the rules. But admittedly not a single step in this direction is taken by the plaintiff-company. It is not even the case of the plaintiff-company that it had chosen to adopt this course but it was prevented by any of the excise officers from pursuing this course. Another course left open to the plaintiff-company was to remove the excisable goods from the factory after payment of excise duty on the basis of the determination of assessable value of the excisable article in question by the department. The plaintiff-company adopted this course. The plaintiff-company had two choices before it - (i) file objection as provided under law, seek provisional assessment and remove the goods or (ii) pay

duty as the determination of assessable value arrived at by the excise officers and valid. It was open to the plaintiff-company to choose either of the courses. The plaintiff-company chose to pay the excise duty on the basis of the assessable value as determined by the excise officers. It is not the case of the plaintiff-company that it had exercised its choice under compulsion from any of the excise officers. There is no evidence that any of the excise officers compelled the plaintiff-company to adopt this course and this course alone. If the plaintiff-company chose to adopt this course - a perfectly legal and valid course - of its own volition it cannot, by any stretch of reasoning, be said to be a case of compulsion and it can never be said that the plaintiff-company was forced to pay the excise duty on the basis of the assessable value of the excisable article determined by the excise officers.

20. A question may be posed, will any one voluntarily pay tax knowing that it is illegal One may not. But all the same if the assessee has not to bear the burden of the tax, he may not like to join issue with the excise authorities. It is a trite knowledge that the incidence of excise duty, for that matter incidence of all the indirect taxes, is always passed on to the consumers of the commodity in question. The manufacturers, who pay the amount of excise duty to the Revenue, never suffer the burden of the same. In the instant case, it is not even the case of the plaintiff-company that it had to bear the burden of excise duty even to the extent of one rupee. In a situation like this, where the manufacturer or the businessman is in a position to pass on the burden to the consumers, he would not like to take cudgels with the authorities and that is the only pragmatic business-like approach which would usually be adopted by a prudent businessman. In fact in real life and even according to law, it is not he (the manufacturer) who pays such indirect taxes. It is his 'hand' which pays the tax. He puts his hand in the pocket of somebody else (i.e. the consumers) and takes out the amount of tax and pays the same to the Government. All this is done by him under the cover of provisions of law. In the instant case also, the plaintiff-company appears to have acted in an utmost business-like pragmatic manner. Why bother, so long as what one is required to pay to the Revenue could be legitimately recovered from the people Even if the recovery is unlawful, keep the face smiling (the plaintiff-company is dealing in photographic cameras) and pay it since

ultimately somebody else is to bear the burden. This appears to have been the stance adopted by the plaintiff-company. A purely pragmatic and business-like approach. Had the approach been otherwise, it would have called for scrutiny.

21. Therefore both these grounds, payment made under mistake of law or under coercion, have not been made out in the pleadings. There is no issue on this point and therefore there is no discussion whatsoever in the judgment of the trial court. But in view of the fact that the plaintiff-company sought to make out a case on these two grounds we ourselves have perused the pleadings and the evidence on the point and on the reappreciation of evidence, we have come to the conclusion that no case regarding payment made either under mistake of law or under coercion has been made out by the plaintiff-company.

22. In view of this position, can the decree passed by the trial court be sustained as discussed hereinabove. The trial court has merely examined the legality or otherwise of the actions taken by the officers of the Excise Department. The trial court after holding that the action taken by the officers of the Excise Department was illegal and not in conformity with the provisions of the Act, straightaway came to the conclusion that the declaration sought for be given and the amount claimed by way of refund be directed to be repaid. The amount of tax could have been ordered to be repaid only if the plaintiff had been able to show that its case fell within the four corners of Section 72 of the Contract Act. If the plaintiff paid the amount of tax not under a mistake of fact or law nor under any coercion or compulsion, he would not have any right to claim the refund of the amount so paid. As discussed by us hereinabove, in this case the plaintiff has failed to prove that the alleged excess amount of excise duty was paid by it under a mistake or under coercion and hence the trial court committed an error in directing the refund of the payment.

23. Then the next question arises as to under these circumstances, was it proper for the trial court to pass the order of declaration The declaration to the effect that the decision and action of the officers of the Excise Department in levying and charging excise duty from the plaintiff on the value at which the products, i.e., cameras, were sold by the plaintiff's distributors to their customers would, in the

facts and circumstances, become a futile declaration inasmuch as even if such a declaration is granted, the plaintiff having not proved the fact that the amount was paid either under mistake or under coercion would not be entitled to get the refund of the same. The relief of declaration is a discretionary relief and the court normally does not grant futile declarations. In this view of the matter, in our opinion, the trial court committed an error in giving declaration as stated above.

In the above view of the matter the trial court has gone completely wrong in ordering the appellant to refund the amount in question and in decreeing the suit of the plaintiff with costs. This part of the judgment and order passed by the trial court cannot be sustained in view of the reasons and finding given by us hereinabove.

24. Realising the aforesaid position, the counsel for the plaintiff-company requested that the matter be remanded to the trial court for recording further evidence on the question that the payment was made under mistake of law or under coercion. It may be noted that as far as the payment under mistake of law is concerned, there is no pleading worth the name. Even by stretching the reasoning, it is not possible to say that there is any averment in this connection. As far as the question of coercion is concerned, there is vague averment to the fact that there were some circumstances under which the plaintiff-company was required to file the price list as per the prices charged by the distributors from their customers. Pleadings in this connection is also not clear and sufficient. In this state of pleadings in the plain remand would serve no purpose whatsoever. Ordinarily in order to do justice the appellate court would and normally should exercise powers of remanding a matter. In the instant case, by remanding the matter which ends of justice are to be served It may be noted that excise duty is an indirect tax. The burden of the duty is always passed on the consumers. It is not the case of the plaintiff-company that the burden of the duty even to the extent of one rupee had to be borne by the company itself. It can never be so because every manufacturer is legitimately entitled to pass the burden of duty on to the wholesaler and the wholesaler in turn will pass on the same to the retailer who will ultimately pass it on to the consumers. Therefore this is not the case where the plaintiff has ultimately suffered the injury. The sufferer of the injury are the numerous consumers of photographic cameras, the excisable article in question. By

remanding the matter, would it be possible to wipe out the injury suffered by the numerous consumers. If that is possible then only the purpose of remand would serve the ends of justice. If this is not going to happen, then we see no reason as to why the matter should be remanded. The plaintiff-company has not expressed even remote possibility of its intention to refund the amount or to utilise the same for the benefit of the consumers of the article in question. Hence the remand of the matter may serve only one purpose - unjust enrichment of the plaintiff-company at the cost of numerous consumers of photographic cameras, mainly belonging to middle class strata of the society and that too with the help of the orders of the court, which we would like to avoid so long as we can.

25. The trial court has also decreed the suit for a sum of Rs. 13,778 on account of the fact that cost of packing material was included in the assessable value of the excisable article. The trial court relied upon the decision of this High Court in the case of Alembic Glass Industries Ltd. v. Union of India and another, reported in 21 GLR 524 : (1978 E.L.T. 18). In paragraphs 17 and 18 of its judgment, the trial court has discussed the point regarding the inclusion of cost of packing materials in the assessable value of the excisable article and it has incidentally relied upon the judgment of the Madras High Court also in the case of E.I.D. Parry Ltd. and another v. Union of India, reported in 1978 E.L.T. J-18, wherein the Madras High Court has proceeded on the footing that the packing cannot be regarded as a process incidental or ancillary to the completion of the manufactured product and hence it was held that the cost of packing of the excisable article, i.e., fertilizer in that case, cannot be included in the assessable value of the commodity. The same view was taken by the Division Bench of this High Court in Alembic Glass Industries (supra) and Second Golden Tobacco case (1980 E.L.T. J-311; 22 GLR 440). Both these decisions have been in terms overruled by the Full Bench of this High Court in the case of Calico Mills v. Union of India, reported in : 1982(10)ELT821(Guj) .

26. The argument that the cost of packing materials cannot be included in the assessable value of the excisable goods arises from the confusion as regards the incidence of duty and the machinery provided thereof. In this connection the nature of excise duty should be properly understood. Excise duty is a tax on the

manufactured goods. Entry No. 84 of Schedule 7 of the Constitution also makes it clear that the excise duty is a tax on goods manufactured in India. The Supreme Court in the case of *Ramkrishna Ramnath v. Kamptee Municipal* : 1978(2)ELT284(SC) in terms held that excise duty is a tax on manufactured goods. Again in the case of *R. C. Jall Parsi v. Union of India*, reported in : AIR 1962 SC1281 , in paragraph 7 thereof, the Supreme Court, after considering the decisions of the Federal Court and the Privy Council, has observed as follows :

'..... It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not effect the essence of the duty, but only relates to the machinery of collection for administrative convenience.....'

Thus it would be clear that the method of realising the duty must be left to the wisdom of the Legislature. A duty of excise may be collected at such time, in such manner and from such person as may be convenient or most beneficial to the Revenue. The Legislature has not fixed any ceiling on the incidence of duty. It is open to the taxing authorities to levy the excise duty even on the basis of quantity. In this case the duty could have been imposed and levied on the basis of quantity, that is, per piece of camera. While charging duty on the basis of quantity, if the excise duty is levied, say, at Rs. 25 per piece and if it is enhanced to Rs. 50 could it have been said that it is not within the purview of the powers of the Legislature In this context, the Full Bench of this High Court has held in *Calico Mills'* case (supra) as follows :

'..... There is therefore no escape from the conclusion that though separate numbers are given in fact the two sections are two incomplete parts of the whole charging section composed of sections 3 and 4 read in a conjoint manner as two supplementary parts of a complete Code. Once this view is taken there remains no difficulty. The extent of the duty in the sense of the burden of duty is not justiciable. It is not for the Court to say how heavy the burden should be - it being within the

power sphere of the Legislature. Since neither the Constitution nor the Act prescribes any upper limit of the burden of levy, Parliament can impose levy of such an order as is deemed appropriate by it. An illustration will make the point clear. Say the ad valorem rate is 10% of the value of excisable goods, the valuation being made by including cost of packing material. Can the Parliament not levy 20% and exclude the cost of packing 10% of cost of article plus packing might be much less than 20% of value sans cost of packing. In other words the mode of computation in so far as the value of packing material is included serves only to enhance the burden of levy. But the levy in essence retains its nexus with the manufacture of the excisable article only.....'

Thus so long as the nature of the duty charged retains the character of excise duty, it is within the competence of the Legislature to include the cost of packing materials for the purposes of determination of the assessable value of the commodity. In this view of the matter, the finding given by the trial court as regards the cost of packing materials and the decree passed on that count is erroneous and not in conformity with the law laid down by the Full Bench of this High Court in Calico Mills' case (supra). The trial court clearly erred in granting declaration to the effect that the action of inclusion of cost of packing materials in the assessable value of the excisable article by the officers of the Excise Department was illegal and void. This finding is not correct and hence the said finding also requires to be reversed and set aside. Therefore, this part of the decree passed by the trial court also will have to be reversed and set aside.

27. Can the decree passed by the trial court granting relief of tax paid be allowed to be maintained Will it not be necessary to mould the relief if decree passed in favour of the plaintiff is to be maintained These questions have arisen and have been argued by both the sides on the assumption that the plaintiff has successfully established its case under section 72 of the Contract Act. The counsel for the respondent plaintiff submitted that while deciding the suit filed by the plaintiff in which the refund of the amount of tax recovered unlawfully is claimed the court will have no jurisdiction whatsoever to refuse the relief of refund on equitable considerations. Various authorities of different High Courts have been cited to show that even in writ jurisdiction the Court has not refused the relief of refund of

tax paid by the plaintiff-manufacturers. On this basis it was sought to be contended that when such is the view taken by various High Courts in different cases while exercising writ jurisdiction, this Court should not take a different view while sitting in appeal against a decree passed in a suit. As far as the writ jurisdiction is concerned, the point is covered by the decision of the Full Bench of this Court in Calico Mills' case (supra). In that case, the petitioner-company had filed writ petition praying for appropriate declaration and direction to the effect that the so-called post-manufacturing charges cannot be included in the assessable value of the excisable article. This Court did not sustain any of the contentions urged by the petitioner and in paragraph 21 of the judgment, the Court observed as follows :

'The curtain cannot be dropped till we observe that in case we had sustained by of the contentions urged by Counsel for petitioners we would have directed refund of the amount to the buyer or directed the same to be deposited in a Bank Account for the benefit of the consumers instead of allowing the petitioners to secure unjust enrichment.'

Therefore as far as the writ jurisdiction is concerned, we are bound by the law laid down by the Full Bench of the Court. We ourselves also believe that in a situation where the plaintiff himself has not suffered injury and simply on technical legal grounds claims refund and wishes to be compensated without expressing slightest intention or desire to refund the amount to the consumers who have ultimately suffered the incidence of the tax, it would be quite just and proper for the court to refuse the relief of refund of the amount so claimed. Thus far there is no difficulty. Even the counsel for the respondent-plaintiff could not seriously dispute the proposition that in a writ jurisdiction the court may exercise its discretion and even go to the extent of refusing the relief of refund of the amount of tax recovered by the State which might have been eventually declared illegal. However, it is contended that the court will not have any discretion to refuse the relief of refund of amount of tax - the tax which eventually may be declared unlawful, while deciding an appeal against a decree passed in a suit. The basis of this contention is that in a suit filed by the plaintiff, once his claim is established, relief prayed for by him must be granted by the court. The court cannot allow itself to be influenced by equitable considerations. In this connection reliance was placed on the decision

of the Supreme Court in *Kanhaiya Lal's case* (supra) and on the decision in the case of *M/s. D. Cawasji & Co. v. State of Mysore and another*, reported in : 1978(2)ELT154(SC) . The counsel for the respondent-plaintiff relied upon the following observations of the Supreme Court in paragraph 10 of the judgment :

'..... 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.'

On this basis it was submitted that there is no power with the court to deny the relief claimed by the plaintiff in a suit. In writ jurisdiction, the court is called upon to exercise its power of issuing high prerogative writ and the court may in its discretion refuse to issue such writ. But while in a suit, the arguments proceeds, the court will no jurisdiction to deny relief. We are bound by the law laid down by the Supreme Court. But the question here is not that of denial or relief prayed. The question is, even in such cases will the civil court have no jurisdiction to mould the relief and to pass the consequent decree accordingly. This question never arose before the Supreme Court in the aforesaid cases and for the reasons to be recorded hereinafter these decisions are of no help to the respondent-plaintiff.

28. New situations create novel and unprecedented problems. Hence unprecedented solutions to meet with the new situations will have to be found out. In a case like this the plaintiff being a manufacturer initially pays the excise duty. Like all other manufacturers he passes on the burden of the excise duty to the consumers. In respect of the amount of indirect taxes, the burden of the same is always passed on to the ultimate consumers. This position becomes abundantly clear if one refers to the provisions of Section 64A of Sales of Goods Act which makes provision for increase and for remission of certain amount realised by the businessman at the time of sale of goods in question, in the event of the increase or decrease of the amount of tax meanwhile. As far as excise duty is concerned, in the case of *R. C. Jall Parsi* (supra) the Supreme Court has held that it is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer.

29. In fact it is not 'He' - the manufacturer who pays the tax. It is his 'hand' which pays the tax. His hand moves; by a chain of reaction, the hand ultimately gets inserted into the pockets of ultimate buyers - the consumers of the commodity in question. The consumers allow their pockets to be cleared - many a time with tears in their eyes and rarely with smile on their faces - but always under belief that the 'Hand' has an authority of law and it will pass on the amount of tax so collected to the Government and the 'Hand' will not turn to 'His' own (the manufacturer's) pocket. It is not even legally permissible for 'him' (the manufacturer) to turn his 'Hand' towards his own pocket and retain the amount. Section 64A of the Sales of Goods Act indicates that the buyer is entitled to remission of the amount in case the amount of tax is decreased; similarly buyer will be under an obligation to pay higher amount in case the amount of tax is increased meanwhile. Incidentally it may be noted that excise duty is specifically mentioned as one of the taxes in this section in reference to which the provision is made. In fact it would be against the basic canons of ethics and morality that such a 'hand' should turn to 'his' (manufacturer's) own pocket. If this is permitted, it will be difficult to distinguish between 'pocketing simpliciter' and 'pick-pocketing under the cover of law'. Atleast we confess our ignorance and frankly state that we are unaware of any civilised system of laws which permits the 'hand' of the manufacturer or the businessman as the case may be to take out the amount from the pockets of the consumers and then allow it to turn to his own pocket and retain the same with him. This is not permissible in England, America and Australia, the countries having Anglo-Saxon system of laws. (See : [1959]1SCR1350 ). 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

30. Having posed the questions in plain language and after understanding the question properly let us turn to the provisions of section 72 of the Contract Act and see what object is sought to be achieved thereby. Section 72 of the Contract Act

occurs in Chapter V of the Contract Act. The chapter deals with relations resembling those created by the contract and not by or under the contract as such. (see *State of West Bengal v. M/s. B. K. Mondal and sons*, reported in : AIR 1962 SC779 ).

31. Therefore, 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. In this connection following two passages from two different English decisions may be seen :

'..... any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep.' (Per Lord Wright in 1974 A.C. 32 *Bibrosa v. Fairbairn*)

'It is no longer appropriate to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires.'

(Per Lord Denning in *Nelson v. Larholt* (1948) I.K.B. at p. 339)

The aforesaid observations made in the English cases have been approvingly quoted by the Supreme Court while explaining the juristic basis of provisions contained in Chapter V of the Contract Act, in the case of *Mulamchand v. State of Madhya Pradesh*, : [1968]3SCR214 . 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.

32. In this situation, if the relief of refund prayed for by the plaintiff is denied straightaway, it may be argued that the State which had no authority of law to recover the amount of tax will retain the same and in that case the State will be unjustly benefited. Therefore, in either situation, if the relief prayed for is granted the intermediaries, that is, the businessmen and/or the manufacturers will be unjustly benefited; on the other hand if the relief prayed for is denied the State which had no authority to recover the amount of tax will be unjustly benefited. It may be noted that in England, America and Australia, such an argument will never be countenanced for the simple reason that in these countries, amount of tax paid under a mistake of law is not refundable at all (Sec - S.T.O. v. Kanhaiya Lal - : [1959]1SCR1350 ). Now consider the position of ultimate consumer who has suffered the incidence of tax; is he not entitled to relief of restitution

33. It is a trite knowledge that the substantial portion of the public revenue is recovered through indirect taxes. The amount collected by the Central and State Government and even local authorities every year through indirect taxes runs into several thousand crores of rupees. The half-clad, half-clad, under-privileged teeming millions of this country and the middle-class citizens who are hard-pressed an account of continuous rise in cost of living index, pay the taxes on the commodities and articles of day-to-day consumption not for the purposes of being retain by the manufacturers and the businessmen nor do they pay the taxes so that the amount once collected from them be refunded to the businessmen or the manufactures in the event of the recovery of the tax being declared unlawful. They pay the taxes in the hope and belief that the objective enshrined in the Constitution of establishing an egalitarian society will be achieved, if not immediately, atleast during the course of a decade or two. Thus the hopes and aspirations of the citizens who suffered the burden of excise-duty and other taxes will be frustrated if the amount is ordered to be refunded to the manufacturer or businessmen. Not only that, but they will have to bear the burden of further taxation in future or will have to suffer the consequences of most imperceptible and inequitable form of taxation, that is, deficit financing.

34. While resolving this question of prevention of unjust enrichment either that of State or that of manufacturers and/or businessmen, this socio-economic perspective as got to be kept in mind by the Court. The courts cannot be oblivious of the socio-economic consequences of its decision and cannot ignore the socio-economic realities of the life of the nation. 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. We cannot forget that the people have solemnly resolved to constitute this country into a Sovereign Socialist Democratic Republic. Now in this background the question be further examined.

35. If the relief of refund of the amount prayed for by the plaintiff is straightaway granted, will the object underlying the provisions of Section 72 of the Contract Act be achieved Will there be restitution and prevention of unjust enrichment If yes, the decree must follow. If no, will it not be the bounden duty of the Court in order to do complete justice and in order to achieve the underlying object behind the provisions of Section 72 of the Contract Act that the relief be suitably moulded and the appropriate consequential decree be passed so that the sufferer of the injury is compensated If the relief of refund prayed for the by the plaintiff is granted straightaway without moulding the relief, following results will follow :

1. The object underlying the provisions of Section 72 of Contract Act will not be achieved, i.e. X the consumer who suffers the injury on account of mistake will not be compensated, but Y i.e. the manufacturer or businessman who has suffered no injury whatsoever and who is a party to the commission of mistake will stand to gain. Manufacturer or businessman will got the refund of the amount to which he is not really entitled to. Thus the very object of Section 72 of the Contract Act, prevention of unjust enrichment and/or restitution will be frustrated.

2. Numerous consumers spread over the entire country will not only be left with the scars of injury inflicted upon them on account of the unlawful recovery of the tax but will also be subjected to further doses of indirect taxation or will have to suffer consequences of most inequitable and imperceptible form of taxation - deficit financing. An insult will be added to the injury.

3. On account of the orders of court - the court which is respected by the people because they believe that it does justice - a situation will be created where the intermediaries who collect the tax and pay the same to the Government will stand to get a windfall profit at the cost of half-clad, half-fed, underprivileged teeming millions of this country and at the cost of hard-pressed middle class citizens.

4. As and when the consumers come to know that the tax paid by them is repaid to the manufacturer or businessmen by the Government, they may come forward and claim refund from the manufacturer or businessman on the same ground that the tax recovered from them was paid under a mistake and therefore they are entitled to get the refund of the same. On account of the fact that the consciousness amongst the consumers is slowly but surely taking shape, it is not unreasonable to think that such litigations may crop up.

As discussed hereinabove, if the decree is refused, the State which had no authority of law to recover the tax would be in a position to retain the amount. In our liberal political set up this may not be considered proper by many. (However, it may be repeated, in America, England and Australia, amount of tax paid under a mistake of law is not refundable. See : [1959]1SCR1350 .) On the other hand, if the relief as prayed for by the plaintiff is granted without moulding the same in appropriate form, the aforesaid consequences would arise. Such a situation would never have been contemplated by the Legislature. Injury is suffered by X (consumer) and compensation to be paid to Y (manufacturer), why This is not the object of Section 72 of the Contract Act. Look at the irony of the situation. Section 72 of the Contract Act aims at prevention of unjust enrichment. The provisions of this very section are called in aid for securing unjust enrichment. Can the conscience of any civilised nation tolerate this

36. By the very nature of the complexity of relations in the modern day society, the Legislature is incapable of contemplating all possible circumstances which may arise in future litigations and consequently the Legislature is incapable of laying down the procedure to be followed by the courts in such situations. But even in such situation the Court is not powerless. The Courts in India are guided by the principles of justice, equity and good conscience. In such situation the courts have

inherent powers, nay, it is the duty of the courts to exercise its inherent powers, so as to meet the ends of justice and prevent the abuse of the process of court. The court must see to it that the object of the provisions of Section 72 of the Contract Act - prevention of unjust enrichment and restoration of money to the person to whom it belongs - is not frustrated.

37. In a somewhat similar situation, the Supreme Court, in the case of *Nawabganj Sugar Mills v. Union of India*, reported in 1976 SC 1152, had an occasion to deal with the question of the inherent powers of the Court. In that case the question was as to how the excess amount recovered by the millers in the form of market price from the consumers of sugar, may be refunded to the ultimate consumer. In that context the Supreme Court has approvingly quoted the proposition - 'The inherent power has its roots in necessity and its breadth is coextensive with necessity'.

After pointing out the difficulties of small claimants who suffered the wrong, the Supreme Court observed that, the wrong may go without redress, and therefore, said, 'If there is to be relief, we must construct here by simple legal engineering'. Then the Supreme Court issued a complex of directions so as to meet the needs of the millers and the range of buyers from whom higher prices were charged. This decision of the Supreme Court clearly lays down the principle that in such a situation the court is not powerless; the court can exercise its inherent powers and mould the relief which may be granted and pass appropriate consequent decree accordingly. In the cases of *Kanhaiya Lal* and *D. Cawasjee* (*supra*) relied upon by the counsel for the respondent - plaintiff, the question never arose as to whether the court can or cannot exercise its inherent powers so as to mould the relief and pass decree accordingly. Therefore, the reliance placed by the counsel for the respondent-plaintiff on these decisions is of no help to him in this connection.

38. The counsel for the respondent-plaintiff has not pointed out to us any decision or any provision of law to show that in such a situation the court cannot exercise its inherent powers to mould the relief and pass appropriate decree accordingly. In above view of the matter, in such a situation wherein by granting the relief or by refusing the same - either of the party is to secure unjust benefit and the object of

restitution of benefits to the persons to whom the money belonged cannot be achieved - the inherent powers of the court can and should be exercised for moulding the relief and for passing the decree accordingly so as to prevent the unjust enrichment and see that the benefit reaped in terms of money is restored to the ultimate consumer to whom it belonged.

39. How the relief may be moulded and what decree can be passed in such a situation The Full Bench of this High Court in Calico Mills' case (supra) has given an indication as to what may be done by the Court in such cases. It is observed to the effect that the amount of tax may be directed to be refunded to the buyer or the same be directed to be deposited in a bank account for the benefit of the consumers instead of allowing the petitioner to secure unjust enrichment. In such situations, in our opinion also, the court should direct the defendant state to deposit the amount to be refunded in a bank account to be opened for the benefit of the consumers. Such an account may be opened in the joint name of the plaintiff and the defendant or in the name of either of them as it may be found appropriate by the Court having regard to the facts and circumstances of each case. The parties should be enjoined with a duty to refund the amount to the ultimate consumer if and when such a claim is made by the consumers. In case, the claim of the consumers cannot be reasonably ascertained and the amount remains unutilised in the bank account, the same should be ordered to be held in Trust for the benefit of the consumers, and should not be permitted to be used in any other manner without the permission of the court.

40. Now it may be examined, if the relief is moulded as aforesaid and the appropriate decree is passed accordingly, what will be the consequences :

1. The object underlying the provisions of Section 72 of the Contract Act will be achieved, namely, unjust enrichment either that of State or that of manufacturers will be prevented and the money will be restored to the persons to whom it belonged.

2. On account of the accidental position of becoming a collecting agency of tax in question, the manufacturers or businessmen will not stand to receive any amount to which they are not really entitled to. In fact no honest manufacturer or

businessman would like to touch such money and utilise it for his own private gain, if he is guided by his conscience and not by the motives of greed and avarice.

3. The respect for the court in the minds of people will be enhanced because the people will feel that the court does not stand for technical compliance but it passes orders by which no one stands to gain unjust benefits without suffering any injury whatsoever simply on account of accidental position in society.

4. Multiplicity of litigation will be avoided. Future litigation which may be initiated by and on behalf of the consumers will be prevented, and the consumers will get the relief without resorting to time consuming and expensive litigation.

5. Speculative litigation will be discouraged. Some of the manufacturers or businessmen when come before the court with a prayer to refund the amount of tax paid by them, they merely take a chance. They have only to incur the cost of litigation in this connection. If they succeed they may be awarded lakhs of rupees or in some cases the amount may even run into crores without there being any subsisting liability or intention to repay the same to the consumers. In the result there is likelihood of a spate of speculative litigation by the businessmen or manufacturers who may have to spend few thousands by way of cost of litigation and if they succeed they will get huge amount in return. There will be a curb on such speculative litigation.

6. If the relief is moulded and the decree is passed accordingly the manufacturer or the businessman will not suffer any injustice whatsoever. The plaintiff who may be a manufacturer or a businessman - and the Government, will have the satisfaction that the case of justice - not technical justice but substantial justice - has been served and justice to the people is not sacrificed at the altar of technicality.

7. The principles enshrined in Article 38 of the Constitution will be achieved to some extent, namely, the orders so passed shall not add to inequality of income and it will be in the direction of elimination of the inequality of income.

8. The legal system will not be exposed to the charge that it operates against unidentifiable numerous consumers of the commodity in question. It is also the duty of the State as enshrined in Article 39A of the Constitution to secure that the operation of legal system promotes justice on the basis of equal opportunity. In a situation like this where it is not possible for the numerous unidentifiable consumers of the commodity in question to go to the court of law and get the amount of tax paid by them refunded, such an order will provide them an opportunity to secure relief without resorting to expensive and time-consuming litigation.

9. Abuse of the process of court will be prevented. The manufacturer or businessman who seeks the aid of the process of the court in order to gain windfall at the cost of the injury suffered by others, will be prevented, from securing such benefits and hence the process of the court will not be abused.

10. Such an order would meet the ends of justice, meaning thereby money will be placed for the benefit of the entire class of consumers, who have suffered on account of the mistaken illegal recovery of the tax in question. There will be restitution in the real sense of the term.

41. In above view of the matter, in a situation like this, where the recovery of indirect taxes like excise duty, customs duty, sales tax, octroi duty etc., is held to be unlawful and even if the plaintiff, i.e. a manufacturer or a businessman, who pays the tax in question to the Government or to the local authority as the case may be, and who has passed on the incidence of the tax to the consumers succeeds in establishing his case, the Civil Court will have power to mould the relief suitably and give appropriate directions as the exigencies of the situation may demand, so as to prevent the plaintiff from securing unjust enrichment and to see that the benefit of the same is restored to the people to whom the money belonged. In our pinion, rather it would be incumbent upon the Civil Court to give such directions so that restitution can be secured and unjust enrichment can be prevented.

42. As discussed hereinabove we are of the opinion that in this case the plaintiff has failed to plead and prove that the payment in question were made either under

mistake or under coercion and, therefore, the plaintiff cannot invoke the provision of S. 72 of the Contract Act and hence the plaintiff is not entitled to claim relief to refund of the amount paid by it. Similarly as discussed hereinabove the plaintiff is not entitled to claim the refund of excise duty paid on the cost of packing material. Moreover as the court does not grant futile declarations the plaintiff is not entitled to the declaration prayed for. In the result we allow the appeal preferred by the Union of India, the original defendant, and reverse and set aside the judgment and decree passed by the trial court and order that the suit of the plaintiff be dismissed. The appeal is allowed accordingly with cost. Since we are allowing the appeal and dismissing the suit of the plaintiff the cross-objections are also ordered to be dismissed.

43. At this stage the counsel for the plaintiff-company prays for a certificate for leave to appeal to the Supreme Court. The case has been decided on the facts and circumstances of the case and mainly on the ground that the plaintiff has failed to establish the necessary facts entitling itself to claim the refund of the amount paid by it. In our view no substantial question of law of general importance is involved in this case and in our opinion no such question needs to be decided by the Supreme Court and hence the certificate as prayed for is refused.