# Unjust enrichment review

## The law of restitution for unjust enrichment in India

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*The law of restitution for unjust enrichment is among the most debated private law topics today. It has been invoked to justify the right to restitution in cases which fall outside the scope of contract law. Despite being well developed in many common law countries, and a part of this area of law being codified in the Indian Contract Act 1872, ss 68–72, courts in India have applied the principle of restitution for unjust enrichment inconsistently and in conflict with codified law. This paper gives clarity on this position and proposes to fill the academic vacuum in this regard.*

### INTRODUCTION

The law of restitution is an area concerned with whether a claimant can claim a benefit obtained at the expense of the claimant from the defendant.[1] It is not the same as compensation,[2] as it is not concerned with whether the claimant can be compensated for loss suffered.[3] Restitutionary remedies also differ from contractual claims such as the claim for indemnity,[4] because restitutionary liability is imposed by the law irrespective of the agreement of the parties. In fact, the law of restitution is subordinate to the law of contract since, where a contractual relationship exists, the contractual regime prevails.[5] Further, restitutionary claims differ from tort claims, as they need not be founded on the commission of any wrongdoing, although restitutionary remedies are sometimes available in the case of a wrong.[6] Where the defendant has profited from the commission

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1. *Chitty on Contracts*, 33rd edn (Sweet & Maxwell, London, 2018), [29.01]; *Great Eastern Shipping Co Ltd v Union of India* AIR 1971 Cal 150, 155.
2. See Indian Contract Act 1872, ch.VI.
3. *Ibid.*
4. *See* Indian Contract Act 1872, ch.VIII.
5. *Guinness Plc v Saunders* [1990] 2 AC 663, 697–698.
6. *Foskett v McKeown* [2001] 1 AC 102.



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of a tort[7]. The principle of unjust enrichment is that no one shall be unjustly enriched at the expense of another.[8] This paper will focus only on the award of restitutionary remedies in cases of unjust enrichment.

The specific relationship between restitution and unjust enrichment can be best understood in this manner: *restitution* is a response to an event, and the relevant event is the *unjust enrichment* of the defendant at the expense of the plaintiff. The response of the law is to reverse the unjust enrichment.[9]

In India, certain remedies for unjust enrichment are provided in Chapter V of the Indian Contract Act 1872. Chapter V deals not with the rights or liabilities accruing from a contractual relationship, but those accruing from relations *resembling* those created by a contract.[10] As such, the remedies for unjust enrichment, as provided in Ch.V are different from the remedies in contract or in tort.[11]

Despite being well developed in many common law countries, and a part of this area of law being codified in the Indian Contract Act, courts in India have applied the principle of restitution for unjust enrichment inconsistently and, in some cases, in a manner that is rather inconsistent with codified law as well as judgments of higher courts. There is an academic vacuum on how recent judgments have interpreted the law of restitution for unjust enrichment in India and where this area of law stands today. This article proposes to restate this area of law and give clarity on its position. As the controversies concerning the correct position of the law specifically lie with respect to the Indian Contract Act, ss 69, 70 and 72, only these provisions have been discussed here. It is emphasised once again that this article is concerned only with the law of restitution for unjust enrichment and not with other areas of restitution, such as restitution for wrongs.

## DEVELOPMENT OF THE LAW IN THE UK AND ITS DIVERGENCE FROM INDIAN LAW

The principle of unjust enrichment made its earliest appearances around the 6th century AD in texts attributed to Pomponius, a Roman scholar.[12] In English medieval law, restitutionary relief was available procedurally for a long time on a case-by-case basis, but the need to turn this relief into a uniform principle was never felt.[13] The first attempt to fill this theoretical vacuum was made only in the 1760s, in *Moses v Macferlan*[14] when Lord Mansfield wrote about an action to recover money which according to equity and good conscience[15] the defendant was required to refund.[16] However, this judgment and

7. *Hambly v Trott* (1776) 1 Cowp 371, 376; *Ministry of Defence v Ashman* [1993] 2 EGLR 102.
8. *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308.
9. *Supra*, fn 6, [126].
10. Indian Contract Act 1872, heading of ch.V.
11. Nilima Bhadbhade, Pollock & Mulla, *The Indian Contract Act, 1872*, 14th edn (Lexis Nexis, 2014), 1041.
12. Peter Birks, *Unjust Enrichment*, 2nd edn (OUP, 2005), 268.
13. JH Baker, "The History of Quasi-Contract in English Law", in WR Cornish, Richard Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present & Future* (Hart, Oxford, 1998), 37–56.
14. (1760) 2 Burr 1005, 1012.
15. *Ibid.*
16. *Ibid*, 1008, 1012.

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other efforts[17] to explain the basis underlying the right to restitution in the case of unjust enrichment did not lead to the birth of an independent subject of restitution. Instead, most of this literature was subsumed within the law of contract.[18]

Sir William Blackstone set the course for this area of law in the UK for the next one hundred and fifty years. He treated unjust enrichment as a contract implied in law and disagreed with the theory put forth in *Moses v Macferlan*.[19] English courts, too, disagreed with *Moses v Macferlan* and it was held as late as in 1914 that, where no contract could be implied, the plaintiff could not recover money merely because it would be fair and right that the money should be paid back to him.[20] However, Sir Henry Maine, the then legal member of the Governor's Council in India, found great dissatisfaction in the views of the likes of Sir William Blackstone and wrote:[21]

"It has been usual with English critics to identify the Quasi-Contracts with implied contracts, but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, act and circumstances are the symbols of the same ingredients which are symbolised, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a Quasi-Contract is not a contract at all."

In Sir Henry Maine's view, restitutionary remedies based on unjust enrichment fell in the domain of quasi-contracts.[22] Around the same time, India promulgated its new law on contracts, the Indian Contract Act. Chapter V of this Act was titled "of certain relations resembling those created by contract" and this chapter recognised restitutionary remedies for unjust enrichment as an area distinct from contractual laws. It is tempting to say that it was Sir Henry Maine's influence in the drafting committee which led to this position of law. The historical reasons behind the enactment of Ch.V in the Act are not well documented. However, it seems that even before the Act came into being, Indian jurisprudence was already in favour of treating restitutionary remedies as quasi-contractual. For example, in 1867, Indian courts had adopted a view contrary to the theory of implied contracts in *Rambux Chittangeo v Modhoosoodun Paul Chawdhry*,[23] wherein it was held that the Indian system, unlike the English system, could profitably abandon all talk of implied contracts. The enactment of the Indian Contract Act led to the branching out of the Indian law on restitution for unjust enrichment from the English law, as English law continued to follow Blackstone's understanding of implied contract and India treated this remedy as falling within the domain of quasi-contracts. This distinction is very pertinent from the

17. See, eg, William David Evans, "An Essay on the Action for Money Had and Received", in *Essays on the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes*, (1802) 1; republished (ed. LD Smith, PBH Birks and FD Rose) [1998] RLR 1.

18. See, eg, Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* (Gould and Banks, 1807); Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (G and C Merriam, 1826); Stephen Martin Leake, *The Elements of the Law of Contracts* (Nabu Press, 1867).

19. William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1768), 3.158–3.165.

20. *Sinclair v Brougham* [1914] AC 398.

21. Henry Maine, *Ancient Law* (John Murray, 1861), 343–344.

22. David J Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001), 284.

23. (1867) 7 WR (India) 377.

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point of view of this article, as it led to significant differences in the way courts in the UK and India interpreted these principles.

Back in the UK, the law of restitution started moving away from Sir William Blackstone's understanding, and judgments since the late 1930s started recognising the validity of Lord Mansfield's views from *Moses v Macferlan*.[24] In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Harbour Ltd*[25] Lord Wright opined:

"It is clear that 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 or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

The position on unjust enrichment as a foundation of a claim in restitution finally became clear when it was recognised in the English case of *Lipkin Gorman v Karpnale Ltd*,[26] wherein a four-stage test[27] was adopted for restitutionary claims:

(1) Has [the defendant] benefited or been enriched?
(2) Is this enrichment at the expense of the plaintiff?
(3) Is the enrichment unjust?
(4) Are there any defences, ie, is there nevertheless reason of policy for denying the remedy?

In sharp contrast to the neglect previously shown to this area by English law, unjust enrichment as a cause of restitutionary claims became a highly debated private law subject after *Lipkin Gorman*. With this judgment, the subject had received judicial blessing.[28]

Today, English law has joined that of US jurisdictions,[29] Australia,[30] Canada,[31] Scotland,[32] France[33] and India[34] in treating unjust enrichment as a ground for restitution. However, the English law on this point is largely judge-made law, unlike that in jurisdictions such as India, where it is legislatively enacted. The test developed by the English courts in such cases is unique and requires the fulfilment of two elements: some form of payment or

24. See, eg, *Berg v Sadler and Moore* [1937] 1 KB 158; *Morgan v Ashcroft* [1938] 1 KB 49; *United Australia Ltd v Barclay's Bank* [1941] AC 1; *Nelson v Larholt* [1948] 1 KB 339.
25. [1943] AC 32, 61.
26. [1991] 2 AC 548.
27. *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.
28. In fact, some other common law jurisdictions were much ahead of English Law. See, eg, *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725; [1954] 3 DLR 785 (Canada); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (Australia).
29. The American Law Institute's *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* (American Law Institute Publishers, 1936), § 1 (and comment (c) thereon); George E Palmer, *The Law of Restitution* (Little Brown, 1978).
30. *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221. For an important attack on the validity of the principle in Australia, *see* Gummow J *in Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516. But *cf* J Beatson and GJ Virgo, "Contract, Unjust Enrichment and Unconscionability" (2002) 118 LQR 352.
31. *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725; [1954] 3 DLR 785; *Pacific National Investments Ltd v Corp of the City of Victoria* [2004] SCC 75; [2004] 3 SCR 575.
32. *Morgan Guaranty Trust Co of New York v Lothian RC* 1995 SC 151; *Shilliday v Smith* 1998 SLT 976, 978.
33. HC Gutteridge and RJA David, "The Doctrine of Unjustified Enrichment" (1934) 5 CLJ 204.
34. Indian Contract Act 1872, Ch.V.

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transfer by the claimant to the defendant (*enrichment*), and an *unjust factor* involved in such transfer which vitiates the defendant's right of retention.[35]

To prove *enrichment*, the claimant must point to the provision of some quantifiable payment or service which a reasonable person would consider to have value. Such enrichment must be coupled with a judicially recognised *unjust factor*.[36] These unjust factors are, without attempting to be exhaustive, mistake, duress, undue influence and failure of consideration.[37] There are also some other unjust factors, such as ignorance/powerlessness, free acceptance, *Woolwich* claims,[38] contribution/reimbursement, and so on, whose existence and nature are contested by some.[39] These unjust factors might seem akin to the bases for vitiating contracts but it is clarified that, where there is a valid, subsisting contract, the parties are bound by it and any payment made under this contract will not be subject to restitution.[40] In order to bring any claim of restitution on the grounds of unjust enrichment, the claimant must first set aside any subsisting contract.[41]

## EVOLUTION OF INDIAN LAW AND RESTATEMENT OF ITS CURRENT POSITION

In India, unjust enrichment as a foundation of claim in restitution is usually seen in cases which fall within Chapter V, ie, ss 68–72, of the Indian Contract Act.[42] To understand the correct position of the Indian law on this point, it is necessary to address some pressing themes.

### Differences from English law

As discussed above, the Indian law on restitution for unjust enrichment had branched out from English law in 1872. However, as has been the practice with commercial cases in India, English cases have been time and again cited by parties before the Indian courts. To their credit, the Indian High Courts in the pre-independence era and around the 1950s proceeded very carefully when the English position was cited before them in this area of law. In some very well-written and coherent judgments of the time, the courts explained the India-specific law on this subject matter and differentiated it from the English position, as discussed below.

The first point where Indian law differs from English law can be noted by understanding s.69 of the Act. Section 69 provides that a person, being interested in the payment of money, which another is bound by law to pay, is entitled to be reimbursed by the latter if

35. Richard Farnhill, "Getting Your Own Back", *Practical Law*, 9 February 2011: uk.practicallaw.com/0-504-7182.

36. *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch).

37. *Test Claimants in the Franked Investment Income Group Litigation v IRC* [2012] UKSC 19; [2012] 2 AC 337.

38. *Woolwich Equitable Building Soc v IRC* [1993] AC 70.

39. V Niranjan, "An Unfortunate Judgment: India and the Law of Restitution for Unjust Enrichment", *India Corp Law*, 2 January 2012: indiacorplaw.in/2012/01/unfortunate-judgment-india-and-law-of.html.

40. *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm).

41. *Kyle Bay v Underwriters* [2007] EWCA Civ 57; [2007] Lloyd's Rep IR 460.

42. *Renusagar Power Co Ltd v General Electric Co* AIR 1994 SC 860, 899.

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he has paid it.[43] This section lays down a wider rule than that required by English law.[44] While English law requires the claimant to show a detriment capable of being quantified,[45] the word *interest* in s.69 also includes the *apprehension* of any loss or inconvenience, and not merely the actual detriment capable of being assessed in money.[46]
As noted in *Nallaya Goundar v Ramaswami Goundar*:[47]

"The interest [under s.69] may range all the way from an honest belief that one's own interest requires that the payment should be made though it may not be such as would stand the test of a judicial trial,[48] to a legal proprietary interest in the property in respect of which the payment is made.[49] It is a question of fact to be decided in the circumstances of each case."

Another major divergence from English law is seen in s.70. Section 70 requires restitution where a person does a thing for another not intending to act gratuitously and the other enjoys it.[50] One of the earliest Indian judgments on this provision is the celebrated case of *Damodara Mudaliar v Secretary of State for India*.[51] The three conditions required under s.70 to establish a right of action at the suit of a person who does anything for another were stated as:

(i) the thing must be done lawfully;
(ii) it must be done by a person not intending to act gratuitously; and
(iii) the person for whom the act is done must enjoy the benefit of it.

The court noted that the position of English law at the time was very restricted in its scope[52] when compared with s.70.[53] Section 70 does not make it essential for the act to have been necessary and done in pressing emergency. Therefore, s.70 can be extended to cases in which the question of *salvage* does not occur.[54] On the other hand, English law at the time required something like salvage as a ground for restitution against unjust enrichment.[55] Moreover, s.70 is not restricted to people standing in specific relations to each other, and, with the exception of the requirement that the act be lawful, there is no other requirement within s.70 as to the circumstances in which it shall be done.[56]

43. Section 69 reads: "*Reimbursement of person paying money due by another, in payment of which he is interested*—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."
44. *Mahalingam Chettiar v Ramanathan Chettiar and Ors* AIR 1935 Mad 587.
45. *Bank of England v Vagliano Bros* [1891] AC 145.
46. *Tulsa Kunwar v Jageshar Prasad* [1906] 28 All 563; *Subramania Iyer v Rungappa Reddy* [1909] 33 Mad 232; *Eastern Mortgage and Agency Co Ltd v Mahommad Fazlul Karim* [1925] 52 Cal 914; *SRMAR Ramanathan Chettyar v RMP Chettyar* AIR 1937 Rang 350.
47. [1958] 2 MLJ 86.
48. *Munni Bibi v Trilok Nath* (1931) ILR 54 All 140.
49. *Govindram Gordhandas Seksaria v State of Gondal* AIR 1950 PC 99.
50. Section 70 reads: "*Obligation of person enjoying benefit of non-gratuitous act*—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."
51. (1895) ILR 18 Mad 88.
52. *Bank of England v Vagliano Bros* [1891] AC 145.
53. *Jarao Kumari v Basanta Kumar Roy* [1904] 32 Cal 374, 377; *Nellie Wapshare v Pierce Leslie & Co Ltd* AIR 1960 Mad 410.
54. *Damodara Mudaliar v Secretary of State for India* (1895) ILR 18 Mad 88.
55. John Austin, *Jurisprudence*, Vol.II (J Murray, London,1873), 944.
56. *Damodara Mudaliar v Secretary of State for India* (1895) ILR 18 Mad 88.

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The Madras High Court's judgment in *Damodara Mudaliar* made it clear that, if a benefit is enjoyed by a person at someone else's expense, it must be disgorged but only in terms of Ch.V of the Indian Contract Act. The judgment was followed widely across different Indian High Courts.[57] In fact, the Privy Council[58] and the Supreme Court,[59] as well as the High Courts,[60] went to the extent of stating that there was no requirement of even examining the English cases on this point because of the clear and explicit terms of s.70. It was also stated that the language of a section of the Indian Contract Act ought not to be enlarged by any implications of English doctrines.[61] Even in cases such as *Mulamchand v State of Madhya Pradesh*,[62] where English judgments were discussed, English judgments were only cited to understand the jurisprudence before the enactment of Ch.V and the ratio was entirely based on the requirements of the provisions of the Act.

Section 72 is another provision which the courts emphasised must be read independently of its English parallel. Section 72 requires a person to whom money has been paid, or anything delivered, by mistake or under coercion, to repay or return it.[63] Previously, the English law rule was that a payment made under a mistake could be recoverable if the mistake was as to a fact but not recoverable if the mistake was as to the law; as a result, there were several Indian decisions which effectively held that s.72 did not apply to money paid under a mistake of law.[64] In reaching those decisions, the courts were particularly influenced by the English decisions of the time. On the other hand, the Calcutta High Court held in *Jagadish Prosad Pannalal v Produce Exchange Corp Ltd*[65] that s.72 uses the word *mistake* without any qualification and there was no justification for engrafting a common law qualification which is not in the statute.[66] Thus, s.72 required restitution when the money was paid whether under a mistake of law or a mistake of fact. The Privy Council has resolved this conflict and agreed with the position taken by the Calcutta High Court.[67]

Another significant difference between the two jurisdictions as regards s.72 was analysed by the Privy Council in *Shiba Prasad Singh v Maharaja Srish Chandra Nandi*.[68] Under English law, any sum paid under a mistake of fact is recoverable notwithstanding the conduct of the parties. As such, English law did not apply the doctrine of estoppel in such cases.[69] However, in *Shiba Prasad Singh*, the Privy Council held that s.72 does not imply that every sum paid under mistake is recoverable whatever the circumstances.

57. *Heramba Chandra Pal Chowdhury v Kasi Math Sukul* (1905) 1 CLJ 199; *Ghasiram v Raja Mohan Bikram* (1907) 6 CLJ 639; *Goolab Chand v M.T.V. Miller* AIR 1938 Mad 966.
58. *Ramanandi Kuer v Kalawati Kuer* AIR 1928 PC 2.
59. *State of West Bengal v B.K. Mondal and Sons* AIR 1962 SC 779.
60. *Secretary of State v G.T. Sarin and Company* AIR 1930 Lah 364; *Zulaing v Yamethin District Council* AIR 1932 Rang 176.
61. *Chunamall v Moolchand* [1928] 30 Bom LR 837.
62. [1968] 3 SCR 214.
63. Section 72 reads: "*Liability of person to whom money is paid, or thing delivered, by mistake or under coercion*—A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."
64. *Wolf and Sons v Dadyba Khimji and Co* (1919) ILR 44 Bom 631; *Appavoo Chettiar v S.I. Railway Co* AIR 1929 Mad 177.
65. AIR 1946 Cal 245.
66. *Ibid*, [9].
67. *Shiba Prasad Singh v Maharaja Srish Chandra Nandi* AIR 1949 PC 297.
68. AIR 1949 PC 297.
69. *R.E. Jones Ltd v Waring and Gillow Ltd* [1926] AC 670.

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There may be circumstances which disentitle a plaintiff by estoppel or otherwise.[70] Such circumstances include, for example, where money has been paid by mistake but the payee, acting in good faith, has parted with the money to another without any enrichment to himself before the mistake is detected.[71]

It was clear from this catena of past judgments where Indian law stood *vis-à-vis* the English law with respect to the meaning, extent and emphasis placed on Ch.V of the Indian Contract Act: First, Indian law requires the courts to look exclusively at the relevant provision within Ch.V; secondly, Indian law does not treat this area of law as an implied area of contract law as has been done by the English law in the past; thirdly, Indian law does not require the claimant to fit his claim in any pre-existing *unjust factor*, as is required by the English law of the present.

### *Divergent cases*

Unfortunately, many Indian judgments have continued to rely on English law when faced with a case concerning restitution for unjust enrichment; and, in doing so, have either misinterpreted or completely failed to address the true meaning of the provisions of Ch.V as given in the Act. Such cases can be broadly categorised into the following:

#### *(i) Cases interpreting Chapter V provisions to be based on the implied contract theory*

Some High Courts have held that s.70 is an instance of an implied contract and, therefore, a minor cannot be made liable on such a contract.[72] This was a result of these courts relying on the English common law rather than the legislative intent of enacting Ch.V. This is an incorrect position. It is true that s.70 is not applicable to minors, but this is not because the provision is based on an implied contract; instead this is because restitution under s 70 requires voluntary acceptance of the work done or thing delivered by someone and this voluntary acceptance would not be present in the case of minors.[73]

#### *(ii) Cases omitting to recognise the existence of Chapter V*

Some judgments have decided cases concerning restitution for unjust enrichment by completely relying on English law (and sometimes, even *Black's Law Dictionary*) without even recognising the existence of the Indian law under Ch.V of the Indian Contract Act.[74] This is despite the Supreme Court's stating that, due to the codification of law in Ch.V, it is not necessary to rely on English law at all.[75]

70. *Shiba Prasad Singh v Maharaja Srish Chandra Nandi* AIR 1949 PC 297; *Nagorao Govindrao v Governor-General in Council* AIR 1951 Nag 372; *Rajesh Gupta v Central Bank of India* (2013) 205 DLT 713.

71. *Union Bank of India v A.T. Ali Hussain and Co* AIR 1978 Cal 169, 174.

72. *Shahbaz Khan v Bhangi Khan* AIR 1931 Lah 344 (2); *Bankey Bihari Prasad v Mahendra Prasad* AIR 1940 Pat 324.

73. *State of West Bengal v B.K. Mondal and Sons* AIR 1962 SC 779, [21].

74. *Modi Vanaspati Manufacturing Company v Katihar Jute Mills Pvt Ltd* AIR 1969 Cal 496; *Annamma v Ouseph Tressiamma* AIR 1975 Ker 185; *Arvind Kumar v State of Bihar* [2003] 2 PLJR 599; *Phanindra Kishore Pal v The State of Tripura* RFA No. 07 of 2011 (18 Aug 2017) Unreported (Tripura High Court).

75. *State of West Bengal v B.K. Mondal and Sons* AIR 1962 SC 779.

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*(iii) Cases employing the unjust factor theory used in the UK*

As noted above,[76] the current position of English law requires a case to fall within a list of pre-determined unjust factors for there to be restitution for unjust enrichment. There is no such list of unjust factors in India. However, the Delhi High Court in *M/s New Cawnpore Flour Mills v M/s Bakemans Industries Pvt Ltd*[77] held: "mistake of fact, mistake of law, duress, undue influence, failure of consideration, discharge of debt, etc. have been recognised as factors, which can render enrichment unjust".[78] Needless to say, the factors mentioned by the court are English law's *unjust factors*,[79] which have been neither recognised nor made mandatory in India. Yet, the judgment analysed these unjust factors as if they constituted the current position of law in the country, mentioning neither that it was discussing the English law, nor the existence of Ch.V of the Indian Contract Act. The Delhi High Court used unjust factors once again in 2013 in *Akuate Internet Services v Star India Pvt Ltd*[80] and in fact criticised the Single Judge who wrote the impugned judgment for failing to provide any clear unjust factor in his findings.

The three categories above represent an incorrect and unfortunate trend. Courts in India must be wary of the fact that not all commercial laws in India are akin to their English counterparts. At the least, they must not omit mentioning provisions of the Indian law which have existed since 1872 and on which several excellent commentaries have been written in celebrated judgments.

**Muddled relationship between restitution and unjust enrichment**

It has already been noted that any cause of action based on unjust enrichment is based neither on consent (as in contracts) nor on a wrong (as in torts).[81] It has also been noted that there may be restitution for grounds other than unjust enrichment, such as restitution for wrongs. However, one particular Supreme Court judgment, *Indian Council for Enviro-Legal Action v Union of India*,[82] has completely muddled this basic understanding of these two doctrines and has set the trend for a string of judgments based on this incorrect understanding.

In *Enviro-Legal*, certain chemical industries were found to have polluted a village and were asked by the Supreme Court to pay costs amounting to Rs37.385 crores. When they did not pay this penalty for over 15 years, the Supreme Court was once again approached. The Court was to decide whether it could direct these industries to pay not just Rs37.385 crores, but also compound interest on this amount as added penalty for the period of delay in payment. The Court could have ordered punitive measures, such as the imposition of heavy costs with interest and also held the industries guilty for contempt of the Court's orders,[83] but instead, curiously, it chose to analyse the law of unjust enrichment to

76. See *supra*, fnn 36–41.
77. CA No. 900/2008 (20 Dec 2010) Unreported.
78. *Ibid*, [31].
79. See generally Peter Birks, *An Introduction to the Law of Restitution* (Clarendon, Oxford, 1989).
80. MIPR 2013 (3) 1. The case is currently pending before the Supreme Court (Diary No. 29582 – 2013).
81. See, eg, *Kotah Match Factory v State of Rajasthan* AIR 1970 Raj 118; *Keshab Kishore Narain Saraswati v State of Bihar* AIR 1971 Pat 99; *Mir Abdul Jalil v State of West Bengal* AIR 1984 Cal 200.
82. [2011] 8 SCC 161.
83. V Niranjan, "The Supreme Court of India and the Law of Unjust Enrichment", India Corp Law, 7 June 2012: indiacorplaw.in/2012/06/supreme-court-of-india-and-law-of.html.

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determine how to disgorge the party of the benefits it gained due to non-compliance with court orders.

When analysing the doctrine of unjust enrichment and tying it up with the principle of restitution, the Court made several anomalous statements. It held that unjust enrichment occurs when the defendant *wrongfully* secures a benefit. This contradicts the very basis of a claim for restitution for unjust enrichment, which arises neither from consent nor from a *wrong*.

The Court also made an attempt to define the nature of the relationship between unjust enrichment and restitution:[84]

> "Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for *usually there can be no restitution without unjust enrichment* …
>
> The terms 'unjust enrichment' and 'restitution' are like the two shades of green—one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. *Which label is appropriate under which circumstances would depend on the facts of the particular case before the court*. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders."

By suggesting that there can be no restitution in the absence of unjust enrichment, the Court created an anomaly, because the law recognises restitution based on other grounds, such as restitution for wrongs. This observation also muddled the difference between a cause of action based on unjust enrichment and a cause of action based on wrongdoing.

The Court also held that restitution and unjust enrichment have to be viewed with reference to two stages, ie, pre-suit and post-suit. It described the pre-suit stage as one where the suit required "application of a substantive law (or common law) right that the court will consider".[85] This holding needs to be reconsidered entirely because, first, there is no such division of these two doctrines into pre-suit and post-suit stages and, secondly, the substantive law that the court must apply in such cases is not the common law—it is statutory law enacted in Ch.V of the Indian Contract Act. In *Enviro-Legal*, the Court did not feel the need to fall back upon even one of the articulately written judgments in Indian jurisprudence on the concept of unjust enrichment and restitution. It is extremely unfortunate that *Enviro-Legal*, specifically the two paragraphs of the judgment reproduced above, have been blindly relied upon by courts across the country.[86] This has presented a grave risk to the otherwise stable jurisprudence of these two doctrines in India.

84. [2011] 8 SCC 161, [159], [161] (emphasis added).

85. *Ibid*, [162].

86. *Ganesh Prasad v LDA Lucknow* (2012) 90 ALR 5; *Sky Land International Pvt Ltd v Kavita P. Lalwani* (2012) 191 DLT 594; *Chandra Shekhar Rajan v Lucknow Development Authority, Lucknow* [2015] 1 All LJ 379; *M/s Ambuja Cements Ltd v The State of Rajasthan* (2015) 5 WLC 32; *Rameshwar v State of Haryana* [2018] 6 SCC 215; *C.K Chandrasekharan v State of Kerala* [2018] 3 KLJ 890.

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**Applicability where there is an underlying contract**

One important issue that has been dealt with by courts when interpreting the provisions of Ch.V of the Indian Contract Act is the applicability of these provisions to cases where there already exists an underlying contract between the parties. Are the provisions of Ch.V applicable only where there is absolutely no contract between the parties or can these provisions also be utilised when there is an underlying contract between them? The answer to this is that Ch.V does not depend upon the existence of a contract binding between the parties.[87] In fact, as a general principle the provisions of Ch.V should not be applied in the presence of an existing contract between the relevant parties.[88] Liability in restitution is based on statute not contract. Therefore, restitution is not a remedy when a contract is breached.[89] Apart from situations where there is no contractual relationship between the parties, ss 68–72 are also applicable where:

*(i) The underlying contract is void* ab initio

So long as the conditions of the relevant section within Ch.V are satisfied, the provisions of that section can be invoked by a party to a contract when the contract is void *ab initio*. For example, in *Mulamchand v State of Madhya Pradesh*,[90] the contract between the appellant and the state was held to be void as it was entered into in contravention of the provisions of the Government of India Act 1935. However, the appellant sued for the return of his deposit and the goods supplied and services rendered. As the conditions of s.70 were satisfied, restitution was ordered. It might seem that in this respect s.70 overlaps with s.65[91] of the Indian Contract Act. However, that is not so since, while s.65 comes into play when an existent agreement is subsequently discovered to be void or a contract eventually becomes void, s.70 is applicable where the contract was void *ab initio*.

*(ii) A contract exists between the parties but the dispute is outside the purview of this contract*

An example of this is *Paras Nath Sinha v State of Bihar*.[92] In this case, a person was employed by the Government on a contract. Due to a mistake, he was over-remunerated. As this was a mistake outside the purview of his contract of employment, restitution was made to the government by applying s.72.

*(iii) Work done is beyond the terms of the underlying contract*

If a party to a contract has done additional work beyond the terms of the contract for the other party without the intention of doing it gratuitously and this other party has obtained

87. *Pallonjee Eduljee & Sons v Lonavla City Municipality* AIR 1937 Bom 417.
88. *Ganesh Prasad v LDA Lucknow* (2012) 90 ALR 5.
89. *Ibid.*
90. AIR 1968 SC 1218. See also *K.S. Satyanarayana v V.R. Narayana Rao* [1999] 6 SCC 104, 108.
91. Section 65 reads: "*Obligation of person who has received advantage under void agreement, or contract that becomes void*—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."
92. [2011] 3 PLJR 374, 379.

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the benefit of the same, the former party is entitled to restitution for the additional work not covered by the contract, under s.70.[93]

Unfortunately, in many cases the above relationship between Ch.V and an underlying contract has been misunderstood and Ch.V's sections have been applied even in the presence of an existing valid and binding contract and in a scenario where the three exceptions mentioned above are not applicable.[94]

### Applicability to the state

What is the extent of the permeability of Ch.V of the Indian Contract Act? Is Ch.V equally applicable to the state and its corporations as it is to a citizen? The answer is yes, with some exceptions.

There was, until 1962, a confusion regarding whether s.70 is applicable to the government. This confusion arose because the government argued that, if s.70 is applied to the state, then it would render s.175(3) of the Government of India Act 1935 and Art.299(1) of the Constitution of India nugatory.[95] These two provisions contain conditions which must be followed while entering into a contract with the Government. If these conditions are not followed, then the contract is rendered void and the Government is not bound by such contract for want of proper form or authority.[96] Some courts have held that, where the Government is not bound by the contract due to the application of s.175(3) or Art.299(1), it could not be asked to provide restitution under s.70 for any unjust enrichment it has enjoyed.[97] Others rightly held that s.70 is a statutory liability independent of any contract and, since the cause of action of s.70 is different from that under s.175(3) and Art.299(1), it can be used to fasten liability upon the Government.[98]

The confusion was finally settled by a five-judge bench of the Supreme Court in *State of West Bengal v B.K. Mondal and Sons*.[99] In this case, there was a suit filed against the state of West Bengal claiming a sum of money for works done by the plaintiff for the state. The claim was made on the foot of a contract or, in the alternative, if the contract in question was invalid, that the money could be recovered under the Indian Contract Act, s.70. The Court agreed that the contract entered into did not comply with the provisions of the Government of India Act 1935, s.175(3) and for this reason the terms of the contract could not be enforced. However, the Court upheld the claim under the Indian Contract Act, s.70. It was clarified: once it is realised that the cause of action for a claim under s.70 is

93. *Food Corp of India v Vikas Majdoor Kamdar Sahkari Mandli Ltd* [2007] 13 SCC 544, 551.

94. See, eg, *Union of India v Steel Authority of India Ltd* AIR 1997 Ori 77; *Food Corp of India v Bhagwan Das Sao* [2007] 4 JLJR 295.

95. See, eg, *infra*, fnn 97 and 98.

96. *Chaturbhuj Vithaldas v Moreshwar Parasram* AIR 1954 SC 236.

97. *Chedi Lal v Bhagwan Das* (1889) ILR 11 All 234; *Radha Krishna Das v Municipal Board of Benares* (1905) ILR 27 All 592; *Punjabhai v Bhagwandas Kisandas* (1929) ILR 53 Bom 309; *Anath Bandhu Deb v Dominion of India* AIR 1955 Cal 626, 630.

98. *Mathura Mohan Saha v Ram Kumar Saha and Chittagong District Board* (1916) ILR 43 Cal 790; *Pallonjee Eduljee & Sons, Bombay v Lonavla City Municipality* [1937] ILR Bom 782; *Corporation of Madras v M. Kothandapani Naidu* AIR 1955 Mad 82; *Union of India v New Marine Coal Co (Bengal) Ltd* (1960–61) 65 CWN 441 (Cal). This decision was upheld by the Supreme Court in appeal in *New Marine Coal Co Pvt Ltd v Union of India* AIR 1964 SC 152.

99. AIR 1962 SC 779.

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based not upon the delivery of the goods or the doing of any work, but upon the acceptance and enjoyment of the said goods or the said work, there was no overlap between s.70 and s.175(3).[100] The Court held: "what s.70 prevents is unjust enrichment and it applies as much to individuals as to corporations and government".[101] In doing so, the Court explained the meaning and scope of s.70 very articulately:[102]

> "If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case s.70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again s.70 would not apply. In other words, the person said to be made liable under s.70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under s.70 arises."

The Court also clarified that, in cases falling under s.70, the plaintiff cannot sue for the specific performance of the contract or ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he has done something. Thus, where a claim for restitution is made by one person against another under s.70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. "That broadly stated is the effect of the conditions prescribed by s.70",[103] the Court concluded.

The Supreme Court's view in *B.K. Mondal* on the applicability of s.70 upon the state has since become settled law.[104] So long as the three conditions given first by the Madras High Court in *Damodara Mudaliar v Secretary of State for India* and agreed with later by the Supreme Court in *B.K. Mondal* are fulfilled, s.70 is applicable to everyone.[105] It can be said that this principle enunciated in the context of s.70 is equally applicable to the rest of the provisions of Ch.V, with the exception of certain matters as discussed below.

*Exceptions to B.K. Mondal*

A divergence from the applicability of the doctrine of restitution for unjust enrichment on the state is however seen in certain cases, primarily cases concerning indirect taxation, where s.72 is usually sought to be applied by a person who has paid extra duty by mistake and desires its refund. The factual situation in such cases is unique. The Government requires the manufacturers to pay tax to it, the manufacturers pass on this tax liability to the ultimate consumers by increasing the price of the commodity. Therefore, the problem arises if at a later stage it is discovered that the tax so paid to the Government was either extra or illegal. How should restitution take place in such a case? If the Government keeps such amount, it would clearly be a case of unjust enrichment by the Government. If the

100. *Ibid*, [15].
101. *Ibid*, [21].
102. *Ibid*, [14].
103. *Ibid*.
104. *Village Panchayat of Jangareddigudem v Kommireddy Narasayya* AIR 1965 AP 191; *Ram Swarup Maru v State of Bihar* AIR 1969 Pat 340, 345; *State of Uttar Pradesh v Chandra Gupta & Co* 1976 All LJ 426, 431; *Rawat Hardeo Singh v State of Rajasthan* AIR 1981 Raj 280; *Union of India v J.K. Gas Plant* (1980) 3 SCC 469; *Orissa Industrial Infrastructure Development Corp v Mesco Kalinga Steel Ltd* [2017] 5 SCC 86, 98.
105. See, eg, *Hindustan Construction Co Muzaffarpur v State of Bihar* AIR 1962 Pat 336, 337.

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money is returned to the manufacturers, they would themselves be unjustly enriched because they have already passed on the burden of the taxes to the consumer. Ideally, the money should be returned to the very consumers who suffered the financial burden, but in most cases it is impossible to trace and repay the thousands of consumers who bought the said commodity, more so because they are not charged this tax separately in the price they pay.

A string of conflicting judgments was given by courts until the position came to be settled by a nine-judge bench of the Supreme Court in *Mafatlal Industries Ltd v Union of India*.[106] These pre-*Mafatlal* judgments can be divided into two categories:

*(i) Cases which interpreted s.72 strictly to exclude equitable considerations*

A five-judge bench of the Supreme Court in *Sales Tax Officer v Kanhaiya Lal Mukundlal Saraf*[107] held that, while interpreting the Indian Contract Act, s.72, no distinction can be made in respect of tax liability or any other liability.[108] As such, the Court held that, when the tax collected was found to be unauthorised and paid due to a mistake of law, it was the duty of the state to return to the producer or manufacturer such money, even if the state had already utilised the money for its own purposes. In holding this, the Court strictly interpreted s.72 to hold that equitable considerations cannot be imported into the provision, as it had clear and unambiguous language. This meant that it was fair to let producers or manufacturers enjoy the windfall of the refund from the state even if they refused to pass on the refund to the consumers who actually paid the tax, because the mandate of the language of s.72 did not impose any such additional liability upon them.[109] This position was approved by a seven-judge bench of the Supreme Court in *State of Kerala v Aluminium Industries Ltd*[110] and followed by courts across the country.[111]

*(ii) Cases which interpreted s.72 flexibly to include equitable considerations*

Many judgments refused to follow the strict approach adopted in *Kanhaiya Lal* and *Aluminium Industries* and saw s.72 for what it wanted to achieve, ie, prevention of unjust enrichment to anyone—even the producer/manufacturer. As such, a two-judge bench of the Supreme Court held in *State of Madhya Pradesh v Vyankatlal*[112] that, as the burden was transferred by the producers to the customers, the producers were not entitled to get a refund and become unjustly enriched. Only the persons on whom the ultimate burden to pay the amount lay would be entitled to be refunded and, if it was not possible to identify such persons, the amount could be utilised by the Government for the purpose for

106. [1997] 5 SCC 536.
107. AIR 1959 SC 135.
108. *Ibid*, [26].
109. *D. Cawasji & Co v State of Mysore* [1975] 1 SCC 636, [10].
110. (1965) 16 STC 689.
111. *Wipro Products Ltd v Union of India* 1981 ELT 531; *Vallabh Glass Works Ltd v Union of India* [1984] 3 SCC 362; *ITC Limited v M.K. Chipkar* [1985] 22 ELT 334; *State of Rajasthan v Maharaja Shree Umaid Mills Ltd* [1985] RLR 201; *Dulichand Shreelal v Collector of Central Excise* [1987] 32 ELT 288.
112. [1985] 2 SCC 544.

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which the amounts were taken (in this case, the development of sugarcane). This equitable approach of *Vyankatlal* was subsequently followed in a number of cases,[113] especially by the Gujarat High Court.[114] In some cases, courts became creative while applying equity to s.72. The Bombay High Court in one case held that, depending on the facts and circumstances of the case, it was for the court to decide whether the illegally collected money was to be entrusted to the state, the assessee or any third agency or utilised to create a welfare fund for the concerned industry.[115] In another case, the Orissa High Court adjusted the tax paid under mistake in one circle against tax due in another circle (in India, geographical divisions of tax collection areas are called "circles").[116] It is pertinent to note here that *Vyankatlal* and the other judgments cited above were technically *per incuriam* until *Mafatlal* was adjudicated, as they went against the larger bench holdings of the Supreme Court in *Kanhaiya Lal* and *Aluminium Industries*.

The interpretation of s.72 in *Kanhaiya Lal* and *Aluminium Industries*, which was good law at that time, had led to problematic consequences. The very same s.72 which was meant to prevent unjust enrichment was leading to the unjust enrichment of the manufacturers/producers. As noted by the Andhra Pradesh High Court at that time:[117]

"on finding the collection of tax without authority of law, regardless of unjust enrichment to the manufacturer, producer or trader, and its effect on the society, the Courts insisted to refund the same to them. Being an indirect tax, they had already passed on its incidence to the consumer. The possibility of restitution to the payer is a remote one. The plethora (of) reported and countless unreported decisions establish that the refund is 'a matter of routine' and a windfall to the intermediary and escalate(s) the gulf of inequality of income amongst individuals very wide."

Noting this problem, a nine-judge bench of the Supreme Court was constituted in *Mafatlal* and the Court in this judgment overruled *Kanhaiya Lal* and *Aluminium Industries* and upheld the ratio in *Vyankatlal*.[118] The Court held that s.72 contains a rule of equity and, thus, equitable considerations were relevant in cases coming under the provision. One such equitable consideration, according to the Court, was the fact that the person claiming the refund had not really suffered any prejudice or loss, in which case he could not be refunded the amount. The ruling in *Mafatlal*, which is the binding position of law in this regard, can be summarised as follows:

- A claim for refund of tax under s.72 is sustainable only when it is based on the ground that the provision of the taxation statute under which it was levied is or has been held to be unconstitutional. Such a claim can be made either by way of a suit or by way of a writ petition. However, if the provision is still constitutional, then all claims of refund will be made according to this provision and taxation statute and s.72 will not be resorted to.

113. *N.V. Ramaiah v State of Andhra Pradesh* AIR 1986 AP 361, 369.
114. *Dhrangadhra Municipality v Dhrangadhra Chemical Works Ltd* [1988] 35 ELT 88; *Union of India v Wood Papers Ltd* [1991] 53 ELT 189; *Navsari Oil Products Ltd v Assistant Collector of Customs* [1992] 60 ELT 550; *Mahendra Mills Ltd v Union of India* [1992] 62 ELT 495.
115. *New India Industries v Union of India* AIR 1990 Bom 239, [33].
116. *P. Rama Rao v State of Orissa* (1990) 77 STC 303.
117. *Godavari Plywoods Ltd v Union of India* [1984] 2 AP LJ 173 (AP), 184.
118. [1997] 5 SCC 536, [54–55].

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- A claim for refund can only succeed where the petitioner/plaintiff alleges and establishes he has not passed on the burden of duty to another person/other persons.
- Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only this person who can legitimately claim its refund. But, where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that this amount is retained by the State (including State undertakings),[119] ie, by the people. There is no immorality or impropriety involved in such a proposition.

A particular paragraph in *Mafatlal* is of great significance when determining whether the doctrine of restitution for unjust enrichment is applicable to the state:[120]

"The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

It may seem that the above paragraph of *Mafatlal* overrules the holding in *B.K. Mondal* that the doctrine of unjust enrichment is equally applicable to the state as it is applicable to a citizen. However, that is not the case. The above paragraph is limited to those cases where a *person can seek to collect the duty from both ends* and the *power of the court* is *exercised to prevent this person's unjust enrichment*. Such cases occur where there were large numbers of people who paid the money by mistake or under coercion and it has now become impossible to trace them and refund the money to all of them. The ruling in *B.K. Mondal* continues to be applicable in all the other contexts. This is evidenced from the continued applicability of *B.K. Mondal* in general cases pertaining to Ch.V[121] and the parallel applicability of *Mafatlal* in cases concerning refund of money paid by mistake or under coercion by a large number of people.[122]

While generally the usage of the *Mafatlal* approach is seen in indirect taxation cases, on multiple occasions, courts have utilised the *Mafatlal* principle in other types of cases too. The Supreme Court, for example, let the central Government keep illegal funds to the tune of crores of rupees which were generated by the state governments of Madhya Pradesh and Chhattisgarh by directing kerosene traders to sell kerosene at a higher price by rounding off pricing figures.[123] The Karnataka High Court let a state university keep a penalty that

119. *CCE, Bangalore-II v Karnataka State Agro Corn Products Ltd* [2006] 202 ELT 47; *CCE, Chennai-I v Superintending Engineer, TNEB* [2014] 300 ELT 45.

120. *Mafatlal* [1997] 5 SCC 536, [108(iii)].

121. *Municipal Committee v Bajrang Rao* AIR 2006 P&H 142; *Bigdot Advertising & Communications Pvt Ltd v Union of India* (2013) II AD (Delhi) 212; *State of Himachal Pradesh v Devender Singh* ILR 2016 4 HP 526; *Orissa Industrial Infrastructure Development Corp v Mesco Kalinga Steel Ltd* [2017] 5 SCC 86, 98.

122. *Hindustan Lever Ltd v Collector of Central Excise, Chandigarh* [2001] 138 ELT 31; *Ganganagar Sugar Mills Ltd v Delhi Cloth Mills and General Co* (1999) 79 DLT 472; *Garware Plastics & Polyester Ltd, Aurangabad v Municipal Corp of the City of Aurangabad* AIR 1999 Bom 431; *SRF Ltd v Collector of Central Excise* [2002] 1 SCC 480; *Shree Digvijay Cement Co Ltd v Union of India* [2003] 2 SCC 614.

123. *Nagrik Upbhokta Manch v Union of India* [2010] 15 SCC 476.

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it had illegally levied upon a private college merely because the college could not plead and prove that it had not passed on the burden of the penalty to the students.[124] These cases point to a problematic aspect associated with the *Mafatlal* way of applying s.72—it lets the state take the benefit of the very same money it generated by illegal means and this might be misused by the state as a means to generate income.[125] The only way to curb this misuse of s.72 by the state is for some solution to be developed either legislatively or by a Supreme Court bench of nine judges or more.

## CONCLUSION

When the rest of the world was struggling to develop a specific body of law on restitution for unjust enrichment, India had already enacted Ch.V of the Indian Contract Act in 1872. Moreover, courts were quick to recognise in the past that the Indian law on this subject matter differs substantially from the English law and, therefore, English decisions may be of no significant use in such cases.

However, in recent times Indian courts have often shown a lack of clarity about these settled principles.[126] In some cases, they have shown an unhelpful tendency to rely on English cases to found their *ratio decidendi*;[127] and in some cases courts have applied a rather incoherent version of these doctrines, refusing to acknowledge the presence of settled statutory law in this regard.[128] The cases falling into this latter category are more dangerous to the litigant because in such cases the court has given itself unlimited powers to decide the presence of unjust enrichment and the mode of restitution on a case-by-case basis.

The only way this area can see more clarity is through sound and well-reasoned judicial pronouncements by the higher judiciary in India. It is hoped that this is done sooner rather than later. In this regard, the words of Jenkins CJ (as he then was) of the Calcutta High Court from the year 1911 are prophetic:[129]

"[The terms of s.70] are unquestionably wide, but applied with discretion they enable the courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

124. *Malnad College of Engineering v State of Karnataka* ILR 2005 Kar 5022.

125. An exception to this is *State of Maharashtra v Swanstone Multiplex Cinema Pvt Ltd* [2009] 8 SCC 235.

126. *Ranipet Municipal Council v D. Kannammal* (1999) 2 LW 41; *Bank of India v T.R. Arora* (2000) 86 DLT 371; *Indian Bank v Mocro Electronics* [2005] 4 ALT 612.

127. For example, in *Nagpur Golden Transport Co v Nath Traders* [2012] 1 SCC 555, the Court relied on an incorrect understanding of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Harbour Ltd* [1943] AC 32. *See* V. Niranjan, "An Unfortunate Judgment: India and the Law of Restitution for Unjust Enrichment", India Corp Law, 2 January 2012; indiacorplaw.in/2012/01/unfortunate-judgment-india-and-law-of.html.

128. *Chandi Prasad Uniyal v State of Uttarakhand* [2012] 8 SCC 417; *Arvind Kumar v State of Bihar* [2003] 2 PLJR 599; *Union of India v Rakesh Chandra Sharma* [2004] 5 SLR 767; *Laxman Haraklal v Ukhaji Zinga Mahajan* AIR 2011 Bom 159.

129. *Suchand Ghosal v Balaram Mardana* (1911) ILR 38 Cal 1, 7.

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