LAW OF UNJUST ENRICHMENT IN INDIA[§]

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Abstract—*The present paper seeks to explain and examine the role of the Law of Unjust Enrichment in India. The paper was presented as a report during the Conference on Unjust Enrichment organised by the Chinese University of Hong Kong in June 2020. The author has examined how the doctrine of unjust enrichment is placed in the Indian legal system statutorily as well as a common-law doctrine. The author has attempted to find answers to the questions of whether India has a well-developed law of unjust enrichment, how often courts in India have accepted and applied it, is there a need to further develop the law of unjust enrichment because frequently courts use the term 'unjust enrichment' in issues concerning even compensation. The discussion is carried out in four parts. Part I will introduce 'unjust enrichment and its characteristics, Part II will lay down the background of the development of the law of unjust enrichment in India, Part III will examine how courts in a few cases in India have dealt with the issue and the role that unjust enrichment plays in judicial decision making. Part IV will conclude the paper.*

Keywords: Compensation, Non-Gratuitous Act, Obligations, Quasi-Contracts, Restitution, Unjust Enrichment.

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I. INTRODUCTION: WHAT IS UNJUST ENRICHMENT?

Seavey and Scott have termed unjust enrichment as a "postulate" that has its root under the law of restitution, which is analogous to the posits underlying tort law (i.e., a right against unjust harm) as well as contract law (a right against breach of promise).[1]

In the words of Peter Birks, "*unjust enrichment is a causative event beyond contract and wrongs, exemplified in the mistaken payment of a non-existent debt. The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt.*[2] *Such a payment gives rise to a right of restitution."*[3]

The right of restitution is considered as the gain-based recovery in comparison to right to compensation which is a loss- based recovery. Therefore, restitution is a right to gain received by the defendant whereas in compensation the defendant makes good the loss suffered by the claimant.

The strict liability is undeniably fastened to the relocation of gains.[4] Peter Birks further states that such a law that promotes gain-based recovery is bigger than that of the law of unjust enrichment. The natural understanding is that in the case of unjust enrichment it gives a subsequent right of restitution. Therefore, it belongs to the major branch of the law of restitution. He further states that such preposition cannot be turned around because quite often some other causative event may also propose a right to gain-based recovery under the law.[5] Therefore, restitution is not the only response to unjust enrichment. Other events/causes to restitution are possible. Right to restitution arises from other events like contracts and wrongs or torts.

According to Goff and Jones, the difference between 'unjust enrichment and 'restitution' is the difference between 'event' and 'response'. The event will be unjust enrichment to which the response is provided by the law through different rights to claimants as per different situations. A right to restitution is one possible response to such an event.[6] Restitution is a branch of response while it is not a causative event. Similarly, compensation is also a branch of response and thus causative events need not necessarily unjust enrichment. Thus, the similarity between the views can be observed. Both Goff and Jones as well as Peter Birks seem to have agreed that the law of unjust enrichment is a sub-set of the law of restitution when on the basis of causative events rights to restitution are provided and categorised. The absolute proposition of that truth

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2 Peter Birks, *Unjust Enrichment* 3-4 (2nd edn. Clarendon Law Series, Part I, 2005).
3 *Id.*, at 3.
4 *Id.*, at 3.
5 *Id.*, at 4.
6 Goff and Jones, *The Law of Unjust Enrichment* 4 (9th edn., Ch. 1, Sweet & Maxwell, 2016).

supposes that unjust enrichment always gives rise to a restitution right and never to any other.[7]

Unjust enrichment is a universal concept that provides for the basis of imposing an obligation that lies on the defendant to make fair and just restitution towards the plaintiff as it is the plaintiff who has wrongfully suffered, and the benefit accrues from the plaintiff. The concept helps in the determination whether such an obligation should be recognised by the law in new or developing categories of cases.[8] It has also been observed that unjust enrichment does not lack the substantive content, "it is an indefinable idea in the same sense of justice being an indefinable idea."[9]

In an unjust enrichment claim, the plaintiff must show the following three things:

a. Defendant received enrichment/ gain

b. The enrichment received by the defendant is at the cost of the plaintiff.

c. The enrichment was wrongful/unjust.[10]

If the above conditions are satisfied, it has to be seen whether there are any defences to the claim. In case there are no defences the court should decide what remedy should be awarded to the plaintiff. According to Goff and Jones, some overriding legal principles may justify the defendant's enrichment and thereby nullify the plaintiff's right to restitution.[11]

According to Goff and Jones, English law not quick to recognise unjust enrichment as a discrete source of rights and obligations.[12] In England, unjust enrichment does give rise to restitution rights. However, some systems take a compensatory view, adding immediately that the recoverable loss is capped by the gain to the other. The claimant recovers his loss up to the maximum of the other's enrichment, which in turn is but one of saying that he covers the other's gain so far as it constitutes a loss to himself. Two important comments relating to capping and compensatory view are-

a. Should the claimant be identified as a person who has suffered a loss? England and Germany do not recognise it.

b. It has to be a loss capped by the defendant's gain. Unjust enrichment is a causative event distinct from contract and wrongs because very slight

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7 Peter Birks, *Unjust Enrichment* 17 (2nd edn. Clarendon Law Series, Part I, 2005).

8 *Pavey and Mathew Pty. Ltd.* v. *Paul*, (1985) 162 CLR 221 quoted with approval in *David Securities Pty. Ltd.* v. *Commonwealth Bank of Australia*, (1992) 175 CLR 353, 379.

9 G. Palmer, *The Law of Restitution* 5 (Boston, Mass: Little Brown and Company 1978).

10 *Banque financiere de la Cite* v. *Parc (Battersea) Ltd.,* (1999) 1 AC 221 : (1998) 2 WLR 475, 227, 234.

11 Goff and Jones, *The Law of Unjust Enrichment* 4 (9th edn., Ch. 1, Sweet & Maxwell, 2016).

12 Id, at 6.

facts raise a strict liability to raise surrender an extant enrichment. The 'enrichee' cannot support all consequential losses suffered by the claimant. The strict liability is tied to extant enrichment.

A. Quasi-contractual theory and unjust enrichment

Before considering the Indian position on unjust enrichment, in my opinion,it is important to discuss developments in English Lawas India is a common law country. Many English judgments are quoted by Indian judges in their judgments, therefore, reference to English Law developments is inevitable. In *Towers* v. *Barret*,[13] Lord Mansfield had observed that quasi-contracts in essence connote 'actions for money had and received." Lord Mansfield explained them on the principle that both law and justice should try to prevent 'unjust enrichment' i.e. no enrichment of one person at the cost of the another should be allowed. The kind of liability that arose in *Moses* v. *Macferlan*[14] was hard to classify. Such a liability could have been accepted either under an implied contract or natural justice and equity. Lord Mansfield preferred it under the principle of natural justice and equity.[15]

The implied-in-fact contract theory was relied upon by the House of Lords in *Sinclair* v. *Brougham*.[16] Lord Sumner said that the "action for money had and received is said to be a 'liberal action'. It is founded upon an implied contract on the part of the defendant and by no means unlimited in its scope. The plaintiff cannot use it to recover money, merely it would be fair and right that it should be paid to him, in the case in which no such contract could be implied." The House of Lords (HL) did not allow any remedy under quasi-contract.[17] Therefore, quasi-contracts continued to be identified with implied contracts. However, such identification restricted the relief which would have been possible under the principle of natural justice and equity.

This restriction was felt by HL in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Barbour Ltd*.[18] Lord Wright providing support to the theory of unjust enrichment observed that remedies for unjust enrichment or unjust benefit in English law and generally different from remedies in contract or tort. Such remedies are known as quasi-contract or restitution and are considered a third category of the common law. Lord Wright pointed out that *pari passu* distribution of the available assets by HL in *Sinclair* v. *Brougham* was adopted as

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13 *Towers* v. *Barret*, (1786) 1 TR 133.
14 *Moses* v. *Macferlan*, (1760) 2 Bur 1005, 1012.
15 Avtar Singh, *Contract and Specific Relief* 558-559 (12th edn., Ch. 10, 2017)
16 *Sinclair* v. *Brougham*, 1914 AC 398 (HL).
17 Quasi contract is "like a contract."
18 *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Barbour Ltd.,* 1943 AC 32 : (1942) 2 All ER 122 (HL).

a technique to prevent unjust enrichment of the shareholders at the cost of the depositors.[19]

The theory that all quasi-contractual claims rested on the implied contract between the parties was articulated in *Sinclair* v. *Brougham* but was decisively rejected *in Westdeutsche Landesbank Girozentrale* v. *Islington LBC*.[20] The implied theory is now a ghost of the past.[21] It is no longer 'appropriate to distinguish between law and equity by holding that various rights in unjust enrichment belong to separate legal categories governed by substantially different principles because of their jurisdictional origin.[22]

II. DEVELOPMENT OF LAW OF UNJUST ENRICHMENT IN INDIA

When Indian Contract Act, 1872 was codified, Chapter V was added but the expression 'quasi-contract' was avoided. Chapter V contains 'certain relations resembling those created by contract'. In *Tan Bug Taim* v. *Collector of Bombay*,[23] the Bombay High Court had observed, *"these obligations were included in the Contract Act by the enactment of Chapter V thereof because even though they did not contract the obligations created thereunder resembled those created by contract*." The Chapter deals with peculiarly legal and just relationships where there may be want of assent and where they may even sometimes be against expressions of dissent.[24] The word 'resembling' indicates that the rights, duties, or liabilities arising from these sections are not strictly contractual and that they may arise independently of any contract. The alleged resemblance between quasi-contracts and genuine contracts was merely in form and not in substance.[25]

Chapter V consists of five sections ie., Sections 68-70 of the Indian Contract Act, 1872. It has been held that the principles that form the basis of quasi-contracts in England have been reduced to statutory liability in India through provisions in sections 68 and 70.[26] The statutory provisions are by no means exhaustive of the doctrine of quasi-contracts. Since it has been a statutory

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[19] Lord Wright , *Legal Essays and Addressees* (57 LOR 200 as referred by Avtar Singh, *Contract and Specific Relief* 560(12th edn., Chapter 10, 2016)

[20] *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council*, (1996) AC 669 : (1996) 2 WLR 802 ,710.

[21] *Cleveland Bridge UK Ltd.* v. *Multiplex Constructuctions (UK) Ltd.*, 2010 EWCA Civ 139 (121).

[22] *Nelson* v. *Larholt*, (1948) 1 KB 339 (343).

[23] *Tan Bug Taim* v. *Collector of Bombay*, 1945 SCC OnLine Bom 32 : AIR 1946 Bom 216, (243).

[24] V.G. Ramachnadran, *Law of Contract in India* 1558 (2nd edn., Vol. 2, Eastern Book Company, 1984)

[25] Alvin W-L See, "An Introduction to the Law of Unjust Enrichment" (School of Law, SMU, Research Paper 22/2013) (SSRN) (June 13, 2020, 5.46 p.m.), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291506>.

[26] *Kora Lukose* v. *Chacko Uthuppan*, 1956 SCC OnLine Ker 11 : AIR 1957 Ker 19.

authorisation, courts in India allow relief under these sections by theoretical considerations concerning quasi-contracts. Courts can give adequate relief under these provisions. In their interpretative jurisdiction, the choice is wide for courts as to what is an unjust benefit, etc. and the principles of equity can be invoked in extending the field of the statutory provisions to suit the circumstances and facts of each case. English cases have been providing valuable guidance as to the scope of relief and the interpretation of these provisions. In India, statutory recognition is given for all forms of restitution for unjust enrichment which are more flexible than what is comparatively available in England in equity or common law. Sections 68-72 provide for five such obligations:

1. Claim for necessaries supplied to person incapable of contracting, or on his account (S. 68)
2. Reimbursement of person paying money due by another, in payment of which he is interested (S. 69)
3. The obligation of a person to enjoy the benefit of the non-gratuitous act (S. 70)
4. Responsibility of finder of goods (S. 71)
5. Mistake or coercion (S. 72)

The above-stated list is not exhaustive. It can be suitably extended on the principles of equity. It is said that relief in other cases not contained in ss. 68-72 may be granted, if –

a. there is a special relationship between the parties analogous to a contract;
b. there is a resultant duty to make restitution or to pay compensation; and
c. there is some underlying aim of making restitution for a benefit unjustly received.

The author has examined S. 70 for the purpose of this paper to understand how the doctrine of unjust enrichment has been used in the chapter. S. 70 is an important section where liability is to pay for the benefits of an act which was not intended to be done gratuitously by the doer.[27] The section is based on the doctrine of restitution which says you cannot unjustly enrich yourself by retaining anything delivered to you which does not belong to you and you must return it to the person from whom you have received it. Similarly, if one person has done something for another, the person who has accepted such work and enjoyed the benefits of such works must compensate the person who had done that work otherwise it will be enrichment unjustly by the labour of the doer. The principle of restitution is not primarily based on the loss suffered

[27] S. 70, Indian Contract Act, 1872.

by the plaintiff but on the benefit enjoyed by the defendant at the cost of the plaintiff which if retained by the defendant will be wholly unjustifiable.[28] It was stated in *State of W.B.* v. *B.K. Mondal and Sons* that s. 70 was framed to avoid the niceties of English law. It was framed to make the position simple, free from fictions of law and consequent complications.[29]

The liability under s. 70 arises only if the following three conditions are satisfied:

a. a person should lawfully do something for another person or deliver something to him;

b. the person must not intend to act gratuitously for the above; and

c. such other person must enjoy the benefit for a thing done or delivered to him.[30]

The intent of Section 70 can be inferred for the purpose of securing payment to person who has done any voluntary act with certain expectation of payment even when no promise/commitment to pay was made by the defendant. The support to the doctrine of unjust enrichment was given in the case of *Mulamchand* v. *State of M P*,[31] where the court referred to s. 70 and observed that compensation claim under the section is not based on any subsisting contract but a different kind of obligation. In this case also it was observed that the juristic basis of such obligation is founded upon a third category of law of quasi-contract or restitution. The court in support of the judgment quoted Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn*[32] and Lord Denning in *Nelson* v. *Larholt*.[33] Though the court did not make any effort to define what is meant by unjust enrichment here it did not allow the restitution because the plaintiff could not prove what he had done for the defendant. The section has been used by courts in cases relating to construction, employer-employee relations, the amount paid in marriage negotiations for a proposed marriage, payment of money, overstayed tenant, liability to pay interest of the borrower, recovery of interest, payment for electricity used after expiry of the license, etc. The courts have referred to the principle of unjust enrichment in a few places while making decisions under the section.

The liability under s. 70 arises only when only when the person voluntarily accepts the thing or enjoys the work done otherwise he always has the option

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[28] *Great Eastern Shipping Co. Ltd.* v. *Union of India*, 1970 SCC OnLine Cal 55 : AIR 1971 Cal 150 (155), *Panna Lal* v. *Commr.*, (1973) 1 SCC 639 : AIR 1973 SC 1174, 1178.

[29] AIR 1962 SC 779.

[30] *State of W.B.* v. *B.K. Mondal and Sons*, AIR 1962 SC 779.

[31] *Mulamchand* v. *State of M.P.,* AIR 1968 SC 1218.

[32] Lord Wright's observations is discussed at fn 17; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Barbour Ltd.*, 1943 AC 32: (1942) 2 All ER 122.

[33] *Nelson* v. *Larholt*, (1948) 1 KB 339, 330,14; Lord Denning quoted at fn 56.

not to accept the thing or work done. Jenkins CJ observed in *Such and Ghosal* v. *Balram Mardana*,

> *"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 for 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*."[34]

It is essential here that the services should be rendered without any per se request as requested services create an implied promise to pay. In the case of *State of W.B.* v. *B.K. Mondal and Sons*, the State was guilty of accepting the work but they tried to escape liability by creating a defence under non fulfilment of requirements of Article 299 of the Constitution of India (s. 175(3), Government of India Act, 1935) and thus no lawful contract was concluded. The Court held that s. 70 can be invoked because the State had accepted storage sheds, used them, and enjoyed their benefit.[35] The court observed, "what section 70 prevents is unjust enrichment and it applies as much to corporations and Government as to individuals."[36] However, in *A. Abu Mohammed* v. *K.M. Mohammed Kanju Labba*, Thomas J was of the view that s. 70 does not distinguish between the grant of a benefit to another on request or a grant without a request. In both cases, the person who enjoys the benefit is liable to compensate the grantor.[37]

In an earlier case of *Damodar Mudaliar v Secretary of State for India*, the question was whether the plaintiffs, who were proprietors of certain villages could be held liable for the cost of repair of certain tanks which were incurred by the government. According to the statement of the plaintiffs, they were aware of the repairs being made. It was observed that as a consequence of the severance of the duty to maintain the tank by the defendant, it devolved to the Government. The Court observed that the Government had acted lawfully and repaired the tank in order to provide benefit to all the villagers. The zamindars knew about the intention to execute the repairs but did not disapprove. There was evidence that the work undertaken by the government was not gratuitous, therefore, it was held that the defendants had unjustly enriched themselves and were liable for the cost of repair.[38]

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[34] *Suchand Ghosal* v. *Balram Mardana*, (1911) ILR 38 Cal 1.
[35] *State of W.B.* v. *B.K. Mondal and Sons*, (1973) 1 SCC 639 : AIR 1962 SC 779.
[36] *Ibid*.
[37] *A. Abu Mohammed* v. *K.M. Mohammed Kanju Labba*, 1994 SCC OnLine Ker 219 : (1994) 2 KLT 713.
[38] *Damodar Mudaliar* v. *SBI*, 1894 SCC OnLine Mad 1 : (1895) ILR 18 Mad 88.

Further support for the doctrine was found in *Govindarajulu Naidu* v. *S.S. Naidu*[39] in which the court had referred to some of the earlier cases of *Heramba Chandra Pal Chowdhury* v. *Kasinath Sukul*[40], *P. Nityananda Mudaliar* v. *Arunachalam Chettiar*[41], *JVallayya Gounder* v. *Ramaswamy Goundar*[42], *Ramachandra Mudaliar* v. *Kannammal,*[43] *Goolabchand* v. *Miller*[44], *Gasiram* v. *Raja Mohan Bikram Sha*[45] and *Mahalingam Chettiar* v. *Ramanathan Chettiar.*[46]

A. Law Commission's Review of Chapter V, Contract Act, 1872

Chapter V had only once been examined and that was by the First Law Commission of India in 1958. The Commission preferred to keep the title as it was more self-explaining as well as apt over expressions such as 'Quasi-Contracts', 'Contracts implied in Law', and 'Constructive Contracts'. However, the Law Commission considered and observed that there is a lack of adequacy for the provision of obligation which resembled those under the contract in the Act. The Commission was in agreement with Lord Wright that "the Indian Contract Act dealt with it in a very unsatisfactory manner."[47] The Commission proposed to make the chapter exhaustive and comprehensive.

The Commission observed, *"The theoretical basis is the principle of 'unjust enrichment' or as Professor Winfield would prefer to call it, 'unjust benefit'. This is derived from the old maxim of Roman Law: 'Nemo debetlocuple-tari ex alienajactura'. No man should grow rich out of another person's loss."*

The Commission referred to the observation of Lord Wright in *Fibrosa Spolka Akeyjna* v. *Fairbairn*[48] It also referred to the observation of Denning L. J. in *Brewer Street Investments Ltd.* v. *Barclays Woolen Co. Ltd., "The proper way to formulate the claim is on a request implied in law or, as I would prefer to put it, on a claim for restitution."*[49]

However, the Law Commission noted that a general agreement as to the precise nature of this doctrine in England was not seen. The Commission cited the observation of Lord Porterand Professor Glanville Williams in support of its observation. Lord Porter said, *"The exact status of the law of*

[39] *Govindarajulu Naidu* v. *S.S. Naidu*, (1958) 2 Mad LJ 148.
[40] *Heramba Chandra Pal Chowdhury* v. *Kasinath Sukul*, (1905) 1 CLJ 199.
[41] *P. Nityananda Mudaliar* v. *Ar. M.M. Aruhaohalam Chettiar*, 1957 SCC OnLine Mad 184.
[42] *J. Vallayya Gounder* v. *Ramaswamy Goundar* S.A. No. 109 of 1955.
[43] *Ramachandra Mudaliar* v. *Kannammal* S.A. NO. 1191 [1955] and S.A. No. 317 [1956].
[44] *Goolabchand* v. *Miller*, 1938 SCC OnLine Mad 140 : (1938) 2 MLJ 688.
[45] *Gasiram* v. *Raja Mohan Bikram Sha* [1907] 6 C.L.J. 63.
[46] *Mahalingam Chettiar* v. *Ramanathan Chettiar* Appeal No. 665 [1948].
[47] 1st First Law Commission Report 1958, Lord Wright, Legal Essays & Addresses, 53.
[48] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Barbour Ltd.*, 1943 AC 32 [61] : (1942) 2 All ER 122.
[49] *Brewer Street Investments Ltd.* v. *Barclays Woolen Co. Ltd.*, (1954) 1 QB 428 [436].

unjust enrichment is not yet assured."[50] According to Professor Glanville Williams,*"this branch of the law in England is defective."*[51]

The Commission observed that in the U.S.A., the law of restitution has been covered extensively due to the American Restatement of the Law added with the coverage containing two hundred sections to the discussion of related principles. The situation is different in India, as whenever the statute could not provide for a definite provision Courts have taken direct assistance from the English and American decisions.

The Commission, however, accepted the various situations which would lead to the application of the law of restitution, and thus the closing in of the categories of quasi-contracts was not concluded. In the recommendation, it was stated that the doctrine of unjust enrichment should be included after the inclusion of well-accepted provisions/cases of unjust enrichment as well as a separate residuary section (S. 72B) which does not cover situations that are left out/not covered under the law. The Law Commission in their attempt tried to provide for exhaustive provisions in the Act as much as possible, however, they acknowledged that there might be instances wherein the act falls short and there will be such cases where the provisions are not provided for. The applicable law for such cases would be nothing but the principles of 'justice, equity, and a good conscience and should be given the widest significance in comparison to the English Law. The Law Commission proposed insertion of S. 72 B after S. 72 which provided for 'Restitution by person unjustly benefited in cases not expressly provided for'.[52] However, this recommendation was not accepted and no more discussion on Chapter V has been undertaken afterwards.

III. UNJUST ENRICHMENT AS A GROUND FOR JUDICIAL DECISION MAKING

In this section, a few landmark cases in which the doctrine of 'unjust enrichment was included in one way or the other have been discussed. In *Mafatlal Industries v UOI,* the question was about the rights and remedies for citizens of India for a refund of unlawfully recovered taxes. The Central Excises and Customs Law (Amendment) Act, 1991 mandated that the asses see is required to prove that the burden of the tax was not passed or forwarded to the customer or any other person as the person who had passed on the burden would not be entitled to the refund of money himself of the illegally recovered

[50] *Reading* v. *Attorney General*, 1951 AC 507, 523.

[51] Law Reform and Law Making, p. 71.

[52] Law Commission had recommended insertion of Ss. 72-A and 72-B. S. 72-A dealt with indemnity. S. 72-B provided that in any case not coming within the scope of Ss. 68 to 72-A, restoration of benefit or making of compensation if there is no contract but the person had received unjust benefit.

tax. The notion that the right to refund flows automatically from Article 265, Constitution of India and s. 72 of the Contract Act, 1872 as an absolute right was rejected by the Supreme Court.[53] It was further held that it cannot be diluted or affected by any such equitable plea as 'unjust enrichment, 'passing on of burden' etc. The basis of refund accrues from the appeal can be done by the asses see under three heads namely unconstitutional levy, illegal levy, or a tax paid under a mistake of law. The Apex Court rejected the notion by a majority ruling that drawing any refund claim by an asses see on the plea of mistake of law under Section 72 that any another asses see has been successful in his claim. The Court examined the proposition and utilised and explained principles of restitution and equity for denying unjust enrichment. In the judgment, the court initially held that the genesis of Section 72 has its origin in the principles of equity. Further, the court maintained the principle that "he who suffers no loss deserves no gain" as an essential tenet under the law of restitution which provides for all refund claims. The basic test to be established by the plaintiff is that defendant has been unjustly enriched at his expense. Thus, in the event,that an asses see who has "passed on the burden of tax to his customer"has been unlawfully enriched and therefore, summing it could be stated that the law is not to serve and provide for windfall gains to the plaintiff who has suffered no loss.[54]

In a comparatively recent case, the *Indian Council for Enviro-Legal Action v Union of India*, the Supreme Court has applied the principle of unjust enrichment and restitution to a new set of circumstances. The case was decided in 1996 against the Hindustan Agro Chemicals Limited, which even after the order to pay a fine in the final judgment, kept the litigation alive for almost 15 years. The company was manufacturing chemicals like Oleum and Single Super Phosphate including certain other industries of the (Respondent numbers 4 to 8) same group. The entire chemical industrial complex was located in the Bichhri village, Rajasthan, India. The SC had ordered the chemical industry to pay Rs 37.385 cr($ 5170075.65) for cleaning the chemical pollution created by them in the village. However, the industry did not pay the amount for 15 years on one or another pretext and filed many petitions. Finally,the court awarded compound interest over the amount unpaid. In this case, the SC applied the principle of unjust enrichment in awarding compound interest over the amount unpaid by the industry.[55] The SC accepted the applicability of the doctrine of unjust enrichment in India and looked into a number of definitions and landmark observations laid down in earlier cases while explaining the doctrine. The court observed that "*unjust enrichment is 'the unjust retention of a benefit to the loss of another, or the retention of money or property of another against*

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[53] S. 72, Contract Act, 1872.

[54] *Mafatlal Industries* v. *Union of India*, (1997) 5 SCC 536, Sunil Gupta, A Comment on Mafatlal v. Union of India (1998) 3 SCC J-10.

[55] *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 3 SCC 212.

the fundamental principles of justice or equity and good conscience."[56] In such a case, even if the defendant who retained the benefit is not a wrongdoer, he may be liable.

The defendant wrongfully secures a benefit or passively receives a benefit which is unconscionable to retain under unjust enrichment. The learned judges mentioned the observation of Lord Wright in Fibrosa v. Fairbairn[57] and Lord Denning in Nelson v. Larholt.[58] In the words of Lord Denning, "*It is no longer appropriate, however, to draw a distinction between law and equity..... 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."*[59]

The judgment also referred to the American Jurisprudence for defining restitution.[60] "*The phrase 'unjust enrichment is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account there for.*"

The court observed that unjust enrichment serves as the basis for restitution. The two doctrines go hand in glove as restitution has its footing in the theory of unjust enrichment. The notion that unjust enrichment is a subset/ ground of restitution, it can be stated though it is a pre-cursor to trigger such a defence because without proving unjust enrichment the question of restitution may not arise. The Court stated that "*it is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.* "The Court previously also considered the scope of 'restitution' *South-Eastern Coalfields*[61] and other cases, however, the term 'unjust enrichment was first considered in *Sahakari Khand Udyog Mandal Ltd v. Commissioner of Central Excise & Customs.*[62]

The SC further held that the terms "unjust enrichment and 'restitution' are like the two shades of green - one leaning towards yellow and the other toward blue.[63] The case further established the fact that Courts have ample powers to grant restitution, especially in the cases which relate to misuse or

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56 *Schock* v. *Nash*, 732 A 2d 217 [232] –[33] (Delaware 1999) USA.
57 *Fibrosa Spolka Akeyjna* v. *Fairbairn Lawson Barbour Ltd.*, 1943 AC 32 : (1942) 2 All ER 122.
58 *Nelson* v. *Larholt*, (1948)1 KB 339 : (1947) 2 All ER 751.
59 *Id*.
60 American Jurisprudence, 2d. Vol. 66 Am Jur 2d.
61 *South-Eastern Coalfields* v. *State of M.P.*, (2003) 8 SCC 648.
62 *Sahakari Khand Udyog Mandal Ltd.* v. *CCE*, (2005)3 SCC 738.
63 *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 3 SCC 212.

non-compliance with court orders. In the current scenario, the court also observed that there is an overlap, and it should be per se be viewed as two stages, i.e., pre-suit and post-suit."The Court further opined to this effect, "*In the pre suit stage, it becomes a substantive or common law right that the court will consider; but in the post-suit stage, when the parties are before the court and any act/omission, or simply the passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's process, along with time delay, to do injustice*."

The Court said that Graham Virgo propounded such a view of law and it has been accepted by a later decision of the House of Lords in *Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another*.[64]

Before explaining restitution, the SC referred to some of its earlier decisions. In *Grindlays Bank Limited vs Income Tax Officer, Calcutta,* the SC observed: *"When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties, the interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstance that it has initiated a proceeding in the court, must be neutralised."*[65]

The Court in *Kavita Trehan vs Balsara Hygiene Products* observed that the jurisdiction to make restitution is inherent in every court and it will be exercised by the court where the case does not fall under s. 144, Civil Procedure Code.[66]

The Supreme Court further referred to the case of *Padmawati vs Harijan Sewak Sangh* in which the Delhi High Court held that "*One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the right fulperson."*[67]

The Supreme Court held that the respondents were coerced to defend the present litigation for a time span of 15 years which also resulted in the wastage of precious judicial time. The applicants were ordered to pay Rs. 10 lakhs as cost in both the interlocutory applications filed by it. The costs so imposed were ordered to be used as a rehabilitation measure for carrying out remedial

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64 *Sempra Metals Ltd.* v. *IRC*, (2008) 1 AC 561 : (2007) 3 WLR 354 : 2007 UKHL 34 : (2007) 4 All ER 657.

65 *Grindlays Bank Ltd.* v. *ITO*, (1980) 2 SCC 191.

66 S. 144, Civil Procedure Code; *Kavita Trehan* v. *Balsara Hygiene Products*, (1994) 5 SCC 380.

67 *Padmawati* v. *Harijan Sewak Sangh* , 2008 SCC OnLine Del 1202.

measures in the village. Further, the court also observed in the event that the cost is not paid by the plaintiff it thus can be treated as arrears of land revenue to mandate the payment.[68]

In another recent case, *M/S Nagpur Golden Transport Co. v M/S Nath Traders*, the respondent booked a consignment of 198 monoblock pumps with the appellant-transport company for transportation from Coimbatore to Gwalior. The truck met with an accident on the way and the goods were refused to be taken by the persons to whom they were delivered. The transport company returned the pumps to the consignor. The respondents filed a suit to claim price of the goods that were damaged against the transporter company alleging negligence. The transport company was asked to a sum of Rs. 3,61,000 (361 million) which included the payment made by the consignee, damages and interest. The question before the Supreme Court was whether the transport company is entitled to take damaged pumps from the consignor since it has paid the full amount to the consignees. The Court quoted the judgment of Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn*.[69] The Supreme Court ordered the return of the 198 damaged pumps by consignors to the transport company and if the 198 damaged pumps were not available with the consignor to find out the value of the 198 damaged pumps realized by the consignor and to pay to the transport company.[70]

In *Rameshwar v State of Haryana*, the SC referred *Indian Council for Enviro-Legal Action* v. *Union of India case* and held that unjust retention of benefit would be completely against the fundamental principles of justice, equity and good conscience. Till the time the deprivation of a party has not been fully compensated for, injustice to that extent will continue. The court considered its duty to grant full restitution in the clear case of fraud on power which gave opportunity for unnatural and unreasonable gains to certain builders or private entities.[71]

IV. CONCLUSION

Chapter V was reviewed in 1958 by the First Law Commission which had recommended for the addition of a sub-section to take care of all matters relating to unjust enrichment which were not covered by the existing sections. However, its recommendation was not accepted and no need was felt by the legislatures for further review of the Chapter. No attempt has been made to understand and review the provisions of Chapter V in accordance with international developments in the doctrine of unjust enrichment. As seen in

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[68] *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 3 SCC 212.

[69] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Barbour Ltd.*, 1943 AC 32 : (1942) 2 All ER 122.

[70] *Nagpur Golden Transport Co.* v. *Nath Traders*, (2012) 1 SCC 555.

[71] *Rameshwar* v. *State of Haryana*, (2018) 6 SCC 215.

judgments, the principle of unjust enrichment along with the definitions propounded by scholars have been mentioned to provide restitution and but the courts have been silent on adding their own explanations in the majority of the cases. The discretion lies with the court to determine 'if the receipt of enrichment is unjust in the circumstances of the case. There is a need for reasoned judgments. The courts have applied the principle of restitution both on the ground of unjust enrichment and justice, equity and good conscience. The circumstances in which restitution has been given are numerous and are probably extended on the basis of inherent powers of courts as well as S. 144 of the Civil Procedure Code. This may raise a question whether the common law of restitution for unjust enrichment applies in India outside the realm of sections 68-72?

It is submitted that the Supreme Court in *Indian Council for Enviro-Legal Action v Union of India* has observed that 'a *person is enriched if he has received a benefit, and he is unjustly enriched* if retention of the benefit would be unjust'. It does not mean that the court would have the discretion to decide if retention of benefit would be unjust in each case on the basis of facts of the case. It is meant here that the defendant's enrichment at the expense of claimant creates a normative imbalance between the parties that must be corrected.[72] The claimant must have suffered a loss that was sufficiently closely linked with the gain of the defendant. This reflects that the law of unjust enrichment is neither concerned with the disgorgement of gains by the defendant nor with the compensation for losses suffered by the claimants but with the reversal of transfers of benefits between claimants and defendants.[73] The claimant is not required to prove that he suffered loss. A right to compensation is a right that the defendant makes good a loss suffered by the claimant whereas the right to restitution is a right to a gain received by the defendant. Unjust enrichment is not a matter of discretion. Unjust enrichment is one of grounds for restitution. Only where restitution is applied as a remedy for unjust enrichment, unjust enrichment and restitution can be compared with two shades of green. This may not be applicable where restitution arises on any other causative event. It is also important to discuss whether there can be different enrichment claims on the basis of pre-suit or post suit claims? In post suit claims it seems that the court decides for restitution only in reference to court proceedings to levelise on the ground of justice and equity. Reference to Sempra Metals case is made by the SC in order to justify compound interest payment to a claimant who by mistake pays taxes and the government saved money in the form of interest which it could have been required to pay if it had to borrow money. It did not borrow money because it had collected undue taxes. However, in a recent judgment of *Prudential Assurance Company Ltd v Commissioners for*

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[72] Goff and Jones, *The Law of Unjust Enrichment* 4 (9th edn., Ch. 1, Sweet & Maxwell, 2016) Example of *Kleinwort Benson Ltd.* v. *Birmingham City Council* , 1997 QB 380 : (1996) 3 WLR 1139.

[73] *Commr. of State Revenue* v. *Royal Insurance Australia Ltd.*, [1994] 182 CLR 51 [75].

Her Majesty's Revenue and Customs, the UK Supreme Court strayed from the decision as held by the Court in *Sempra Metals case*.[74] The Court observed that the claimants are prohibited to bring claims under unjust enrichment if the subject matter pertains to compounding of interest on taxes under the defence of mistake of law.[75] The decision in Sempra Metals held that in addition to the payment of the unlawfully levied tax, the time value of money could be considered a separate benefit for the purposes of the law of restitution was not accepted. It was held that once the tax had been repaid, there is no additional benefit to be reversed by the award of compound interest.[76]

The Supreme Court in *M/S Nagpur Golden Transport Co. v M/S Nath Traders* without making any observations on unjust enrichment did not allow the unjust enrichment. In this case, the consignor was enriched at the expense of appellant but the SC did not identify the unjust factor on the basis of which the enrichment was found to be unjust.[77] Was the unjust factor the failure of consideration or pumps sent back by mistake to the consignor or transport company sent the damaged pumps back to the consignor on the basis that it would not be held liable to consignee. The Court referred the case of *Fibrosa*in which a failure of performance of consideration was found. However, in the present case, there was no failure of performance of consideration because there was no consideration between transport company and consignor relating to damaged good so delivered back to consignor. The SC considered the point that the consignor has both the sale consideration and the damaged pumps.

The author would like to conclude that there has not been much discussion about developments in unjust enrichment and the position is considered as settled. The existence of the law of unjust enrichment is simply acknowledged without much reflection. However, the author feels that there is a need for settled principles for applicability of the principle of unjust enrichment and the grounds for deciding an enrichment as 'unjust', and many more questions like how the loss has to be identified, should claimant be identified as a person who has suffered loss etc? It has been left to the discretion of the courts on case to case basis. The focus has been more on providing restitution rather than concentrating on unjust enrichment. Every unjust enrichment must be returned seems to be the underlying principle. The principle of unjust enrichment is extended to variety of circumstances and the principle of equity

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74 *Sempra Metals Ltd*. v. *IRC*, (2008) 1 AC 561 : (2007) 3 WLR 354 : 2007 UKHL 34 : (2007) 4All ER 657.

75 *Prudential Assurance Co. Ltd*. v. *Comms*., 2018 UKSC 39.

76 Julian Copeman and Ajay Malhotra, Herbert Smith Freehills, "UK: Supreme Court Finds there is no Claim in Unjust Enrichment for Compound Interest on Mistaken Payments" (Herbert Smith Freehills, September 14 2018), <https://www.mondaq.com/uk/arbitration-dispute-resolution/735794/supreme-court-finds-there-is-no-claim-in-unjust-enrichment-for-compound-interest-on-mistaken-payments>.

77 V. Niranjan, "An Unfortunate Judgment: India and the Law of Restitution for Unjust Enrichment" (Indian CorpLaw, 2 January 2012).

can be invoked in extending the field of the statutory provisions to suit the circumstances and facts of each case. The law of unjust enrichment in India should also test positive on the anvil of predictability under the Rule of Law. Although on the basis of statutory provisions reference by the courts to earlier decisions and applicability of the principles of justice, equity and good conscience, it appears to test positive but further research may help in testing it. The words of Goff and Jones appear to be true here, "*whatever may be the underlying justifications for the award of restitution in these cases, the 'unjust element' in 'unjust enrichment' is simply 'a generalisation of all the factors which the law recognises as calling for restitution'.*"[78]

[78] Goff and Jones, *The Law of Unjust Enrichment* 7 (9th edn., Ch. 1,Sweet & Maxwell, 2016).