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Limiting Judicial Oversight: The Exclusion Clause

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ABSTRACT

Preclusive clauses, otherwise known as privative, exclusion, or ouster clauses, are statutory provisions which prima facie prohibit judicial review of the exercise of the discretionary powers to which they relate. As we shall see, such clauses take a variety of forms; all, however, raise the same fundamental tension between the rule of law (which strongly favors access to courts — and therefore judicial review) and the constitutional duty of the courts, under the doctrine of legislative supremacy, to give effect to the sovereign will of Parliament. Although never explicitly repudiating their loyalty to Parliament in this context, the courts pursue a clear policy of seeking to preserve judicial review in the face of preclusive provisions. This judicial attitude was recently exhibited by the Court of Appeal in R (Sivasubramaniam) v. Wandsworth County Court [2002] , which had no difficulty in rejecting a submission that a 54(4) of the Access to Justice Act 1999, which precludes appeal against certain decisions to grant or refuse permission to appeal, implicitly prevented judicial review of such decision.

Keywords: *Judicial Review, Exclusion Clause*.

I. INTRODUCTION

The fundamental principle is ubi-Jus-ibi-remedium (where there is Right, there is Remedy) i.e. remedies are correlative with Rights. Remedies can be constitutional or statutory like Judicial review, writs, injunction, damages, declaration etc. Judicial review has constitutional basis because of the Art. 32, 136, 226, 227 of Constitution of India.

Judicial Review means – Court's power to review the action of other Branches of government especially the courts' power to invalidate legislative and Executive action as being unconstitutional[2]. Judicial Review has been declared as basic structure of the constitution[3]. No statutory provision can effect this basic structure. But the position is different when a person seeks an ordinary remedy through a civil suit for unjunction, damages etc. Sec. 9 of the CPC[4]

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[2] Black's law Dictionary 8th edn. At p. 864.

[3] *Keshvananda Bharti v. State of Kerala,* AIR 1973 SC 1461, *Minerva Mills Ltd. v. Union of India,* AIR 1980 SC 1789,*S.S. Bola v. B.D. Burman,* AIR 1997 SC 3127.

[4] Sec. 9 **Court to try all civil suits unless barred** – *"The court shall (subject to provision herein contained) have*

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being a statutory provision, it's scope can be curtailed by another statutory provision by inserting exclusion clause, either by express provision or by necessary implication.

II. EXCLUSION CLAUSE: EXPRESS OUSTER AND IMPLIED OUSTER

The manifestation of legislative intent to limit the scope of judicial review, can be express or by necessary implication.

(A) Express Ouster

A clause in a statute may expressly oust the civil courts from taking cognizance of disputes arising under the Act. If there is express provision in any special Act barring the jurisdiction of a civil court to deal with matters specified thereunder, the jurisdiction of an ordinary civil court stands excluded. In case of an express exclusion, the consideration as to the **scheme of the statute** in question and the **"adequacy or the sufficiency"** of remedies provided for it may be **relevant** but it **cannot**, however, be **decisive**.

S. 18 of the Madras General Sales Tax, 1939, ran as follows:

"No suit or other proceeding shall, except as expressly provided in this Ac be — instituted in any court to set aside or modify any assessment made under this Act".

The Supreme Court ruled in *Illuri Subbayya v. State of Andhra Pradesh*,[5] that no — suit could be filed in a civil court to recover an amount which the assessee claimed had been illegally collected from him as sales tax under the Act. In coming to this conclusion, the Court referred to the elaborate alternative remedies provided by the — Act itself to which the aggrieved party could take recourse to challenge the correctness of an order made by the Authority under the Act.

In connection with an express bar to the jurisdiction of the civil courts, the Supreme Court has observed in *Dhulabhai v. State of Madhya Pradesh*.[6]

"When there is an express bar to the Jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies — provided may be relevant but is not decisive to sustain the Jurisdiction of the civil court".

The Central Excise Act provides for a complete machinery including provisions for

Jurisdiction to try all suits of civil nature excepting suit of which their cognizance is either expressly or impliedly barred".

[5] AIR 1964 SC 322 : (1963) 50 ITR 93.

[6] *Dhulabhai v. State of M.P.,* AIR 1969 SC 78 : 1968 93) SCR 662. Exmphasis added.

appeals to *CEGAT*.[7] S. 11-B expressly bars courts to exercise jurisdiction in refund claims, It has accordingly been ruled by the Supreme Court that no suit is — maintainable to claim refund of excise duty on the ground that it has been collected from him by misinterpreting the Excise Act.[8]

(B) Implied exclusion/outer

As stated above, under S. 9, CPC, civil courts' jurisdiction can he impliedly excluded. When a question arises as regards implied exclusion of the jurisdiction of the civil courts under a statute, the court considers the question whether any adequate and efficacious alternative remedy under the Ai is provided for. It the answer is in the affirmative, it can safely be concluded that the jurisdiction of the civil court is barred.

(C) Test for implied outster

In certain circumstances, the adequacy and sufficiency of remedies provided for by the Act may become decisive if an implied exclusion of civil court's jurisdiction is claimed.[9] Generally speaking, wherever a right, not pre-existing, in common-law, is created by a statute, and that statute itself provides a machinery for the enforcement of the right, both the right and the remedy having been created *uno flatu* and a finality is intended to the result of the statutory proceedings, then even in the absence of an exclusionary provision, the civil courts' jurisdiction is impliedly barred.[10]

Where, however, a right pre-existing in common law is recognised by a statute and a new statutory remedy for its enforcement provided, without expressly excluding the civil court's jurisdiction, then both the common-law and the statutory remedy might become concurrent remedies leaving an element of election to the person of inherence.[11]

If, on the other hand, if a statute creates a right or imposes a liability and creates a machinery for adjudication, the Civil Court's jurisdiction may be taken to have been impliedly excluded.

In *N.D.M.C. v. Satish Chand,*[12] the New Delhi Municipal Corporation levied property tax on property owned by the respondent. He filed a suit for an injunction against the committee to restrain it from levying the tax which he argued was illegal and without jurisdiction. The Act in

[7] *Customs, Excise and Gold (Control) Appellate Tribunal.* See, Jain, *Treatise,* 1.
[8] *Mafatlal Industries Ltd. v. Union of India,* (1997) 5 SCC 536 : JT 1996 (11) SC 283.
[9] *Kamala Mills Ltd. v. State of Bombay,* AIR. 1965 SC 1942 : 1966 (1) SCR 64; *Dhruv Green Fields Ltd. v. Hukum Singh,* AIR 2002 SC 2841 : (2002) 6 SCC 416.
[10] *Raja Ram Kumar Bhargav v. Union of India,* AIR 1988 SC 752 : (1988) 1 SCC 581 : *N.D.M.C.* v. *Satish Chand,* AIR 2003 SC 3187, at 3190 : (2003) 10 SCC 38.
[11] *Raja Ram Kumar Bhargav v. Union of India,* AIR 1988 SC 752 : (1988) 1 SCC 681.
[12] AIR 2003 SC 3187 : (2003) 10 SCC 38.

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question provided for a machinery for purposes of tax assessment. A statutory provision provided that the liability of any person to be assessed or taxed is not to be questioned "in any other manner or by any other authority than is provided in this Act."

The Supreme Court pointed out that an express bar to the jurisdiction of the civil court under s. 9, CPC, arises where a statute itself contains a provision that the jurisdiction of a civil court is barred. An implied bar may arise when a statute provides a special remedy to an aggrieved party. The Act gives a special and particular remedy for the person aggrieved by an assessment of the tax under the Act. The Act provides that an appeal against an assessment of any levy would lie to the deputy commissioner who could seek the opinion of the High Court on any point on which he entertained a reasonable doubt. The Act also provides a particular forum and a specific mode of having this remedy. The Court ruled that by *inevitable implication,* the jurisdiction of the court was excluded.

III. JUDICIAL POLICY REGARDING EXCLUSION CLAUSE : CONSTRUED STRICTLY AND PRESUMPTION IN FAVOUR OF EXISTENCE

Whether it would be possible to devise an ouster clause that excluded review is less a matter of semantics than of judicial attitude and legislative response. The courts have always been in the position to interpret the words in an Act of Parliament and, thus, they can, if they choose, construe them as only applying to errors within jurisdiction, or, as precluding only appeal. Short of provoking a constitutional clash by rejecting this judicial interpretation, there is nothing that Parliament can do. Clearly the determination of the courts to preserve judicial review in the face of ouster clauses raises issues of sovereignty. Whatever the courts' interpretation of these clauses has been, the parliamentary intent was clear: to limit or remove the courts from the particular area in question.

It may be stated at the very outset that judicial policy is not to infer readily exclusion of jurisdiction. Presumption ordinarily is in favour of the existence, rather than the exclusion, of the jurisdiction of the civil court to try civil suits. The general principle is that a statute excluding the jurisdiction of civil courts should be construed strictly.

In *Manjeti,*[13] the Court has laid down the following two tests to determine the question of exclusion of jurisdiction:

(i) whether the legislature intent to exclude arises explicitly or by necessary

[13] *State of Andhra Pradesh v. Manjeti Laxmi Kantha Rao,* Air 2000 SC 2220 : (2000) 3 SCC 689; *Dhruv Green Field Ltd. v. Hukam Singh,* air 2002 sc 2841 : (2002) 6 SCC 416. Also see, *Dhulabhai v. State of Madhya Pradesh,* AIR 1969 SC 78 : 1968 (3) SCR 662; see, *infra.*

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implication; and

(ii) whether the statute in question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.

In this connection, the Supreme Court has observed in *Bhatia International v. Bulk Trading SA:*[14]

> "While examining a particular provision of a statute to find out whether the jurisdiction of a court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be ousted unless the very statutory provision explicitly indicates or even by *inferential conclusion* the court arrives at the same when such a conclusion is the only conclusion."

IV. TOOLS OF EXCLUSION CLAUSE TO LIMIT JUDICIAL REVIEW BY LEGISLATURE

Legislature adopt many tools for exclusion clause by playing with different words like "Finality Clause", "Conclusive Evidence", "shall not be questioned clause", "as if enacted in the Act", "Time limit clause".

(A) Finality Clause

Finality clauses are statutory terms that purport to render the decision of a particular agency unassailable.

Sometimes, provisions are made in a statute by which the orders passed by administrative tribunals or other authorities are made final'. This is known as 'statutory finality'. Such clauses are of two types:

(i) Sometimes no provision is made for filing any appeal, revision or reference to any higher authority against an order passed by the administrative tribunal or authority; and

(ii) Sometimes an order passed by the administrative authority or tribunal is made final and jurisdiction of civil court is expressly ousted.

With regard to the first type of 'finality', there can be no objection, as no one has an inherent right of appeal. It is merely a statutory right and if the statute does not confer that right on any party and treats the decision of the lower authority as 'final', no appeal can be filed against that decision.[15]

[14] AIR 2002 SC 1432 : (2002) 4 SCC 105 : 2002 (1) Arb LR 675.
[15] For detailed discussion, as to right of appeal, *see* C.K. Thakker, *Code of Civil Procedure* (2002, Vol. II) at pp. 288-89.

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With regard to the second type of finality, provisions are made to exclude jurisdiction of civil courts. And even though the subject-matter of the dispute may be of a 'civil' nature and thus covered by Section 9 of the Code of Civil Procedure, 1908, a civil suit, is barred by the statutory provision. For example, Section 170 of the Representation of the People Act, 1951 reads thus:

> *"No civil court shall have jurisdiction to question the legality of any action taken or' any decision given by the returning officer or by any other person appointed under this Act in connection with an election'.*[16]

In such cases, the correct legal position is that the jurisdiction of a civil court may be ousted either expressly or by necessary *implication*. But even in the cases where the jurisdiction of a civil court is ousted, it has jurisdiction to examine the cases where the provisions of the Act and the Rules made thereunder have not been complied with, or the order passed by the tribunal is a 'purported order'[17], or the statutory authority has not acted in conformity with the fundamental principles of natural justice,[18] or the decision is based on 'no evidence'[19] etc. In all these cases, the order cannot be said to be *'under the Act'* but is really *de hors* the Act and the jurisdiction of civil court is not ousted.

(B) Exclusion / Finality Clause Under Industrial Dispute Act 1947

The policy underlying the Industrial Disputes Act is to provide a speedy, Inexpensive and effective forum for resolution of industrial disputes between the workmen and their employers. The idea is to protect the workman from being caught mo the labyrinth of civil courts. The tribunals created by the IDA have power to give a broader range of remedies than what the civil courts can provide. It is in the interest of the workmen that industrial disputes are adjudicated in the *fora* created by the IDA. S. 17 of the Industrial Disputes Act declares that every award of the labour court, industrial court and National Tribunal is "final", and "shall not be called in question by any court in any manner whatsoever". Accordingly, in view of the above, the Supreme Court has ruled that the jurisdiction of the civil courts has been *impliedly* excluded in respect of industrial disputes and the appropriate forum for resolution of such disputes is the

[16] *See also*, Section 27 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954; S. 78 of the Estate Duty Act, 1953; S. 293 of the Income Tax Act, 1961 : *Shyam Lal Yadav v. Kusum Dhawan,* (1979) 4 SCC 143: AIR 1979 SC 1247.

[17] *Union of India v. Tarachand Gupta;* (1971) 1 SCC 486: AIR 1971 SC 1558.

[18] *Srinivasa v. State of A.P.,* (1969) 3 SCC 711: AIR 1971 SC 71; *Dhulabhai v. State of M.P.,* AIR 1969 SC 78: (1968) 3 SCR 662; *Dharangadhra Chemical Works Ltd. v. State of Saurashtra,* AIR 1957 SC 264: 1957 SCR 152; *Radha Kishan v. Municipal Committee,* AIR 1963 SC 1547L (1964) 2 SCR 273.

[19] *Kaushalya Devi v. Bachittar Singh,* AIR 1960 SC 1168: *Bhatnagars & Co. Ltd. v. Union of India,* AIR 1957 SC 478: 1957 SCR 701; *Kedar Nath v. State of W.B.,* AIR 1953 SC 404: 1954 SCR 30; *STO v. Shiv Ratan,* AIR 1966 SC 142: (1965) 3 SCR 71; *Chandra Shekhar Soni v. Bar Council of Rajasthan,* (1983) 4 SCC 255: AIR 1983 SC 1012; *Labhkunver v. Janardan,* (1983) 3 SCC 514: AIR 1983 SC 535.

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forum constituted under the IDA.[20] Accordingly, the Court ruled that the suits filed in the instant case were not maintainable in law.

The Supreme Court has laid down the following proposition for adjudication of industrial disputes:[21]

(1) The Industrial Disputes Act defines an industrial dispute and sets up a machinery to settle such disputes. The Act does not have any specific provision barring civil courts form taking cognizance of industrial disputes. Nevertheless, the Supreme Court has ruled that the Act impliedly excludes civil courts' jurisdiction from the area of industrial disputes.

Where the dispute involves recognition, observance or enforcement of a right or obligation created by the 'Industrial Disputes Act', the jurisdiction of the civil courts has been impliedly barred. The appropriate forum for resolution of such disputes is the forum created by the Industrial Disputes Act. The only remedy is to approach the fora constituted by the Act.

(2) Not only this, the disputes arising under the standing orders and other sister labour laws have to be settled by the *fora* provided by the IDA.[22]

- If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in the civil court.
- If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, jurisdiction of the civil courts is impliedly barred. The appropriate forum for resolution of such disputes is the one created by the I.D. Act. The only remedy available to the suitor is to approach the *fora* constituted under the Act.[23]

[20] *Rajasthan SRT Corpn. v. Krishanakant,* AIR 995 SC 1715 : (1995) 5 SCC 75 : 1995 (2) LIJ 728: *Chamdrakant Tukaram Nikam v. Municipal Corporation of Ahmedabad,* AIR 2002 SC 997 : (20O2) 2 SCC 542 2002 (1) LLJ 842.
[21] *Rajasthan SRT Corpn. v. Krishnakant,* AIR 1995 SC 1715 (1995) 5 SCC 75 : 1995 (2) LLJ 728.
[22] *Raja Ram Kumar Bhargava v. Union of India,* AIR 1988 SC 752 : (1988) SCC 681 : (1988) 171 ITR 254: *Som Datta Bukders v. Kanpur Jal Sansthan,* AIR 2002 All 238.
[23] Also see, *Premier Automobile Ltd. v. Kamlekar,* AIR 1975 SC 2238 : (1976) 1 SCC 496 : 1975 (2) LLJ 445; *Jitendra Nath Biswas v. Empire of India and Ceylone Tea Co.,* AIR 1990 SC 255 : (1989) 3 SCC 582 : 1989 (2) LLJ 572.

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(4) On the other hand, when a dispute between a workman and his employer arises under the general contract law, the civil court has jurisdiction to entertain the same.[24]

A suit praying for perpetual injunction based on unruly or unlawful activities of the workers interfering with the course of business by the management, (which not an industrial dispute) falls within the jurisdiction of the civil court.[25]

V. FINALITY CLAUSE & INDIAN CONSTITUTION

The question of conferring finality on administrative action in India can be conveniently studied under the following headings:

(i) Constitutional modes of judicial review and administrative finality.

(ii) Non-constitutional modes of judicial review and administrative finality.

(i) *Constitutional modes of judicial review and administrative finality.*—No finality clause contained in any statute and expressed in any language can bar the judicial review available under Articles 32, 226, 337 and 136 of the Constitution. In *Deokinandan Prasad v. State of Bihar*[26], the Supreme Court held that Section 23 of the Pension Act, 1871 which provided that Suits relating to matters mentioned therein cannot be entertained in any court does not bar the constitutional modes of judicial review. In the same manner the High Court of Andhra Pradesh quashed Section 6(a) of the A.P. Preventive Detention Act, 1970 which provided that the order of detention would not be invalidated on the ground that it contained some vague and irrelevant grounds, as violative of Article 22(5) of the Constitution.[27]

Even in cases where the Constitution itself makes the action of an administrative authority final, the constitutional modes of judicial review cannot be barred by any necessary implication. In *Union of India v. J.P. Mitter*[28] the Supreme Court held that even in the face of Article 217(3) of the Constitution which makes the order of the President final, in cases of dispute relating to the age of a judge, the constitutional mode of judicial review is not barred.

Sticking to the same kind of judicial behaviour, the Supreme Court again held in *Indira Nehru*

[24] *Sirsi Municipality v. Cecelia Kom Frances Tellis,* AIR 1973 SC 855 : 1973 (1) LLJ 226 : (1973) 1 SCC 409; *Ram Kumar v. State of Haryana,* AIR 1987 SC 2043 : 1987 Supp SCC 582 : 1982 (2) LLJ 504; *Rajasthan State Road Transport Corp. v. Krishna Kant,* AIR 1995 SC 1715 : (1995) 5 SCC 75 : 1995 (2) LLJ 728.
[25] *Sri Balaji Rice Mills v. Rice Mill and Flour Mill Workers Union,* (2004) 21 ILD 12 (AP).
[26] (1971) 2 SCC 330: AIR 1971 SC 1409. *See also Durga Shankar v. Raghuraj,* AIR 1954 SC 520 wherein the Supreme Court held that Section 105 of the Representation of the People Act which made every order of the Election Tribunal final and conclusive does not bar constitutional modes of judicial review.
[27] ILR 1972 AP 1025.
[28] (1971) 1 SCC 396: AIR 1971 SC 1093. *See also Election Commission v. Saka Venkata Subba Rao,* AIR 1953 SC 210.

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Gandhi v. Raj Narain[29], that clause (4) of Article 329-A (inserted by the Constitution Thirty-ninth Amendment Act, 1975) which frees the disputed election of the Prime Minister and the Speaker from the restraints of all election laws, does not bar the constitutional modes of judicial review. In *Satyavir Singh v. Union of India*[30], also the Supreme Court held that Article 311(3) of the Constitution which makes the decision of the government on question whether it is impracticable to hold enquiry against a government servant before disciplinary action as final, is not so final that the court cannot do anything. Therefore, even in the face of finality clause of Article 311(3) court can still consider whether the power has been properly exercised. Similarly the Supreme Court while upholding the validity of the Constitution Fifty-second Amendment Act, 1985 popularly known as the anti-defection law, held that clause 7 which has taken away the power of judicial review of the courts by making the actions taken by the Speaker under the Act as final shall not take away the writ jurisdiction of the High Court and the Supreme Court.[31] Clause 7 provided that "no court shall have jurisdiction in respect of any matter connected with the disqualification of any member of a House under the Tenth Schedule notwithstanding anything in the Constitution".

However, there are some matters, in which administrative decision are considered final. It was held that the Presidential declaration under arts 341 and 342 of the Constitution whether a particular community is a scheduled caste or a scheduled tribe for the purposes of reservations or such other special treatment was final and conclusive, and no question could be raised in a court.[32] This is a case of finality being conferred by the Constitution. Since these articles were part of the original Constitution and were not inserted by a constitutional amendment, the question of the basic structure violation did not arise. In L. *Chandra Kumar v India,*[33] the Supreme Court read cl (d) of art 323A [inserted by the Constitution (Forty-Second Amendment) Act 1976] narrowly so as not to exclude judicial review by a High Court under art 226 of the Constitution. The clause gave power to Parliament to exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under art 136 with respect to the disputes or complaints' to be adjudicated upon by administrative tribunals. The Court held that the clause did not exclude the jurisdiction of the High Court under art 226 of the Constitution.

Clause (4) & (5) of Art. 368 are ultra-vires because they exclude judicial review which is basic feature of the constitution as held in Minerva Mills Ltd. v. Union of India 1980[34] and recently

[29] 1975 Supp SCC 1: Air 1975 SC 2299.
[30] (1985) 4 SCC 252: AIR 1986 SC 555.
[31] *Kihoto Hollokan v. Zachillm,* 1992 Supp (2) SCC 651.
[32] *TV v. A. Gurusamy* (1997) 3 SCC 542.
[33] (1997) 3 SCC 261.
[34] AIR 1980, SC 1789, Cl (4) to Art 368 "No Amendment of this Constitution (including the provision of Part III)

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in I.R. Coelho v. State of Tamil Nadu AIR, 2007, SC. Supreme Court speaking through *Y.K. Sabharwal C.J.* held that any law placed in the ninth schedule of the Constitution of India after 24th April 1973 will be open to challenge on the ground that they destroy or damages in the basic structure of the constitution.

VI. CONCLUSIVE EVIDENCE

One way of excluding judicial scrutiny has been noticed in extending special probative force to certain administrative actions. Thus, Section 35 of the Companies Act, 1956 treats a certificate of incorporation given by the Registrar of Joint Stock Companies to be *"conclusive evidence"* that all the requirements of the Act have been complied with.[35]

The other instance of probative weight is found in the Land Acquisition Laws. Sub-section (3) of Section 6 of the Land Acquisition Act, 1894 enacts that the declaration of the State Government is *"conclusive evidence"* that the land is required for a public purpose.[36] In such cases, the conclusiveness is but fair in public interest.

(A) "Shall Not Be Questioned" Clause

Another formula used to exclude the courts has been the "shall not be questioned clause". As has been seen from the *South East Asia Fire* case, this may be used in conjunction with a no certiorari clause. Any- hope that persevering parliamentary draftsmen might have had that this formula would work where all else had failed was to prove unfounded.

In *Anisminic*,[37] s.4(4) of the Foreign Compensation Act 1950 stated that a determination of the commission should not be called in question in any court of law. Their Lordships unanimously held that this only protected *intra vires* determinations. *Ultra vires* determinations were not really determinations at all. They were nullities, which could be of no effect. Section 4(4), or any equivalent provision, could, therefore, only immunise from attack errors of law within jurisdiction and this concept has itself now largely ceased to exist.[38]

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made on purporting to have been made under this Article [whether before or after the commencement of Sec. 55 of Constitution (Forth-second Amendment) Act 1976] shall be called in question in *"any court on any ground"*. Cl (5) to Art 368 "For the removal of doubt it is hereby declared that there shall be no limitation whatever in the Constituent Power of Parliament of amend by way of addition, variation or repeal the provision of this constitution under this article."

[35] *Moosa Goolam v. Ebrahim Goolam*, (1913) 40 Cal 1(PC).

[36] *Somawanti v. State of Punjab.* Air 1963 sc 151, 162-65: (1963) 2 SCR 774; *Lila Vati Bai v. State of Bombay*, AIR 1957 SC 521, 525: 1957 SCR 721; *Valjibhai Muljibhai Soneji v. State of …….*

[37] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, AT 170-171, 181, 200-201, 202; *R. v. Secretary of State for the Home Department Ex p. Mehta* [1992] C.O.D. 484.

[38] *Cf. R. v. Acting Returning Officer for the Devon and East Plymouth European Constituency Ex p. Sanders* [1994] C.O.D. 497, distinguishing *Anisminic* in a case concerned with a "shall not be questioned clause" in the context of a returning officer's duties in relation to the acceptance of nomination papers on the ground that the ouster was not absolute.

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(B) "As If Enacted In The Act"

The underlying object of this ancient formula is to protect all rules, regulation or bye-laws framed or notifications issued under the Act which are in the nature of delegated legislation or orders passed or actions taken thereunder.[39] Such provisions clothe subordinate legislation with the force of the provisions of the parent Act and all actions are to be effective "as if enacted in the Act". Their legality and validity can be questioned in the same way as the legality and validity of the Act itself.[40]

Section 19(5) of the Madras General Sales Tax Act. 1949 read as under:

> *"All rules made under this section shall be published in the Fort St. George Gazette, and upon such publication shall have effect as if enacted in the Act."*[41]
>
> *(emphasis supplied)*

The effect of such "as if enacted" clauses may be considered in the light of leading cases on the point.

In Institute of *Patent Agents v. Lockwood*,[42] Lockwood was registered as a patent agent under the Patents Design and Trade Marks Act, 1888. A declaration was sought that since the necessary formalities for registration had not been complied with, Lockwood could not be registered as patent agent. The Act left to the Board of Trade to make such general rules as were required for giving effect to the provisions of the Act. The rules required payment of registration fee. The validity of that requirement was 'challenged. But the rule was supported on the ground that in view of the provisions of the Act that the rules 'shall be of the same effect as if they were contained in this Act", the questions of *ultra vires* could not be raised.

Upholding the objection. Lord Hershell, L.C. observed:

> "I own I feel very great difficulty in giving to this provision, that they 'shall he of the same effect as if they were contained in this Act', any other meaning than this, that *you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act."*[43]

(C) "Time Limit" Clause

In India, we have not yet faced a problem regarding the time limit clauses. The time limit clauses

[39] *State of U.P. v. Delhi Cloth Mills,* (1991) 1 SCC 454: AIR 1991 SC 735.
[40] *Ibid.; see also, Prithi Pal Singh v. Union of India,* (1982) 3 SCC 140: AIR 1982
[41] *See also, State of Karela v. Abdulla,* AIR 1965 SC 1585: (1965) 1 SCR 601.
[42] *Ibid.,* at p. 360 (AC).
[43] *Ibid.,* at p. 360 (AC).

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exclude access to courts after the expiration of a stipulated period. In England, a distinction has been made between total finality clauses and the time limit clauses. While the former have been held to apply only to matters within jurisdiction the latter have been held to exclude recourse to courts completely after the expiration of the prescribed period, provided, of course, that the time prescribed is not unreasonable. Actually, in view of the constitutional provisions, even the time limit clauses would not exclude judicial review, The courts have declined review when parties have been guilty of delay or have not exhausted the alternative remedies. However, questions affecting the fundamental rights, jurisdiction and natural justice cannot be kept away from courts.

VII. DAMAGE & BREACH OF CONTRACT AND EXCLUSION CLAUSE

The formula that no suit shall lie for anything done or purported to be done in good faith under the Act has been held to include an 'omission'. as well.[44] This formula bars suits for damages and compensation for administrative acts done under the Act.[45] In this connection, the Bombay Port case may be referred to.

The plaintiff had imported certain goods. The Bombay Port Trust delivered a part of the goods to the plaintiff but could not deliver the rest as they were not traceable. He brought a suit after the six-month time limit. As stated earlier, the court had ruled that "omission to do an act" was covered by the expression "act done."[46] The plaintiff argued that the failure to do what the Act mandated the Port Trust to do, *viz.*, to deliver the goods, could not be "in pursuance of this Act."

It was held that though the authority might have neglected to comply with the law, yet the ouster clause gave protection to it, as the act of non-delivery was in the discharge of official duty under the Act. There has to be a reasonable or legitimate connection between the act or omission and the discharge of official duty. The short delivery of the goods was in purported exercise of the bailee's obligation under the Act and was covered by s. 87.

The ouster clause will not cover the case of breach of contract. In *Bombay Housing Board v. Karbhase Naik & Co.*,[47] it was held that non-payment of an amount of money due to the respondent on the basis of breach of contract between him and an administrative authority could not be said to be an act done or purported to be done in pursuance of the Act under which the

[44] *Amalgamated Electricity Co. v. Municipal Committee, Ajmer,* AIR 1969 SC 227 : 1969 (1) SCR 430; *Public Prosecutor v. R. Raju,* AIR 1972 SC 2504 : (1972) 2 SCC 410 : 1972 CrLJ 1699; *Trustees of Bombay Part v. Premier Automobiles,* AIR 1974 sc 923 : (1974) 4 SCC 710.
[45] *Govt. of Madras v. Basappa,* AIR 1964 SC 1873 : (1964) 15 STC 144; *S.I. Syndicate v. Union of India,* AIR 1975 SC 460, 468 : (1974) 2 SCC 630.
[46] *Trustees of Bombay Part v. Premier Automobiles,* AIR 1974 sc 923 : (1974) 4 SCC 710.
[47] AIR 1975 SC 763 : (1975) 1 SCC 828.

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said authority functions but is an act under the contract. While the authority may have entered into the contract in pursuance of the Act, the breach of contract cannot be regarded as having any reasonable connection with any duty cast upon the authority by the Act. Therefore, the privative (ouster) clause would not apply. Similarly, the ouster clause will not prevent a person from suing the government for the recovery of the price for the goods supplied to it, under s. 70 of the Indian Contract Act, 1872.[48]

VIII. COMPARATIVE STUDY : THE POSITION REGARDING OUSTER/FINALITY OR PRIVATIVE CLAUSE

(A) Finality Clause in England

In England where Parliament is supreme and can exclude judicial review of any administrative action, the attitude of courts in the Nineteenth Century was to accept the finality clause as final. In Institute of *Patent Agents v. Lockwood*[49], the House of Lords interpreted the finality clause "as contained in this Act" to mean that the jurisdiction of the court is barred. However, as courts jealously guard their jurisdiction, the Lockwood doctrine was overruled in *Minister of Health v. Yaffee*[50] . Interpreting a finality clause couched in similar language, the court held that it can still scrutinize whether the subordinate legislation conflicts with the parent Act or whether the procedural requirements have been complied with. The tool which the court may wield to get around the finality clause is the interpretation of the clause in such a manner as not to exclude the power of the court where it is so possible without offending the canons of interpretation.

This judicial behaviour in the face of parliamentary sovereignty created controversy in England, resulting in the inclusion of this question in the terms of reference of the Franks Committee. This committee recommended that in cases involving jurisdictional facts and in cases where appeal on the point of law is not provided, the power of judicial review should not be excluded. On this recommendation, Section 11(1) was inserted in the Tribunals and Enquiries Act, 1958 which provided that any finality clause in any statute passed before 1958 shall not exclude judicial review.

Therefore, in England, there cannot be finality in cases of *ultra vires* actions of the administrative authority. *Anisminic Ltd. v. Foreign Compensation Commission*[51] is a pace-setter for judicial behaviour in this direction. In this case, following the Suez crisis, the Egyptian

[48] *Union of India v. J.K. Gas Plant,* AIR 1980 SC 1330 : (1980) 3 SCC 469. Here the outster clause barred the suit for "any damage" by anything done under the act. See, *infra.*
[49] 1894 AC 347.
[50] 1931 AC 347.
[51] (1969) 1 All ER 208. The principle laid down in this case was followed in *S.E. Asia Fire Bricks v. Non-Metallic Products,* 1981 AC 363.

Government took over British companies and signed a treaty in which the Egyptian Government made available a certain amount of money to the British Government for distribution amongst the companies. The names of the companies were given in the treaty and included the name of the appellant-company. This amount was made over to the Foreign Compensation Commission constituted under the Foreign Compensation Act, 1950. Section 4 of the Act contained a finality clause to the effect that the decisions of the Commission shall' not be called in question in any court. The claim of Anisminic Ltd. was rejected on the ground that they had transferred their interest to an Egyptian company. Under the Act, the Commission had no power to decide the question of entitlement to compensation. The court held that since the Commission had committed an error of jurisdiction in determining an issue which was outside its jurisdiction, the jurisdiction of the court was not barred. As the distinction between error of jurisdiction and error within jurisdiction is not very clear, the, decision in the Anisminic case (supra) makes the judicial review broad-based even in the face of a clear finality clause. Therefore, even if the constitutionality of an Act of Parliament cannot be questioned by courts, the courts can still enquire as to what Parliament intended in passing the impugned provision or as to whether there was any abuse of power conferred by Parliament, whether rules of natural justice were observed by the authority, or whether the authority acted within or in excess of jurisdiction.[52]

Another technique of giving finality to administrative action used in England was to confer power on administrative authorities in 'subjective terms'. For example, use of words like when they are satisfied' or 'as they deem it fit and proper', etc., gave the administrative authority absolute discretion in the exercise of their power. This technique was used in England to meet the conditions created by wars. However, even in the face of absolute subjective discretion conferred by Parliament on administrative authorities courts consistently held that the discretionary powers must be exercised judiciously and there if power is exercised in bad faith courts will exercise the power of judicial review.[53] Thus even in England where Parliament is supreme 'finality' is not absolutely final.

(B) In French Constitution

Under the French Constitution Parliament is supreme. Courts have no power to declare the law of Parliament unconstitutional in the popular sense though constitutional council exercises pre-promulgation review. It may follow therefore that the finality clause in any French statute would oust the jurisdiction of the court. However, it is heartening to note that French courts have never

[52] *See* Thakker, C.K. : ADMINISTRATIVE LAW (1992), Eastern Book Company, p. 259.
[53] *Robinson v. Minister of Town and Country Planning,* (1947) 2 All ER 395. *see also* Thakker, C.K., *Administrative Law,* (1992), Eastern Book Company, p. 260.

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accepted this position and there is no instance in French legal history of a successful exclusion of judicial review though it still remains a theoretical possibility. In Lamotte (February 17, 1950), the power was given to an administrative officer to requisition and bring into cultivation any farmland which is abandoned or uncultivated for more than two years. The statute contained a finality clause to the effect that the action of the administrator cannot be the object of any administrative or judicial proceeding. The Conseil d'Etat held that this does not bar judicial review in cases of excess of jurisdiction.[54]

There is no denying the fact that in the area of administrative finality courts hold a very delicate balance between power and liberty in a modern form of government. Therefore, a trend in judicial behaviour which regards 'finality' and 'judicial review' as complementary and not contradictory is a welcome sign.

(C) Finality Clause In USA

In the USA, the right to judicial review, which is grounded both in 'due process and the constitutional position of judicial power, cannot be taken away by any 'finality' clause in the statute. The basis of this proposition is that the Congress cannot override the fundamental principle of the constitution o separation of power and so it cannot divest courts of their inherent power to review the actions of administrative authorities which are illegal, arbitrary or unreasonable and which impair personal or property rights.

The decision of the U.S. Supreme Court in *Breen v. Selective Service Local Board*[55] is a pointer in this direction. Though judicial review outside the constitutional structurisation can be regulated by the Congress,[56] yet to interpret the finality clause literally may mean the creation of serious constitutional problems. In Breen case (supra) the petitioner who was an undergraduate student, and thus entitled to deferment, was classified as 'available for military service'. The statute contained a finality clause which prohibited judicial review of 'classification' after the registrant responds negatively to an induction order. The Supreme Court held that the statute cannot be interpreted literally as a bar to pre-induction review. Therefore, the denial of judicial review in USA in the face of finality clause constitutes judicial self-limitation and not the lack of power. The Supreme Court of USA rightly stated in *Barlow v. Collins*[57], "preclusion of judicial review of administrative actions...is not lightly to be

[54] Quoted in Brown and Garner : FRENCH ADMINISTRATION LAW (1967).
[55] 396 US 460 (1970). *See also Shaughnessy v. Pedreiro,* 349 US 48.
[56] Section 12, Administrative Procedure Act, 1946. *Section 12 of the Administrative Procedure Act, 1946 states: "Except so far as (1) statutes preclude judicial review, or (2) agency action is by law committed to agency discretion, the power of judicial review has been retained."*
[57] 397 US 159, 166 (1970).

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interfered with".

IX. GROUNDS FOR CHALLENGES FOR EXCLUSION CLAUSE

Even if an order made by a Statutory Tribunal has been declared as 'final', if there is abuses of power by the tribunal or the order is de-hors the Act, it is open to be questioned in a Court of Law. In *Radha Kishan v. Municipal Corporation*[58] held, "Even in cases of Expresses or Implied bar the civil court's jurisdiction is not completely ousted. A *suit in a civil court will always lie to question the order of a tribunal created by statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions."*[59] (emphasis supplied).

Suffice it to say that in the classic decision of *Dhulabhai v. State of M.P.*[60], after discussing the case-law exhaustively, *Hidayatullah, C.J.* summarised the following principles in this regard:

(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must he held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot he brought

[58] AIR 1963 SC 1547 : (1964) 2 SCR 273.
[59] *Ibid.*, at p. 1551 (AIR).
[60] AIR 1969 SC 78: (1968) 3 SCR 662.

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before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act, but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund tax collected in excess of constitutional limits or is illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant inquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.[61]

X. JURISDICTIONAL ERROR & FINALITY CLAUSE

Usually, when there is a 'finality' clause present in the statute, the judicial policy is to hold that it does not exclude from the court's purview a case of 'jurisdictional error". If the adjudicatory body in question commits a "jurisdictional error" while deciding a case, then a civil court can entertain a suit challenging the body's decision, and the 'finality' clause does not come in the way of the court in doing so.

The leading case on the point is *Anisminic v. Foreign Compensation Commission,* a House of Lords' decision in England.

In England, the judicial policy has been to narrowly interpret ouster clauses. The sheet anchor of judicial review of administrative action is excess of jurisdiction. Any act outside jurisdiction is a nullity because to be valid an act needs statutory authorisation and if it is not within the powers given by the concerned statute, it has no legal legs to stand on.[62] The most important

[61] *Ibid.,* at pp. 89-90 (AIR) : 682-84: *see also, Premier Automobiles Ltd. v. Wadke,* (1976) 1 SCC 496 : AIR 1975 SC 2238. For detailed discussion regarding the jurisdiction of civil courts, *see, C.K. Takwani, Civil Procedure* (2003) at pp. 27-42.

[62] The judicial policy in this regard has been expounded succinctly by *FARWELL LJ* in 1910 in *R. v Shoreditch Assessment Committee: ex. p. Morgan,* (1910) 2 KB 859, 880:
"No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess… or to refuse to exercise a jurisdiction which it

recent pronouncement in the area of ouster clauses is *Anisimnic Ltd. v. Foreign Compensation Commission,* [63] a trend setting pronouncement of the House of Lords.

In this case, the House of Lords sought to restrict the scope of finality clauses by giving a connotation to the concept of excess of jurisdiction. The Foreign Compensation Act, 1950, constituted a tribunal for adjudicating claims on funds paid by a. foreign Government to the British Government in compensation for the expropriation or destruction of British property abroad. S. 4 of the Act provided: "The *determination* by the Commission of any application made to them under this Act shall not be called in question in any court of law".

In spite of such a provision, the House of Lords held unanimously that the ouster clause did not give protection to actions which were *ultra vires*, and the court's jurisdiction was not ousted with respect to them'. The word 'determination' in the statutory provision in question could net be construed as including everything which purported to be a determination but which was in fact no determination at all. If one seeks to show that the determination is a nullity, one is not questioning the purported determination—one is maintaining that it does not exist as a determination. Only an error committed within jurisdiction was outside the purview of the civil court's jurisdiction because of the ouster clause. In the instant case, the tribunal in question did have jurisdiction to enter into the enquiry in questions. Nevertheless, the House of Lords held that the error committed by the commission was of jurisdiction as its decision was based on a matter which it had no right to take into account and so its decision was a nullity arid, thus, subject to judicial review. The order of the commission was thus quashed in spite of the ouster clause.

It has already been noted earlier that at present the judicial thinking is tending towards expanding the scope of the concept of "jurisdictional error". [64] The impact of *Anisminic* has been three fold :

XI. IMPACT OF ANISMINIC CASE

(i) To render obsolete the technical distinction between "errors of law" which go to "jurisdiction" and "errors of law" which do not.

(ii) The scope of the concept of 'jurisdictional error' was very much extended.

(iii) A consequence of great importance of this judicial approach has been that the

has.. It is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited …"

[63] (1969) 2 WLR 63. Also, *supra.*

[64] *Supra*.

efficacy of privative clauses is nullified to a large extent as such clauses can protect only non-jurisdictional errors and the courts can thus extend their control over statutory authorities and tribunals.

The principle that no privative clause can pre-empt challenge to an administrative action if it is *ultra vires* or outside jurisdiction of the concerned authority has been subsequently reiterated in many cases in England. For example, the Privy Council has accepted this principle in *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Mfg. Employees Union.*[65]

(A) Jurisdictional facts and privative clauses

Even though a statute may bar a civil suit, yet the courts may characterise a fact as "jurisdictional" and thus hold that the privative clause does not bar determination of the jurisdictional fact by a court in a suit. If a body decides a jurisdictional or collateral fact erroneously It raises a question of jurisdictional or collateral fact erroneously, it raises a question of jurisdictional error. It is on the correct finding of the collateral fact that the jurisdiction of the body itself depends and no body can usurp jurisdiction by finding a jurisdictional fact erroneously. Reference may be made in this connection to *Munni Devi v. Gokal Chand*[66].

(B) Fundamental procedure (principles of natural justice)

As early as 1940, the Privy Council stated in Mask[67], as a general proposition, that the jurisdiction of the courts would not be excluded where the statutory tribunal has not acted "in conformity with the fundamental principles of judicial procedure." Again, in *Dhulabhai v. Stare of Madhya Pradesh*,[68] the Privy Council reiterated the same proposition. The first proposition laid down by the Supreme Court in *Dhulabhai* envisages that a finality clause does not exclude courts' jurisdiction 'here the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(C) Unconstitutionality & private clause

It is now a well-established proposition that no private or ouster clause can bar civil court's jurisdiction to entertain a suit questioning the constitutionality of the parent statute and of any action taken thereunder. The Constitution being the.

[65] (1980) 2 ALL ER 634.
[66] AIR 1970 SC 1727 : (1969) 2 SCC 879.
[67] *Secretary of State v. Mask & Co.,* AIR 1940 PC 105 : 44 Cal WN 705 : 1940 (2) Mad LJ 140.
[68] *Dhulabhai v. State of M.P.,* AIR 1969 SC 78 : 1968 (3) SCR 662.

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XII. CONCLUSION

The decision-making bodies may tend to act as pet despots in the absence of independent judicial control over them from the above. True, in India, writ jurisdiction can always be invoked. This is a built-in safeguard of great consequence against misuse of administrative power, but it may not always be possible for all and sundry to go to the High Court to vindicate their rights. It is necessary that a remedy be available to a citizen nearer at hand. From this point of view, remedy by way of suit against the Administration ought to be available to him which he may invoke in the lower court at less expense. This will result in making the Administration more transparent and accountable to the people. Denial of judicial remedies at lower level only increases the burden of the High Courts.

Then, there are many questions which cannot be satisfactorily resolved through the machinery of a writ-petition. For example, High Courts are reluctant to go into questions writ petition;[69] writ is not regarded as a suitable remedy for seeking refund of money illegally collected by the Administration as a tax.[70] or for impeaching contractual obligations.[71] For any such purpose, one has to take recourse to the remedy by way of a suit. If that approach to justice is barred by a statutory provision, the citizen may be left ***'high and dry'*** with no effective remedy; to vindicate his rights against infringement of his rights at the hands of the Administration. Unfortunately, not much attention has so far been directed towards improvement of ordinary remedies against the Administration because of the availability of the writ system, but development of ordinary remedies is intimately connected with the idea of easy access to justice by common, ordinary persons.

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[69] *Supra*. Also, *D.L.F. Housing Construction (P) Ltd. v. Delhi Municipal Corporation,* AIR 1976 SC 386 : (1976) 3 SCC 160.
[70] Supra. Also, *D.R. Mills v. Commissioner of Civil Supplies*, AIR 1975 SC 2243.
[71] See, *supra*, Chapter XXVII, under *Infra*, Government Contracts, Also, *Har Shanker v. Deputy E. & T. Commissioner* AIR 1975 SC 1121, 1126: (1975) 1 SCC 737.

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