CHAPTER 9

ERROR OF LAW ON THE FACE OF THE RECORD

9.1 General

It is accepted law that declaration is available where the action in question is vitiated by jurisdictional error. But the difficulty arises where declaration is claimed on the ground that a decision is tainted with an error of law apparent on the face of the record. This happens when a tribunal which proceeds with a matter with jurisdiction takes into account irrelevant considerations, or leaves out relevant considerations, or puts a wrong or unreasonable interpretation on a statutory provision or bases its decision on no legally admissible evidence. Whether a declaratory action lies to correct such errors of law which do not go to jurisdiction is the subject matter discussed in the Chapter.

It is proposed to draw a distinction between the effect of jurisdictional error and error within jurisdiction, on an order before discussing the details. An order vitiated by jurisdictional error is considered void ab initio, an order not in existence. But an error within jurisdiction has no general effect of
invalidating an order; it merely renders the erroneous order liable to be quashed, i.e. voidable in law.\textsuperscript{1} Where an order is declared to be void, it would be destitute of all legal effect from the outset and hence can be ignored. It is said that in case of a voidable decision the Court can declare such a decision to be voidable and that would not help the Plaintiff much because he will have to institute other proceedings to get the order set aside. The view is that in such cases the declaration by the Court only amounts to an advice that the Plaintiff may apply for Certiorari to get the order quashed. Hence, it was observed: "In otherwords, the Court can grant a declaration only where the decision which is being impugned is without jurisdiction and void, but not where it is within jurisdiction and merely voidable".\textsuperscript{2}

During the early period the Courts viewed all errors committed by inferior Courts, to be jurisdictional. By 1720 it was clearly settled that not every statutory requirement was to be treated as jurisdictional. That a distinction between errors of jurisdiction and errors within jurisdiction was thus recognised and this fact is demonstrated by the establishment in the latter part of the 18th century by the practice that findings on jurisdictional matters could be impugned by affidavit evidence.\textsuperscript{3}

2. Rubinstein, \textit{op.cit} p.117, 118.
Till the first half of 19th century the Kings Court strictly applied the principle of interpretation that statutes creating new jurisdictions ought to be strictly construed and on that basis quashed convictions and orders for even minor technical defects. The parliament passed the Summary Jurisdiction Act in 1848 to retaliate the dominance of King's Court in the matter of issue of Certiorari. The legislation relieved the authorities from the duty to give reasoned decisions and thus made it impossible for the Courts to correct errors of law other than those which went to jurisdiction. After 1850 the jurisdiction to issue Certiorari to quash for error of law apparent on the face of the record was seldom involved and the very existence of that jurisdiction came to be forgotten. The fact that such jurisdiction ever existed was even denied by the Court of Appeal in Race Course Betting Control Board v. Secretary of State for Air. Thus the power of review for error of law was almost wholly forgotten after 1848, until it was dramatically revived in 1950 in R V. Northumberland Compensation Appeal Tribunal Ex. P. Shaw. In this case, error of law apparent on the face of the record was restored as a ground of review and rapidly rose to great popularity.

4. (1944) 1 All E.R.60.
5. (1952) 1 All E.R.122.
9.2 Error of Law and Jurisdictional Error - Distinction

In India, the law on the point is not clear. According to Dr. A. T. Markose, "The principles that govern the grant of declarations in Public Law are the same as those which govern the issue of prerogative writs as far as the merits of the administrative action are concerned".\(^6\) If this is true, declaration can be claimed on the ground of error of law as well, being a recognised ground for the issue of the Writ of Certiorari. But a close analysis of the Indian cases makes it difficult to accept the veracity of the statement. With due respect it is submitted that Dr. Markose's statement does not appear to have been supported by any judicial decisions. In early decisions, error of law apparent on the face of the record is not seen as a ground for certiorari.\(^7\) The Courts held that certiorari could be issued only for jurisdictional defects and not when an order was merely erroneous. The explanation for the refusal of error of law apparent on the face of the record in India may be the disuse of the doctrine in England during that time. In \textit{T. C. Basappa V. Nagappa}\(^8\) the ground was specifically


7. \textit{Kumaraswami Mudali V. Muniratna Mudali} (1932) I.L.R. 55 Mad. 942, 944. An application for a writ of certiorari to have the order of the Revenue Board quashed was dismissed.

mentioned by the Supreme Court and it was applied in Hari Vishnu Kamath v. Ahmad Ishaque. 9

In the case of Brij Raj Krishna 10 the Supreme Court refused a declaration on the view that the House Controller had ample jurisdiction under S.11(1) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 "to determine whether there is non payment of rent or not as well as jurisdiction.... to order eviction of a tenant". 11 It was held that the wrong decision of the Controller did not entitle the Plaintiff to ask for the declaration.

In Rama Rao v. Gopalakrishnamurthy 12 the Plaintiff had filed the Suit for a declaration that the decision of the Board of Revenue to the effect of appointing the Defendant as karnam under S.13 of the Madras Hereditary Village Officers Act, 1895 was ultra vires. Dismissing the Suit, the Court observed: "There is no doubt that if the Tribunal created by S.13(1) of the Act for adjudicating upon claims to Village Officers specified in S.3 acted without jurisdiction there would be available a right to the aggrieved person to seek his remedy in the Civil Court or in

11. Ibid at 117.
this Court.... Where, however, all that is provided is that the Tribunal acting within its jurisdiction and exercising the powers conferred on it by the Act has reached an erroneous decision in law or fact as regards the rights of rival claiments to the Karnam's Office, S.21 bars a writ in the Court."\(^1\)\(^3\) for a declaration to set aside the decision of the tribunal. In Sambayya V. Tirupatayya\(^1\)\(^4\) on which the Plaintiff in Rama Rao's\(^1\)\(^5\) case was relied on and the Court granted declaration on the ground that the order terminating the Plaintiff was made without jurisdiction by the Revenue Divisional Officer.\(^1\)\(^7\)

The Law on the point in India seems to be that a declaration on an error of law is not available. The reasons for this proposition is discussed at the beginning of this chapter. The decision in Anisminic case did not have any effect in India. The latest pronouncement was in Bata\(^1\)\(^8\) case where the Supreme Court rightly refused the declaration sought since the error was not jurisdictional.\(^1\)\(^9\)

13. Ibid at 896.
17. The decision in Tarachand's case is an exception.
19. In Bharat Kala Bhandor's Case A.I.R. (1966) S.C.249, the prayer was granted mainly because of the contravention of a constitutional provision.
In India the remedy available for error of law is "certiorari". "In otherwords, the declaration is not an available remedy for error of law on the face of the record. Only certiorari will do." 20 In England, the Parliament is Supreme and almost all the statutes coming out are with 'no-certiorari' clauses. In such cases no certiorari will be available. There the party aggrieved seeks a declaration that the decision is invalid on the ground that the tribunal must have misconstrued the extent of its own powers and so exceeded its jurisdiction. 22

In Healy V. Minister of Health 23 the Plaintiff prayed for a declaration that he was a mental health officer within the meaning of the provisions of the relevant statute for the purpose of superanuation benefits. There the Plaintiff asked for a declaration of his legal rights and not the validity of the decision of the Minister. The Plaintiff neither pleaded that the Minister's decision was wrong in law. The Court held that the question had already been determined by the Minister and hence the Court had no jurisdiction to entertain the action. Suppose the Plaintiff prayed a declaration that the decision of the Minister was wrong in law, would the decision of the Court have been different? It may be submitted that the decision of

22. As done in Anisminic case.
23. (1955) 1 Q.B.221.
the Court would have been the same even if the Plaintiff had argued in the like manner because the Plaintiff did not allege any jurisdictional error there.

In *Taylor v. National Assistance Board and Law Society* 24 the Plaintiff applied for a declaration that the amount of alimony should have been excluded by the board when computing the rate of her income. The board accepted the preliminary objection that the decision was final and a declaration could not be granted. The Board had jurisdiction to decide the matter and while exercising it whether some wrong calculation was made it would not have affected the jurisdiction. Following an observation in the decision of Denning L.J. in *Bernard v. National Dock Labour Board* 25 the Court, however granted the declaration prayed for. It may be submitted here that the observation was made because there the notice was issued without jurisdiction. Here the alimony payable to her was in dispute at the time of making the application for civil aid certificate. The Board took into account the amount of alimony as well. The Court granted declaration on the ground that the board computed the monetary contribution in a manner contrary to the true construction of the relevant statute and regulations. The error committed by the tribunal was clearly within

24. (1956) 2 All E.R.455.
jurisdiction. The declaration was granted on the ground that "...the Court should not tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law... If it (the Court) cannot so intervene, it would mean that the tribunal could disregard the law". So it may be said that Taylor's case is an authority, and perhaps the only one, for the contrary proportion in English law.

In Punton V. Ministry of Pensions, the Plaintiffs claimed unemployment benefit under the National Insurance Act, 1946. The Plaintiffs had been thrown out of employment owing to a trade dispute by others. The Commissioner interpreted priviso(a) to S.13(1) of the Act and held that they were not directly interested in the trade dispute. Instead of praying for certiorari, they applied for a declaration. When the case came in appeal the Court of Appeal held that the Court had no jurisdiction to grant a declaration. Sellers, L.J. observed that the question whether on the facts found by the Commissioner, the Commissioner came to the correct decision in point of law, "...would have been the precise issue if

26. The decision was considered to be an exception by de Smith, op. cit. (4th edn.), Pt.520.
27. Bernard's case at p.1111.
29. (1964) 1 All E.R.448.
proceedings had been taken by way of certiorari and a decision could have been obtained in such proceedings which could have resulted in the Commissioner's decision being quashed and of no effect. "30 It was also held:

Apart from certiorari there is no machinery for getting rid of the decision of the National Insurance Commissioner and what is more important no way of substituting an effective award on which the claims could be paid. I would be out of harmony with all authority to have two contrary decisions between the same parties on the same issues obtained by different procedures, as it were on parallel courses which never met or could meet, and where the effective decision would remain with the inferior tribunal and not that of the High Court.31

But such a situation would have arisen only if the Court reddecides the amount of assistance. In the Punton32 case (No.1) the Court took the view that a declaration was available in the place where certiorari was issued. But in Punton33 (No.2) the Court did not follow the view. Similarly Tailor's34 case was disapproved.

31. Ibid at 455.
32. (1963) 1 All E.R.275.
33. (1964) 1 All E.R.448.
34. (1967) 2 AC 147.
Then came the decision in Anisminic\textsuperscript{35} case, which confused the whole law regarding jurisdictional error and error committed within jurisdiction.

\textbf{Lord Pearce Observed},

Lack of jurisdiction may arise in various ways. The tribunal ... may ask itself wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.\textsuperscript{36}

The wide-ranging observation, in effect, is said to have reduced the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. Not only that, by the decision, any error can be accurately described as arising from a failure to take into account a relevant factor or taking into account of an extraneous consideration. The practical result of the decision is said to be the virtual end of error of law on the face of the record and is replaced by jurisdictional error. Fortunately, the Court granted declaration only after qualifying

\textsuperscript{35.} (1969) 1 All E.R.208.

\textsuperscript{36.} Ibid at 233.
the error as one affecting the jurisdiction and thus making the order or decision void. This shows that declaration is available only against a void order. This action and not for one which is only voidable which in turn asserts that error of law is not considered to be a ground for the issue of declaration. "The conclusion is therefore that it is impossible for tribunals to commit error of law within jurisdiction; an error of law will always be a jurisdictional error since it will concern a given element whose existence or meaning must be decided by the tribunal prior to the exercise of jurisdiction but which cannot be varied by the Tribunal's decision." 37 So the point is whether there is a tendency to issue declaration for non-jurisdictional defects by classifying them as jurisdictional defects under the wide definition given in Anisminic 38 case.

Lord Denning, in Pearlman's case 39 observed that the difference between the two types of error was being eroded. His Lordship suggested: that the distinction should be discarded. According to the learned Judge the High Court should have, jurisdiction to control the proceedings of inferior Courts and tribunals by way of judicial review, because no Court or Tribunal had the jurisdiction to make an error of law

on which the decision of the case depended. 40

It may be concluded that in England, the distinction between the two types of error is being eroded. In many cases, 41 declaration has been granted for errors committed within jurisdiction. Lord Denning seems to be one of the prominent advocates for the giving up of the distinction. 42 The Courts have showed their willingness to grant declarations that decisions of statutory bodies were invalid if affected by error. But "(t)he declaration, which had been hailed as a more satisfactory substitute for certiorari, received its first serious check" 43 in Punton's case. But the decisions of latter cases show a leniency to treat the two errors as identical.

The distinction between error of law apparent on the face of the record and jurisdictional errors remain significant for many reasons. The effect of the former is to leave a decision valid, although erroneous, till set aside by appropriate proceeding while the latter renders a decision a nullity. 44 While a void decision can be impeached in a collateral

40. _Ibid_ at 372.
41. _Anisminic_ case, _Pearlman_ case.
42. _Pearlman's_ case, _Punton's_ case (No.1) etc.
44. Dr.M.S.Nayar "Error of Law" 3 AC L.R. 1979 at 306.
proceeding, a valid decision cannot be disturbed by an authority other than by an appropriate one. In England, the distinction between jurisdictional and adjudicatory fact has received a jolt by the decision of the House of Lords in Anisminic Ltd., V. Foreign Compensation Commission.\textsuperscript{45} It is now generally agreed that the formulation of the categories of defects which may be termed jurisdictional leaves not even a single case to be characterised as adjudicatory.\textsuperscript{46} Lord Denning M.R. observed in Pearlman V. Keepers and Governors of Harrow School\textsuperscript{47} "So fine is the distinction that in truth the High Court has a choice before it whether to interfere with an inferior Court on a point of law. If it chooses to interfere it can formulate its decision in the words. "The Court below had no jurisdiction to decide this point wrongly as it did'. If it does not choose to interfere, it can say, "The Court had jurisdiction to decide it wrongly and did so". The learned Judge also observed "I would suggest that this distinction should now be discarded". The observation was made in view of a privative clause excluding the Writ of Certiorari and judicial review on the ground of error of law. According to Rawlings\textsuperscript{48} errors can be classified into

\textsuperscript{45} (1969) 1 All. E.R.208.


\textsuperscript{47} (1979) 1 All E.R.365, 372.

\textsuperscript{48} Rawlings. "Jurisdictional Review after pearlman" (1979) public law 404.
three types 1. cases where the essential conditions for the existence of jurisdiction are absent. (2) cases where an error of law committed by the tribunal causes excess of jurisdiction and (3) a mere error of law.

9.3 Importance of Distinction

It is submitted that the distinction is important and has to be maintained because of the following reasons. It is the law that additional evidence is admissible to show any jurisdictional defect while it is not permissible to show any defects within jurisdiction such a distinction is important because otherwise parties may misuse the provision by adducing evidence before the Court which ought to have been adduced before the tribunal. The distinction between the two types of errors is necessary for the proper observance of the rule. Certiorari differs from declaration in as much as it is available to correct errors of law apparent on the face of the record. Declaration is available only for jurisdictional defects. Probably it was the non availability of declaration to correct the particular type of error disclosed in the Anisminic49 case which prompted the learned Law Lords to classify the error as jurisdictional. It is the law that privative clauses, which exclude Courts' jurisdiction to issue certiorari, can protect only defects committed within jurisdiction. Anisminic case falls within this category. In India jurisdiction

49. (1969) 1 All E.R. 208.
to issue certiorari being constitutional, statutory exclusion is an impossibility. That is why Anisminic case has not received much importance in India.50

A declaration will not lie in respect of defects that do not go to jurisdiction. This is because the decision is not a nullity and the declaration is not capable of quashing a decision. Certiorari is therefore necessary. It follows that unless the wide rationale which is said to follow from the Anisminic case is employed declaration cannot lie in respect of an error of law whether or not on the face of the record.51 This view can not be regarded as highly technical if the result of declaration is taken into account. According to A.T. Markose declaration is available on all grounds which writs are available. However the author did not discuss the effect of declaration in the case of error of law which makes the administrative action only voidable.52 However, it is not clear from the cases whether the embargo on extending the declaration to errors within jurisdiction is a matter of jurisdiction or discretion.53 It can

50. Sethi V. R.P. Kapur A.I.R. (1972) S.C.2379. In this case the Supreme Court was reluctant to follow the Anisminic decision even with respect to its revisional jurisdiction under S.115 of Code of Civil Procedure.


plausibly be argued that this rule is an aspect of the general notion that a declaration will not be issued where it will serve no useful purpose, it being a matter of discretion.\textsuperscript{54} Thus if a declaration is made that a decision is erroneous this will normally be useless since the decision will remain fully valid and effective unless it is set aside. However, if the tribunal in question has the power to revoke its own decisions a declaration could serve a useful purpose so as to persuade the Court to exercise its discretion in favour of making the declaration. A declaration will lie when a decision is a nullity. Thus any defect which makes a decision ultravires or a nullity is in principle reviewable by means of a declaration. In this respect the declaration is capable of achieving the same result as any of the prerogative orders. Like certiorari it can expose the nullity of an existing or prospective decision. Whether a declaration can be made in respect of a non-jurisdictional error the Supreme Court Act, 1981, Section 31(2) provides that the Court may grant a declaration where having regard to the availability of the prerogative orders and to all the circumstances of the case it would be just and convenient to do so. It can be stated that this equates the scope of the declaration to that of certiorari. The purpose of S.31(2) is to govern the question of choice of remedy, not to alter the law relating to individual remedies.

\textsuperscript{54} Stevenson v. United Road Transport Union (1977) 2 All. E.R.941.
However, if a declaration is now available in respect of an error of law, it would follow that the error need not be apparent on the face of the record. Declaration is a remedy which, if granted usually confirms that the act or decision of an administrative agency is ultravires, that is null and void. As such, declaration is clearly unsuited to and will not be granted in respect of a merely voidable decision which is affected by an error of law on the face of the record.

The traditional approach seen in Punton V. Ministry of Pensions55 is that declaration can only declare existing legal rights and relationships and cannot create or constitute such rights. The traditional view of the scope of the declaration could act as a brake on the development of declaration as a flexible remedy. A prospective declaration which seeks to limit the consequences of a finding that a decision is ultravires is almost certainly doing more than simply declaring legal rights and, by discriminating between those rights which it is prepared to recognise and those which it is not, in performing a constitutive rule.56 The nature of declaratory relief was of importance when some errors of law were regarded as non-jurisdictional and voidable only. Certiorari was considered the only effective remedy as a voidable decision needed to be

55. (1964) 1 WIR 226, Petercane "A Fresh Look at the Punton Case". (1980) 43 MLR 266.

quashed, as it was a decision within the jurisdiction of the body concerned and so not ultravires, it continued to produce legal effect until it was quashed.\(^57\) A declaration that a legally valid decision had been taken in such a way as to render it susceptible to challenge was of little practical value, but to accept that the declaration had the effect of holding the decision to be no longer valid as from the date of the declaration was seen as creating a new legal relationship, not declaring an existing one.\(^58\) The particular issue has lost much of its practical relevance as the Courts have reached the position that all errors of law are jurisdictional. The argument is, however, of considerable relevance in considering the availability of prospective declarations.

The Court in its discretion, will not grant a declaration unless the remedy would be of real value to the Plaintiff. The Court will not grant declarations which are academic and of no practical value. The action for a declaration has been used to test the validity of delegated legislation, and the vires of decisions of tribunals whether statutory or voluntary. But a declaratory judgement cannot quash a decision and the remedy may not be appropriate where the decision was within jurisdiction but there is error of law on the face of the record.\(^59\)

\(^57\) Ibid at 100.
