CHAPTER 4

THE CONCEPT OF JURISDICTIONAL ERROR

"To segregate the logical from the sophistical throughout the whole field of jurisdiction would be a labour of Hercules, but what follows is an attempt to ventilate one of the worst corners of the Augean stable".  

Conferment of power on the administrative authorities to take decisions affecting the rights and liberties of citizens is a common feature of the modern industrial society. But all administrative bodies and tribunals are required to act within the limits of their jurisdiction. The word 'Jurisdiction' is a hard concept to understand. The term in its general sense means authority to decide. Any act which goes beyond the limits prescribed will be an ultra vires act. It may be pointed that all actions which are vitiated by jurisdictional error can be characterised as ultra vires but the converse is not true. Historically the doctrine of 'vires' was applied to non-judicial

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bodies exercising legislative or administrative powers and the term 'jurisdiction' was applied to bodies administering judicial functions.

The historical distinction between the doctrine of 'ultra vires' and 'jurisdictional error' is being lost now. The only distinction—which is subtle too—which can be seen is in the procedural aspect of 'ultra vires' doctrine.

Traditionally a jurisdictional error is committed where a tribunal omits some preliminary step which will clothe it with jurisdiction or purports to exercise jurisdiction to decide a matter other than that whose decision has been entrusted to it by statute; or where it purports to exercise jurisdiction when the facts or circumstances upon whose existence its jurisdiction depends, do not exist. Similarly, a tribunal commits a jurisdictional error where it declines to exercise jurisdiction, where the necessary facts or matters do exist.2

If the authority acts without jurisdiction the action will be a nullity; In Ram Swarup v Shikar Chand3 Sec.3(4) of the U.P. (Temporary) control of Rent and Eviction Act, 1947,


which provided that the order of the commissioner under Sec.7(F), be final" the Court held that the bar created by the aforesaid provision would not operate in cases where the plea raised before the Civil Court goes to the root of the matter and this would be so where the impugned order is a nullity. In Shiv Kumar Chadhar v. Muncipal Corporation of Delhi\textsuperscript{4}. N.P. Singh J. held that the provisions contained in Delhi Muncipal Corporation Act, 1957, being nullity in the eye of law, the same amounted to 'jurisdictional error' because of which civil courts jurisdiction was not barred as the impugned order was outside the Act. Want of jurisdiction may arise from the nature of the subject matter, i.e. the inferior Court may not have authority to enter on the enquiry or upon some part of it or from the absence of some essential, preliminary or upon the existence of some particular facts collateral to the actual matter which the Court has to try and which are conditions precedent to the assumption of jurisdiction by it\textsuperscript{5} or that it may have done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity or it may have acted in bad faith or that it may have refused to take into account something which it was required to take into account.\textsuperscript{6} In short the tribunal may "lack jurisdiction if it has no power to enter upon an enquiry.

\textsuperscript{4} (1993)3 SCC 161.
\textsuperscript{6} Anisminic v Foreign Compensation Commission (1969) 1 All. E.R. 208, 213.
into a matter at all; and it exceeds jurisdiction if it nevertheless enters upon such an inquiry or, having jurisdiction in the first place, it proceeds to arrogate an authority withheld from it by perpetrating a major error of substance, form or procedure, or by making an order lying outside its limited area of competence". If the exercise of a decision maker's power is conditional upon a particular set of facts, a clear mistake as to those facts will mean that the decision was made without jurisdiction and can be declared void by a reviewing Court.

4.1 Jurisdictional Error and Error Within Jurisdiction

Lord Esher, M.R. in \textit{R. v. Commissioners for Special Purposes of Income Tax} elaborately explained the term, as "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things it shall have jurisdiction to do

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such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which include the jurisdiction, to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more... In the second of the two cases it is an erroneous application of the formula to say that the tribunal cannot be given themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide without any appeal being given, there is no appeal from such exercise of their jurisdiction”.

The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. The existence of such a condition or fact is collateral to the actual matter which the tribunal has to decide. The determination whether such condition or facts exists or not is logically prior to the determination of the actual question which the tribunal has to try. Though the tribunal has
to make a finding as to the existence or non-existence of the condition or fact in order to decide whether jurisdiction has to be exercised or not in the particular case it cannot by wrong decision with regard to a collateral fact, give itself jurisdiction which it would not otherwise possess.

The tribunal is bound to decide the collateral fact in the first instance only to make up its mind whether it has to exercise the jurisdiction vested in it by law.

It is said that in England, "during the course of the Seventeenth century, distinction gradually came to be drawn between acts done without jurisdiction and erroneous act". But the question is how can these two errors be differentiated? Rubinstein suggests the following tests:

"... matters which are essentially the crux of the adjudication are to be placed within jurisdiction. Such questions are: Whether a person is guilty of an offence or not; whether deportation should be ordered... On the other hand, those preliminary questions which must be answered affirmatively before the essential matters can be decided from the gateway through which the tribunal must pass before reaching the

safeguards of his jurisdictional sphere and the shelter of his privilege of err".12

It seems that Rubinstein introduces time element in order to distinguish between jurisdictional matters and non-jurisdictional matters by a distinction between matters that are adjudicated first and those that are considered later. But Jaffe suggests that jurisdictional matters are those matters on which the legislature's attention has been focussed.13 In practice such formulations have been of no use and a Court enjoys much liberty in the classification.

In Pearlman v. Keepers and Governors of Harrow School,14 the question was whether installation of a Central heating system constituted a structural alteration within the meaning of the Housing Act, 1974. The majority of the Court of Appeal held that an erroneous finding by the Judge at first instance on this point deprived him of jurisdiction. Lord Denning M.R. denied that there is room any longer for the notion of error of law within jurisdiction. "The way to get things right is to hold thus: no Court or tribunal has any


jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it". 15

The dividing line between jurisdictional error and error of law is so thin that it is reduced almost to vanishing point. 16 The question of 'jurisdictional error' may be said to be dependent on the attitude of the judge. If he opts to quash the decision or action of the administrative authority he will depict a particular question to be collateral and will strike down the order or decision. This is because "...there is no yardstick to determine the magnitude of the error other than the opinion of the Court". 17 'Generally speaking any limitation put on a power of an authority by the Constitution should be characterised as a jurisdictional matter. 18 But it is doubtful whether this suggestion will bear fruit because in India violation of a constitutional provision is sometimes considered by courts to be a matter to be decided by the tribunal. The same matter has been considered to be a collateral fact in one case and

15. Ibid., at p.372.


adjudicatory fact in another case.\textsuperscript{19} Inspite of the vital
distinction between jurisdictional error and error of law, Courts
often treat the errors as identical. For example in the case of
\textit{Union of India v India Fisheries Ltd.},\textsuperscript{20} the Supreme court
observed: "But if we interpret S.49 E as we have done, it is a
clear case of lack of jurisdiction. At any rate, there is an error
apparent on the face of the orders..."\textsuperscript{21} Such scant respect
shown by courts is understandable if the applicant seeks
certiorari, because certiorari lies against both types of errors.
The distinction between jurisdictional and non-jurisdictional
errors is cardinal in declaratory action because the former
renders the decision void and the latter voidable. Hence it is
submitted that such wide observations are not helpful to
understand the distinction.

The inconsistency in treating a particular fact either
'collateral' or 'adjudicatory' is evident in the cases of \textit{Tata Iron
and Steel Company},\textsuperscript{22} and \textit{S.T.C. v Mysore}.\textsuperscript{23} The question in

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\item \textsuperscript{19} \textit{Tata Iron and Steel Co. v S.R.Sarkar}, A.I.R. (1961)
S.C.65.
\item \textsuperscript{20} A.I.R. (1966) S.C.36.
\item \textsuperscript{21} \textit{Ibid.}, at 37.
\item \textsuperscript{22} A.I.R. (1961) S.C.65.
\item \textsuperscript{23} A.I.R. (1963) S.C.548.
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both the cases was whether a particular sale transaction was 'interstate' or not. If it was interstate, the constitution prohibited such assessment and the order of the officer would be vitiated by jurisdictional error. In Tata's case the Supreme Court held that whether the transaction was interstate or not was not a collateral question. The apex court observed that it was a case where the sales tax office failed to apply the correct tests and held it to be an error of law not going to the root of jurisdiction. But in S.T.C.'s case the Supreme Court declared the order to be null and void on the ground that the officer gave himself jurisdiction by deciding a collateral fact wrongly. The importance of the distinction between jurisdictional error and error within jurisdiction cannot be undermined. The order of decision affected by error within jurisdiction will leave the decision or order valid till it is set aside. But an act vitiated by jurisdictional error renders it void. An void act or decision is subject to collateral attack. But a valid act or order cannot be impeached collaterally.

The decision of the Supreme Court in Union of India v Tarachand Gupta and Bros.\(^2\) has been greatly influenced by the decision in the Anisminic case. There the Supreme Court granted relief to the Respondent on the ground that it was none of the business of the Collector to ascertain whether the parts

and accessories constituted a 'moped' when put together. And also that the Collector erred in applying the correct provision. Here there are two provisions. The Collector had to see whether the goods imported were spare parts and accessories as envisaged under entry 295. If the imported articles constituted an autocycle when put together, entry 295 would be applicable. So the Collector had jurisdiction to impose customs duty and accordingly he had to decide the entry also under which it had to be quantified. How can it become a jurisdictional error if the Collector wrongly applied entry 294 instead of 295? If it could be characterised as jurisdictional error, he should have lacked jurisdiction or exceeded it or abused the power. Here none of those contingencies was in existent. The error committed here was only an error which can fall within the jurisdiction of the Collector. In this respect the case of Tarachand Gupta cannot be distinguished from that of Narasimhalu's case or that of West Bengal's case.

Which facts are collateral and which are adjudicatory is a complex question leading to controversies and inconsistencies. However, the matter has been formulated by unusual clarity by Justice Lalith Sharma in the case of Mohammed Illyas v Muhamed Hasibur Rahman. The learned Judge observed:

"where the Legislature confers jurisdiction on such tribunals to proceed in a case, conditional or the existence of certain state of facts... the existence of the same as a matter of fact is a sine qua non for the exercise of jurisdiction by the tribunal. If the civil Court comes to a conclusion that the essential facts do not exist, it can declare the decision of the tribunal as without jurisdiction". This is because, it is a collateral question on which the jurisdiction of the tribunal turns. If the tribunal is vested with jurisdiction to decide whether the preliminary state of facts, on which the exercise of jurisdiction depends, exists, then the fact will become merely adjudicatory. Then that decision could not be vitiated by jurisdictional error.28

In the light of the above propositions the correctness of the decisions in the cases of Tata Iron and Steel, S.T.C. and Bata Shoe Company is to be seen. In Tata's case the Supreme Court held that transaction in question was not an interstate transaction and hence there was no error going to the root of the jurisdiction of the authority. There the sales tax officer had jurisdiction to decide whether a particular transaction was interstate or not. It was a condition on the existence of which he gets jurisdiction, and thus a fact which he had to decide. In this respect it is submitted that the decision of the Supreme Court is correct. In S.T.C.'s case also the situation was

similar, but the Supreme Court held it to be a collateral question. In Bata's case, the Municipality while exercising jurisdiction under the particular Act, held that a certain assessment could be corrected and the assessee was liable to pay double duty which was permitted by Rule 1-4(b). The Court held that Sections 66(1)(b) 83, 84 and the rules framed under Sections 71,76 and 85 of the C.P. and Berar Municipalities Act, 1922 showed that the Municipality possessed the right and the power to assess and recover octroi duty and double duty on goods which were brought within the municipal limits. So any error in the exercise of that power could not be said to be a jurisdictional error.

4.2 Jurisdictional Error -- Absence Of Jurisdiction

Jurisdictional Error is classified mainly under three heads viz. Absence of Jurisdiction, Excess of Jurisdiction and Abuse of Jurisdiction. But this division is not accurate for with regard to want of jurisdiction and excess of jurisdiction, "...the two terms are now considered almost as identical and are freely inter-changed".

30. Ibid.
31. Rubinstein op.cit - at 244.
An administrative action can be annulled if the party can show that the authority had acted in absence of jurisdiction.

In *News papers Ltd.*, v. *State Industrial Tribunal*\(^{32}\) the Government referred a dispute to the State Industrial Tribunal and the Tribunal ordered the employer to reinstate the dismissed employee without 'break of service'. The Supreme Court after considering the U.P. Industrial Disputes Act, 1947 held that the dispute referred was not an industrial dispute since it was an individual dispute and the Tribunal had no jurisdiction to inquire into matters other than industrial disputes.

In *J.K. Chaudhuri v R.K. Gupta*\(^{33}\) the governing body of a College dismissed the principal for moral turpitude and inefficiency after conducting a proper enquiry. The Respondent made a representation to the Vice-Chancellor of the Gauhati University praying that the governing body be directed not to fill the post till the disposal of the suit. The Committee appointed by the University made a report that there was no ground justifying the dismissal. As a result the University directed the governing body to reinstate the Respondent. It was

\(^{32}\) A.I.R. (1957) S.C. 532. There, one steno-typist was dismissed from service; His case was not taken up by any union. Finally, the U.P. working Journalists took up his case.

contended before the Supreme Court that principal and members of the teaching staff belong to separate categories. The power of the University to interfere with the disciplinary proceedings was limited to the teaching staff only. Principal was the administrative head of the college. Accepting the contention, the Supreme Court held "(S)o far the University interfered with the action taken by the Governing Body against respondent No.1 in his capacity as the principal of the College it acted without jurisdiction..." In the above case, the University had jurisdiction to interfere with the proceedings pertaining to the teaching staff only. The statute did not state that the University had no jurisdiction in the case of Principals. The respondent had been initially appointed as a Professor. If these factors are taken into consideration it is submitted with due respect that the decision may be correct.

In Universal Imports Agency v the Chief Controller of Imports and Exports34 the Supreme Court held that the authorities had no power to confiscate the imported goods on the ground that they were imported without valid licence. The importation had been effected validly in accordance with the law prevailing at that time. But in Pioneer Traders v The

34. A.I.R. (1961) S.C.41. The Petitioners in Pondicherry entered into contracts to import goods before the merger. Pondicherry later merged with India and all the pre merger laws stood repealed and the Indian laws were made applicable.
Chief Controller of Imports and exports, the majority took the view that an order of confiscation was a quasi judicial order and was not liable to be challenged as violative of Art.19 (1)(f). Das gupta, J. dissenting, observed that the Collector or the Central Board of Revenue had no jurisdiction to make an order of confiscation or penalty. It is submitted that the dissenting judgement is correct because Ujjam Bai was applicable only if the authority had jurisdiction to enter upon the enquiry in the first instance.

The first essential for jurisdiction is the proper constitution of the Tribunal. This touches aspects of qualification of the members appointed and status of the authority. S.8(2) of the Industrial Disputes Act, 1947 provides that on retirement of a sole member of Tribunal the Government must appoint another person and continue the proceedings. But instead of taking action under S.8(2), the Government constituted a new tribunal under S.7(1) in the case of Ramdayal Chasiram Oil Mills v Labour Appellate Tribunal. The Supreme Court held that in such a case a new reference ought to have been made by the Government to the tribunal vested

with jurisdiction to adjudicate the dispute. If a particular statute provided that the tribunal constituted under it should consist of three members, the conclusion of the tribunal will be vitiated by want of jurisdiction if the tribunal consisted any number other than three. The question arose in United Commercial Bank v Workmen. One of the three members of a tribunal constituted under the Industrial Disputes Act retired during the proceedings. The Supreme Court quashed the award by the other two members on the ground that it lacked jurisdiction.

Under the fiscal statutes, the question of jurisdictional error arises most frequently. Under the taxation laws the assessing authority is vested with power to impose tax on the existence or non-existence of prescribed conditions. Very often, the taxing authority clothes itself with power by wrongly deciding the existence or non-existence of such conditions. For instance S.2(C) of the Bengal Finance (Sales Tax) Act, 1941 defined a "dealer" as any person who carried on the business of selling goods in the State of West Bengal. Explanation II included persons who carried on the business of selling goods and who had the authority to sell goods belonging to the principal. The sales tax officer imposed tax on the appellants who were commission agents. In Mahadayal Premchandra v

Commercial Tax Officers,\(^{39}\) the appellants were not having the authority to sell goods belonging to the principal. The Supreme Court struck down the assessment.

In certain cases, a constitutional limitation is put on the jurisdiction of the taxing authority. Art.286 of the Constitution prohibits imposition of tax on inter state transactions. Once a transaction is held to be interstate, then the states have no jurisdiction to assess the transaction. The power to decide whether it is an interstate transaction or not is also vested with the same authority. This is because the jurisdiction of the Authority cannot depend on its own conclusion.

The Central Sales Tax Act, 1956 remedied the situation and provides for assessment and collection of tax by state authorities. In Tata Iron and Steel Co., v S.R.Sarker\(^{40}\) the conclusion of the Sales Tax Officer was that (1) all the sales affected in favour of the parties in West Bengal satisfied the conditions, prescribed by S.3(b) and (2) that the place where the documents were delivered by the company through its head sales office to the purchaser was the place where the sale was


effected. The Supreme Court held that these assumptions were wrong. It was held: "The Commercial Tax Officer has failed to apply the correct tests and had made assumptions which are not warranted..." An usual criticism levelled against the decision is that it "was a case of ultra vires being either of 'collateral fact' wrongly decided, or of irrelevant considerations being taken into account".41 But in the case of Madan Lal Arora v Excise and Taxation Officer42 the Supreme Court struck down a best judgement assessment made after the lapse of three years because Section 11(4) of the East Punjab General Sales Tax, Act, 1948, provided for making best judgement assessment within three years as mentioned in the provision in cases where the correctness of the return was doubtful.

In Ujjam Bai v Uttar Pradesh43 the Supreme Court observed that the jurisdiction of a tribunal would not depend on the correctness of its findings but upon their nature and "it is determinable at the commencement, not at the conclusion". The lack of jurisdiction may arise if a tribunal is improperly constituted. "But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question

41. Dr.M.S.Nair, "Error of law apparent on the Face of the Record" 3 Ac.L.R. 301 (1979).
that it is empowered to determine". The issued notification under S.4(1)(b) of the U.P. Sales Act exempting handmade cigar, cigarates and bidies from sales tax provided additional excise duties which had been paid. The assessee claimed exemption from sales tax on the strength of the notification in December, 1957. It was held that the authority had jurisdiction to assess the Petitioner. Here the Petitioner had approached the Court under Art.32 on the allegation that the assessment order had violated his fundamental right to do business. It was held that the proper course was to move the High Court for a writ of certiorari for error of law apparent on the face of the record. The Supreme Court once again considered the question which arose in Tata's case, and in *State Trading Corporation of India v State of Mysore*. The only dispute which arose in the above case was whether certain sales were liable to be taxed. The Petitioners contended that they were not liable to be taxed by a State law since they were made in the course of interstate trade. The Court upheld the contention of the Petitioners. It was held that the taxing authority wrongly decided a collateral fact and assumed jurisdiction. Hence the taxing authority had acted without jurisdiction. In Tata's case, as stated earlier, the

44. On Nov.25, 1958 the Government exempted bidis from sales tax unconditionally with effect from July, 1, 1958.


decision turned on similar facts. But there it was held that it was only an error of law on the face of the record. There appears a conflict between these two decisions. It may also be submitted that if the decision in Tata's case is accepted it is difficult to agree with the conclusion in S.T.C. case. In Union of India v India Fisheries Limited,47 the Court rejected the contention of the Appellant that the income tax officer had jurisdiction to set off the refund due. It was held that... "if we interpret S.49E as we have done, it is a clear case of lack of jurisdiction".48 There a question of interpretation of a statute was treated as jurisdictional matter.

The question which arose in Fonseca (P) Ltd. v L.C.Gupta49 was whether the Deputy Secretary to the Government of India, was empowered to order eviction of unauthorised persons from public premises under the Defence of India Rules, 1971. The Supreme Court held that the Central Government alone was empowered to make an order under that Rule and "under the Rules of Business it would be the Minister or the officer empowered thereby who alone could exercise those powers in the name of the president". The Secretary

48. Ibid at 37.
"...admitted by having no such power the order made by him was wholly illegal, ineffective and void".50

The Supreme Court in Isha Beevi v Tax Recovery Officer51 held that an applicant challenging the jurisdiction of a taxing authority must convince the Court that the action taken by the authority had been vitiated by complete absence of jurisdiction. In this case, the appellants questioned the jurisdiction of the tax recovery officer to proceed with the recovery against the appellant's properties.

The question involved in Haryana v Haryana Co-op Transport52 is different from the above questions. The Respondent challenged the award given by a labour Court on the ground that the presiding officer did not have the prescribed qualifications. The High Court upheld the contention. The defence of the Appellant that the validity of the appointment could not be challenged collaterally was rejected. Dismissing the appeal the Supreme Court observed that "the proceeding was taken principally and predominantly for challenging the appointment itself".53

50. Ibid. 566.
53. Ibid at 240.
4.3 EXCESS OF JURISDICTION

The tribunal or administrative authority may proceed with jurisdiction but if the authority travels beyond the limits of the power the decision of the authority will be struck down for exceeding the jurisdiction. In Uttar Pradesh v Raja Mohammed Amir Ahmed Khan54 a document was presented before the collector under S.31 of the Stamp Act, 1879 for his opinion as to the correct duty payable. Instead of rendering his opinion, the Collector impounded it and issued notice to the Respondent requiring him to deposit the duty plus penalty. S.33 of the Act, provided that any person who was a judge or was in-charge of a public office before whom an instrument chargeable with duty was produced or comes in the performance of his functions was required to impound the instrument if it was not duly stamped. S.31 provided that the Collector should determine the duty chargeable. The Supreme Court held that S.31 did not postulate anything further to be done by the Collector. It was held;

"When the Collector is asked to give his opinion, he had to determine the duty with which, in his judgement the instrument is chargeable and there ends his duties and powers. After the determination of the duty, the Collector becomes functus officio..."55 This is a clear case where the authority exceeds the power sanctioned to it.

55. Ibid at 789-790.
In *Management N.P.C. Corporation v Workmen*\(^5\) there was a dispute between the Appellant and its employees. As a result of a settlement, the pay scale of the muster roll workmen was decided and certain other questions regarding other categories of workmen were referred to the tribunal. The Tribunal gave award allowing 25% increase in the wages of all labourers including muster-roll workmen. The Appellant contended that the question of the pay scale of the muster-roll workmen was not referred to the Tribunal and the Tribunal exceeded its jurisdiction. The Supreme Court held: "The pay scale of the muster-roll workmen decided as a result of the settlement and that was not one of the questions referred to the arbitrator. The Industrial Tribunal was therefore acting beyond its jurisdiction in allowing a 25% increase".\(^5\)

In another case the Supreme Court held that the issue of notice under S.147(a) of the Income Tax Act to reopen assessment on the ground that income of the assessee had escaped assessment, would be without jurisdiction if the two necessary conditions were not satisfied.\(^5\) The two conditions are that there should be an escapement of income of the assessee and the Income Tax Officer must have reason to believe that

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the assessee had omitted or failed to disclose fully and truly all material facts. In this case, the Appellate Assistant Commissioner allowed the amount to be paid to another company, as a deduction in computing the taxable income. The notice issued by the Income Tax Officer did not disclose the reason for which he had decided to reopen the assessment. It was held that if there was no rational nexus between the "reasons" and "belief" which appears in S.147(a), the notice issued by the Income Tax Officer would be liable to be struck down as invalid.

4.4 Abuse Of Jurisdiction

The power conferred on the authority must be used for the purpose for which it is conferred. If the power is used to achieve an ulterior purpose, it will affect the jurisdiction of the authority. An instance is the case of G. Sadanandan v Kerala.59 The Petitioner was arrested and detained in custody under Rule 30(1)(b) of the Defence of India Rules, 1962, to prevent the Petitioner from acting in a manner prejudicial to the maintenance of supplies and services of essential commodities. The Petitioner alleged that second Respondent had initiated criminal proceedings against him and he was present at the time of search of his shop situated in Chalai, Trivandrum. It was he, who had arrested the Petitioner from his house. The person

who made the F.I.R. in the criminal case was a salesman in his brother's provision store at Trivandrum and both of them were closely related to the Respondent. After considering the materials carefully the Court observed, "...we see no escape from the conclusion that the impugned order of detention... must be characterised as clearly and plainly malafide. This is a case in which the power conferred on the appropriate authority have been abused".60

In England the question of jurisdictional error has attracted more importance and attention. The importance of the difference between jurisdictional and non-jurisdictional errors had been recognised from the beginning of the 17th century. The lines which discriminate jurisdictions are fine, but they are clear and distinct and if they are once effaced, endless and inextricable confusion must be the consequence".61 The English Courts have developed the principle of jurisdictional error to facilitate review of administrative action because, in England, the Parliament is supreme. A major part of the statutes coming out of the Parliament bears the "no certiorari" clause. Since there was no 'constitution' to act as a touchstone to test the validity of those 'non-certiorari' clauses, the only recourse before the English Court was to see whether there was

60. Ibid at 1930.

any error which may affect the validity of the administrative action. "Yet nothing is more conspicuous than the failure of English law to evolve a consistent jurisdictional doctrine; even elementary principles are subject to conflicting or irreconcilable views".62

In R.V.Fulham (etc) Rent Tribunal63 the Court refused to issue certiorari on the ground that the tribunal had jurisdiction to inquire into the facts in order to decide whether or not it had jurisdiction. In the above case an unfurnished house was let out and later the tenant signed a document, agreeing that he would hire the furniture of the landlord and consider the house to be furnished. Later the tenant applied to the Rent Control tribunal to fix the fair rent of the unfurnished house. The Landlord and Tenant (Rent Control) Act, 1949 empowered the tribunal to fix rent only if the house was unfurnished. The contention of the landlord was that the agreement that they had entered into later proved the letting to be one of furnished premises. And it was also argued that the tribunal had no jurisdiction to inquire into the bonafides of the transaction.

The Anisminic64 case gave the term 'jurisdictional error'

63. (1950)2 All E.R. 211.
a wider meaning which gave a new phase to the problem. Lord Diplock observed "It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires". In *Anisminic* case the facts were that the properties owned by the appellant in Egypt were sequestrated by the Egyptian Government after the Israel-Egypt hostilities. Later the appellant reached an agreement with the Egyptian Government where by it agreed to sell the properties to T.E.D.O. an Egyptian organisation. As a result of the treaty, after two years, the Egyptian Government paid compensation to the British Government in respect of properties listed in Annexure 'E'. The Foreign Compensation Commission which was entrusted with the task of disposing of the amount held that the appellant had failed to establish their claim on the ground that T.E.D.O. the successor in title was not a British national. Art.4(1) of the Foreign Compensation Order, 1962, the Foreign Compensation Commission was required to treat a claim to compensation as established if the property was listed in Annexure E, and if the Applicant was the person referred to in Annexure E, as the owner of the property or was the successor-in-title of such person and that the owner and any person who became successor-in-title was or at any time a British National. In the above case the reason for rejecting the application was

that the successor-in-title of the applicant was not a British national. The House of Lords held that "the Commission made an enquiry which the order did not empower them to make and based their decision on a matter which they had no right to take into account"; 65a thus they were "seeking to impose another condition, not warranted by the order" 66 for they had no jurisdiction to put further hurdles in the claimant's way. 67

The decision of the House of Lords deserves great attention. In the above case, the Commission had jurisdiction to ascertain the maintainability of the application using the test in Art.4. If the applicant was the original owner, then he had to prove that he was a British national. Similarly if the applicant was a successor-in-title he also had to prove that both he and the original owner were British nationals. If the applicant himself was the original owner, the second provision had no relevancy. The primary function of the Foreign Compensation Commission was to fix the quantum of compensation and disburse the same. Here the Commission was entrusted with the task of determining the jurisdictional fact viz. whether the applicant is entitled to any compensation.

66. Per Lord Wilberforce.
67. Per Lord Pearce.
The Commission had no authority to decide the jurisdictional fact wrongly and if it so decided, it is always open to judicial intervention. Here the Commission came to a wrong conclusion regarding the collateral question, i.e. eligibility of the Applicant to any compensation by asking irrelevant questions.

According to the dissenting judgement the Commission committed an error by enquiring whether the original owner had a successor-in-title and if so whether he was a British national. In other words the Commission committed an error by construing that Art.4(1)(b) (ii) which had an impact over Art.4(1)b(i) which do not vitiate the conclusion of the commission. Lord Morris and Lord Pearce were of the opinion that the error, if any, was an error within jurisdiction, Lord Morris held:

When they were hearing argument as to the meaning of those relevant parts they were not acting without jurisdiction. They were at the very heart of their duty, their task and their jurisdiction. It cannot be that their necessary duty of deciding as to the meaning would be or could be followed by the result that, if they took one view, they would be within their jurisdiction, and if they took another view that they would be without.... Their jurisdiction and area and range of it is clear
and specific. No condition precedent has to be satisfied before their jurisdiction in regard to a claim begins.68

The prayer of the appellant was for a declaration. If the prayer had been for a writ of certiorari, no such roundabout analysis would have happened. Not only that the privative clause which prevented judicial intervention could not be met with, if the error committed was only an error within jurisdiction. "The breakthrough made by Anisminic was that, as regards administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and error of law that did not was for practical purposes abolished." The effect of the decision is that the question of the difference between jurisdictional error and error within jurisdiction became once more complicated and confused. "It is quite clear that a statutory tribunal may step outside jurisdiction in the course of its enquiry... whether there is excess of jurisdiction, or merely error within jurisdiction can be determined only by construing the empowering statute, which will often give little guidance. It is really a question of how much latitude the Court is prepared to allow."69 The real weakness in the majority's position, according to Prof.Wade is that it leaves the commission with virtually no margin of legal error. It comes perilously close

68. Ibid at 228-229.
to saying that there is jurisdiction if the decision is right, but none if it is wrong.\textsuperscript{70} The majority law Lords took a very orthodox view of what amounts to excess of jurisdiction, a view that no one could quarrel with. They say that jurisdiction is a matter of field or area of cognisance\textsuperscript{71} and of course excess of jurisdiction will be going outside that field or area. 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{72} One may well conclude that this case supplies another instance of the familiar phenomenon a hard case making bad law.\textsuperscript{73}

Another important decision in this realm is \textit{Pearlman v Keepers and Governors of Harrow School}.\textsuperscript{74} The facts were that, wishing to get the benefit under the provisions of the Leasehold Reform Act, 1967, the appellant applied to the County Court for a declaration that the central heating system which he had installed was an "improvement amounting to

\begin{itemize}
\item \textsuperscript{70} \textit{Ibid} at 211.
\item \textsuperscript{71} Lord Pearce (1969) 2 AC at p.195.
\item \textsuperscript{72} Gravets, "Time Limit clauses and Judicial Review. The Relevance of context" 41 \textit{M.L.R.} (1978) 383, 391.
\item \textsuperscript{73} Gordon D.M. "What did the Anisminic case decide" 34 \textit{M.L.R.} (1971) at p.11.
\item \textsuperscript{74} (1979) 1. All. E.R. 365.
\end{itemize}
that the retable value should be reduced. Met with failure both in the County Court and the Divisional Court, the Appellant approached the Court of Appeal for certiorari. It was held that the judge's mis-construction of the words in para 1(2) of Sch.8 of the Act was an error of law which went to his jurisdiction. No Court had jurisdiction to make an error or law on which the decision of the case depended. It was held that the judge had gone outside his jurisdiction by asking the wrong question to himself whether the central heating system amounted to a structural alteration. Lord Denning, observed:

But the distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction is very fine. So fine indeed that it is rapidly being eroded. Take this very case. When the Judge held that the installation of a full central heating system was not a 'structural alteration or addition' we all think that he went wrong in point of law. He misconstrued those words. That error can be described on the one hand as an error which went to his jurisdiction.... I would suggest that this distinction should now be discarded. The High Court has and should have jurisdiction to control, the proceedings of inferior courts and tribunals by way of judicial review.75 With due respect it is submitted that the suggestion

75. (1979) 1 AII E.R. 365.
that the distinction should be discarded, cannot be accepted. If it is accepted the question which arises is what will happen to the effect of void and voidable actions. This suggestion may be to surpass the privative clauses. If it is held that the order suffers only an error within jurisdiction, the Court’s jurisdiction to look into it will be shut out.

In *Re Recal Communications*76 the Court of Appeal assumed jurisdiction and ordered inspection of the Company's books or papers, reversing the judgement of High Court. The Court of Appeal, following the observation of Lord Denning in Pearlman's case, observed, "...No Court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends.77 But the House of Lords disapproved the decision in Pearlman's case and held that:

The jurisdiction of the Court of Appeal is wholly statutory; it is appellate only. The Court has no original jurisdiction. It has no jurisdiction itself to entertain any original application for judicial review. There is simply no room for error going to his jurisdiction, nor is there any room for judicial review".78

77. Ibid at 637.
78. Ibid at 637, 640.
In the transformed landscape of administrative law, if jurisdictional excess is to be treated as an inherent quality of error of law, demarcation of the scope of legal error would seem decisive in regard to judicial review. The crucial decision is made at the point of classification of the nature of the error, since there would no longer be any room, once the error is identified as an error of law, to address the question whether the error lies within or outside jurisdiction. 79

The last case in this series is the case of South East Fire Bricks v Non Metallic Mineral Products Manufacturing Employees Union. 80 The main question before the Privy Council was whether the High Court had jurisdiction to quash an award of the Industrial Court on the ground of error of law. The Industrial Court made an award in favour of the employees. This was challenged on the ground of an error of law on the face of the record. The High Court quashed the award. The Federal Court of Malaysia reversed the decision. Hence the appeal. The Privy Council held that "if only the error of law affected the jurisdiction of the tribunal, certiorari would be available." For this purpose a distinction was to be drawn between an error of law which affected jurisdiction and one which did not. It may be submitted, in this context that it


is the decision in Anisminic case that caused such confusion. Basing that decision, Lord Denning, M.R. went a step further and appealed to discard the difference between jurisdictional and non jurisdictional errors. The majority's reasons in Anisminic case contain not a few hints that, that concept was never far from their minds, since they cite a number of cases that are decided favourites of those who believe in jurisdictional facts. But actually the majority reach the conclusion that the commission's decision was a nullity for excess of jurisdiction, without any facts being designated as jurisdictional. The cases that they cite suggesting a connection seem in truth to have no logical bearing on the general line of reasoning they pursue.81

The tendency seen in England to extend the principle of jurisdictional error further82 is the result of the privative clauses entailed to every statutes coming out. But the courts want to guard the interests of the citizen inspite of the 'nocertiorari' clauses. As a result the courts came forward even to denounce the difference between the two types of errors however crucial it is. The Courts wanted to keep the tribunals within the limits.

82. Anisminic case, Pearlman's case, etc.
The orthodox theory of administrative law was that error of law, unless it was manifest on the face of the record, vitiated an administrative decision only if it impinged on jurisdiction. The distinction between jurisdictional and non-jurisdictional errors of law falls into place within the framework of judicial review. There are however two different classes of facts; facts which the tribunal has power to determine, and facts which must exist objectively before the tribunal has jurisdiction. If a tribunal makes mistakes as to facts of the former class, Courts of law have no inherent jurisdiction to interfere. Mistakes as to facts of the latter class however will deprive the tribunal of its jurisdiction and its decision can be quashed as ultra vires. Facts of this latter class are conveniently called (as in America) jurisdictional facts. G.M. Gordon says that if the tribunal untruly finds that jurisdictional facts exist, then that finding will deprive the tribunal of its jurisdiction. But ex hypothesi the tribunal never had jurisdiction. And ex hypothesi the tribunal will lack jurisdiction whatever its findings, and not any findings, govern all.

In India, the decision in *Anisminic* case has little importance. The fundamental rights and the constitutional limitations act as a check to the administrative authorities. Even if the statutory remedy of declaration is shut out, the Court can extend protection to the citizens by using the constitutional provisions.

The difference between jurisdictional error and error within jurisdiction is still maintained in India. If this difference is discarded as suggested by Lord Denning, M.R. certain complex problems will arise. Moreover, the stemming of the administrative tribunal in all respects will affect the beneficial programmes set out especially for the well being of the 'poor-working' class adversely.