Chapter IV

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We have seen earlier that the Pure Theory of Jurisdiction formerly followed by the Court no longer reigns supreme. An attempt will be made here to show how, by stretching the doctrine of ultra vires in the light of the Anisminic case, the House of Lords was able to treat error of law (Jurisdictional Law) as error of Jurisdiction and its relation with the principle of "speaking order".

What is an Error of Law?

A determination that is erroneous in law can be set aside if the error goes to jurisdiction, or if the error is apparent on the face of record.

Error of law includes misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong questions, taking irrelevant consideration into account or failing to take relevant consideration into account when purporting to apply the law to the facts, admitting inadmissible evidence or rejecting admissible or relevant evidence, exercising a discretion on the basis of incorrect legal principles given reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons.
There is often difficulty in deciding whether a question should be classified as one of law or as one of fact. Determination of the primary fact is not a matter of law, but to make a finding unsupported by any evidence is an error of law. Drawing inferences from the facts as found and in particular determining whether the primary or secondary facts fall within the ambit of a statutory description, are potentially classified as questions of law, as questions of fact or as questions of mixed law and fact. The method of classification may be important, for judicial review of finding of law may entail an independent determination of the matter already decided, whereas review of finding of fact is likely to be more limited. If the question is treated as one of mixed law a fact, the range of meanings that can reasonably be ascribed to a statutory expression is a question of law. But whether facts as found fall within the ambit of that expression may be held to be a question of fact, on which the decision of the competent authority will not be disturbed unless it is perverse or is erroneous because a wrong legal approach has been adopted.

A court will be generally reluctant to disturb the finding of a tribunal with specified knowledge of technical subject matter, irrespective of whether these finding be classified as law or fact. But there is not a fixed rule that the courts will deter to the finding of expert bodies on question of law.

1) Board of Trustees of Haradana Mosque V. Mohamad (1966)
   All E.R. 546 F.C.C.

   Baldwin & Francis Ltd. V. Patent Appeal Tribunal (1959) 2
   All E.R. 423 (H.L.)
In English and Indian law, control of the court over the jurisdiction of the inferior authority has to be discussed in two different principles, viz., (1) The Principle of jurisdictional control, and (2) Error of law apparent on the face of the record as an exception to the above principle. So far as India is concerned, the court interfere on the ground of "true interpretation of statute".

**Jurisdictional Principle and Questions of Law**

The wider powers of the court to review administrative action start with the doctrine of ultra vires of which the jurisdictional principle is a branch. Public authorities must act within their powers. If they take unauthorised action, they are acting beyond their power (ultra vires) and the court will strike it down. This function of the court is founded on its inherent jurisdiction to interfere with administrative action and stop its illegal execution. Judicial review is first and foremost, a matter of statutory interpretation to make sure that the power given by Parliament to an authority is not exceeded. The fundamental principle of controlling administrative action is the doctrine of ultra vires.

We shall examine here the attitude of the courts in relation to the decisions of the inferior authority pertaining to questions of law. The English courts made a distinction between error of jurisdiction and error of law for the purpose of invoking the doctrine of ultra vires. Error of law on the face of the record does not exhibit the characteristics of
jurisdictional error. It is an exception to the general rule of non-reviewability of error of law. This leads us to draw a distinction between error of law affecting jurisdiction and error of law going to the merits of the case. So far as the former is concerned the authority can not, by misinterpretation of law, assume jurisdiction. To the latter class review is invoked on the ground of error of law on the face of the record.

One should not forget that the court has a limited function to perform vis-à-vis the administration. This is true in relation to a questions of law, though it is a realm where the court is free. The role of the reviewing court is to serve as a check on the administrative authorities - a check against abuse of power. The province of a court of law is to confine the administrative authority within the bounds of legality. The limited role of the court does not prevent it from the judicial scrutiny of the question of legality. Otherwise it makes judicial review of administrative order a hopeless formality for the litigant. "It reduces the judicial process in such cases to a mere faint". ¹

In almost every case in which the administrative order is challenged on the ground of jurisdictional error, the courts are faced with the problem of statutory interpretation. The

court has to determine whether the authority has exceed its limit or not. It is imperative for the court to interpret the law and to intervene if the authority has exceeded the limit according to the court's interpretation. Thus the court's do interfere in the determination of the inferior authority when there is an error of law.

This leads us to draw a distinction between an error of law affecting jurisdiction and error of law going to the merit of the case. The principle behind the first is that an action is reviewable because no authority can be allowed to assume jurisdiction by taking a wrong view of law. So far as the later principle is concerned in which an action is reviewable only when an error is apparent on the face of the record.

In this context it is necessary to emphasis that the general doctrine of ultra vires must be extended to jurisdictional law just as we have seen in the chapter - III relating to the 'jurisdictional fact', it can be observed that in many cases the courts overlook the fact that the principle of ultra vires, when invoked on undisputed fact, necessarily involves questions of law i.e., questions of legal limits of power.

In R v. Snedchetich Assessment Committee, Farwell J observed that, "it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of

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2) Jurisdictional fact appears for the first-time in (1969) 2 A.C. at 308 (Lord Wilberforce) in Anisminic case.
3) (1910) 2 K.B. 889, 880.
its own jurisdiction is founded on law or fact. Therefore a discussion on review of law must also embrace the legal aspects of the general doctrine of ultra vires. Prof. H.W.A. Wade rightly observed that:

"Where facts are fully admitted on both sides and the only question agitated is whether the legal standards have been rightly and correctly applied to factual situation, the courts have reviewed such cases, treating them as jurisdictional fact but they ought to be treated as cases of jurisdictional law."

To take the standard examples with a view to substantiate the above point of view, it is necessary for the court to determine whether land is a park within the meaning of the statute, whether the payment made by a tenant to a landlord is a premium, whether a particular building is a house. In all these cases one can observe that the court determined the legal meaning of the term in relation to the undisputed facts and substituted its judgement on jurisdictional law. In other words when the facts are admitted, the only question left for the court is to see whether the definitions given to the statutory terms are satisfied in law. As Lord Green M.R. pointed out that,

"Whether a particular building does or does not fall under that word is a mixed question of law and fact; fact in so far as it is necessary to ascertain all the relevant facts relating to the building, and law in so far as the application of the word 'houses' to these facts involves the construction of the Act."

The doctrine of ultra vires enables the court to review question of law in a different context. Thus Lord Denning said:

2) White and Collins V. Minister of Health (1939) 2 K.B. 238
3) R.V. Hulme Kent Tribunal Ex.P. Phillips (1950) 2 All E.R. 311
4) In re Bultle (1939) 1 K.B. 570
5) In re Bultle (1939) 1 K.B. 570
"The court can interfere on the ground that the
Minister has gone outside the powers of the Act
or that any requirement of the Act has not been
complied with. It seems to me that the court
can interfere with the Minister's decision if
he has acted on no evidence; or if he has come
to a conclusion to which on the evidence he could
not reasonably come; or if he has given a wrong
interpretation to the words of the statute; or if
he has taken into consideration matters which he
ought not to have taken into account, or vice
versa; or has otherwise gone wrong in law. It is
identical with the position when the court has
power to interfere with the decision of a lower
tribunal which has erred in point of law". 1

There is no point in adding more cases, since the
characterisation makes no difference to the fundamental rule.
Suffice it to say that review on this ground (ultra vires)
extends as much to questions of law as to those of fact.
Prof. Wade suggests that "all that is necessary is to make
it clear that, despite the general habit of discussing the
rule as dealing with a certain class of facts, it extends
equally to a certain class of questions of law". 2

An attempt has been made to equate an error of law as to
jurisdiction with the ground of the principle of 'jurisdictional
law' i.e., misinterpreting the statute or overlooking a legal
rule. It is also necessary to recall in brief what has been
said in the Chapter - III in relation to "jurisdictional fact",
theory. It is observed that jurisdiction of the authority
depends upon the existence of certain facts which is a condition
precursor to the lawful exercise of its power. Further, the

1) Asbridge Investment Ltd. V. Minister for Housing and
Local Govt. (1965) W.L.R. 1220 at 1226
2) H.W.R. Wade: Anglo-American Administrative Law - More
Reflection, (1966) 22 P.342
conclusion is drawn that the administrative authorities are not final authorities to determine the limits of their own jurisdiction. It is the judicial function of the court, where the jurisdiction of an inferior authority depends upon a finding of fact, the reviewing court should be able to determine in its own independent judgment whether or not that finding is correct. "The law is settled that where a jurisdiction is given to a tribunal in certain events, the jurisdiction only arises on the actual happening of those events. If they have not happened in fact, they cannot arrogate jurisdiction to themselves by wrongly deciding that they have happened".

The law is stated by Luxmoore, L.J., in White and Collins v. Minister of Health.

"The first and most important matter to borne in mind is that the jurisdiction to make the order is dependent on a finding of fact; in such a case it seems almost selfevident that the Court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital finding on which the existence of the jurisdiction relied upon depends. If this were not so, the right to apply to the Court would be illusory." 1

In the above examples viz., Park, House etc., it has been observed by the court that the authority had no power to determine finally what was part of a park. Here in the light of jurisdictional fact theory the court declared the order illegal. In fact here the question was really one of jurisdictional law.

1) (1939) 2 K.B. F. 856
govern the facts were agreed upon and the only question was what was a 'park' within the meaning of the Act". The same principle applies not only to administrative acts but also to the finding of tribunals. It is observed in *Hannay v. Allen* that,

"It is a general rule that no court of limited jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends".

It is a well settled principle that it is for the court to give the final meaning to the statutory term. An administrative authority has no power to do so. In other words their conclusion or determination is always subject to the final scrutiny of the court. As Lord Redcliffe observed that,

"It is a question of law what meaning is to be given to the words of the Income Tax Act 'Trade, manufacture, adventure or concern in the nature of trade', and for that matter what constitute profits or gains' arising out of it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning".

Here in the process of interpretation of the statutory term, one has to bear in mind the distinction between interpretation and application. In the process of interpretation of the statute there are three steps 1) finding or choosing the proper statute or statutes applicable 2) interpreting the statute in its technical sense 3) applying the meaning so found to the case at hand.

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1) (1853) 9 Ex. 111 at 140
2) Edward V. Baird (1865) 2 E.L.R. 410, 420
3) De Sroover: "Steps in the process of interpreting Statutes", (1922) 10, New York, Uni. Law quarterly review 1 at P.17
De Sloover points out that,

"To find out the meaning of a statutory term only in the abstract is to engage in vacuous academic exercise. It is when the meaning so found is applied to the case at hand that the statute is really being interpreted. Indeed, as one authority well puts it, the final application to a specific case is the crux of the whole process of statutory interpretation".¹

That application really is the critical stage of the interpretative process is clear upon the consideration of Austin's famous distinction between what he called genuine and spurious interpretation. The latter type, said he, involves the application of a statutory provision to a case which does not upon a proper interpretation come within the statute. De Sloover observes that, "The judge applies the law to the facts, according to his opinion of the meaning; or (by a process which is generally confounded with interpretation or construction, but which in truth is legislation) he decides according to his own notion of what the legislator ought to have established. By this extensive or restrictive interpretation ex ratione legis, much judiciary law grows up".²

In R.V. Bulter³ the Master of the Rolls explained the proper approach in the following words. The issue in that case was an administrative finding that certain buildings were 'houses' rather than 'other buildings', under the relevant section of the Housing Act 1936. Lord Green observed "it seems to me that the buildings properly fall under the word 'houses' in the section. Whether a particular building does or does not

1) De Sloover : ibid P.20
2) ibid P.19 quoting Austin, Jurisprudence
   See Found : Spurious Interpretation (1907) 7, Columbia
   Law Review P.379
3) (1939) 1 K.B. 570
fall under that word is a mixed question of law and fact; fact in so far as it is necessary to ascertain all the relevant facts relating to the building, and law in so far as the application of the word 'houses' to those facts involves the construction of the Act.

According to Lord Greene's view, the reviewing court may use its own independent judgement with regard to the application of the statutory term to the particular factual situation. Due weight is to be given to the administrative ascertainment of the facts, but in the ultimate analysis it is for the court to determine whether those facts come within the statutory concept. This was the approach of Master of the Rolls in the Butler case, where he decided whether or not the buildings in question were 'houses' on the basis of the facts as found by the administrative body; he observes as follow,

"As so frequently happens in dealing with Acts of Parliament, words are found used and very often the commoner the word is, the greater doubt it may raise—the application of which to individual cases can only be settled by the application of a sense of language in the context of the Act, and if I may say so, a certain amount of common sense in using and understanding the English language in a particular context. There may, of course, be cases which fall very near a borderline, and it is impossible to lay down any exhaustive definition as to what is or is not a house. Every case must be considered in the light of its own facts, but in the present case I am of opinion that these buildings come under the word 'houses'," 1

The approach of Lord Greene suits modern cases, keeping in view the doctrine of ultra vires in its relation to questions of law.

1) A V. Butler, (1939) 1 K.B. 570 at P.579
We have seen in the Chapter - III that the courts have taken a broad view in relation to the principle of jurisdictional fact theory. It is also observed in the Chapter - V that any error pertaining to the No Evidence Rule is an error of law amounting to excess of jurisdiction which is a recognised ground of ultra vires. The jurisdictional principle is based on ultra vires theory. Because of erroneous refusal of admissible evidence, the authority cannot assume jurisdiction. Further a tribunal which has made a finding of primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any primary facts found by it, will be held to have committed error in point of law.¹

Commenting upon the present position of law, the observations of Prof. S.A. de Smith are worthy of note:

"The concept of error of law includes the giving of reasons that are bad in law or (if there is a duty to give reasons) inconsistent, unintelligible or, it would seem, substantially inadequate. It includes also the application of a wrong legal test to the facts found, taking irrelevant considerations into account and failing to take relevant considerations into account, exercising a discretion on the basis of any other incorrect legal principles, misdirection as to the burden of proof, and wrongful admission or exclusion of evidence, as well as arriving at a conclusion without any supporting evidence.

If the drawing of an inference or the application of a statutory term is held or assumed to be a

¹) Davis v. Price (1958) 1 W.L.R. 434, 441-42
   R v. Birmingham Compensation Appeal Tribunal, Ex.P.
   Road Haulage Executive (1952) 2 All E.R. 100
   Mardina Mosque Trustees v. Nahmid (1967) 1 A.C. 13
   Global Plant Ltd. v. Secretary of State for Social Services (1972) 1 Q.B. 139 at 155
matter of fact (or fact and degree) for the "tribunal" of first instance, a court may still hold that the decision is erroneous in point of law if any of the defects listed in paragraph (5) is present or if the inference or conclusion is one that no reasonable body of persons properly instructed in the law could arrive at (as where the evidence and primary facts point unmistakably to a different conclusion)." If the formulation is slightly changed, and it is said that an error of law exists whenever the conclusion is one to which the competent authority cannot reasonably come on the evidence adduced, the scope of judicial review is potentially extended; there can be a wide difference between power to set aside unreasonable decisions and power to set aside only those decisions which no reasonable person could make. The adoption of the narrower test by the Divisional Court in relation to the concept of "material change of use" in enforcement notice appeals has aroused some criticism. Certainly it is open to the courts to expand the scope of review for errors of law by adopting the broader test.1

The present position in England can be seen from the Anisminic case in this case the House of Lord decided by a majority of three to two that the Commission has made a legal error in holding that the appellants were not entitled to claim compensation, and that error went to the jurisdiction. Critics may cite this case as an extreme example of jurisdictional error. But the principle laid down in this case in relation to the doctrine of jurisdictional error can be supported by some very interesting dicta on the general scope of jurisdiction as review. Thus Lord Reid, while preferring to use the term "jurisdiction" to mean entitlement "to enter upon the inquiry in a question" goes on to say:

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1) Prof. S.A. de Smith: Judicial Review of Administrative Action 111rd Edn, 1973 p.117-128
"But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.

Similarly, Lord Pearce in his speech says,

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the 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 inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity."

1) Lord Reid: Anisminic Ltd v. Foreign Compensation Commission (1969) 2 A.C. 147 at P. 171
2) Lord Pearce: Ibid P. 198
Prof. S.A. de Smith\(^1\) commenting on Anisminic case posed the question, "is not the practical effect of the decision neverthe less to obliterate the distinction between reviewable error on matter going to jurisdiction and errors which are normally unreviewable (otherwise than appeal) because they go to the merits of the decision". He further doubts that "it is very difficult to see what error of law the commission would have been allowed to perpetrate without the prospect of judicial intervention".

It is clear that the effect of the actual decision in the Anisminic case and the above two opinions of Lord Reid and Lord Pearce is to reduce the difference between jurisdictional error and error of law within the jurisdiction to vanishing point. It can be shown in two ways. Firstly it may be asked whether following the principles by the majority, it would have been possible for the Commission to make an error of law within the jurisdiction. This is the point made by Lord Morris\(^2\) in his dissenting judgement when he asks, "is it to be said if the commission decided that some one was not a British national and refused to treat a claim as established that it could be sought to show that the person was a British national after all and the commission exceeded their jurisdiction in refusing the claim? Lord Morris is surely right in arguing that if the majority are to be followed, the answer to this question must be

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2) (1969) 2 A.C. 147 at 138
"yes" and the commission would be similarly vulnerable on any question of construction which might arise under the order. As Diplock L.J.¹ said in the Court of Appeal, the order "bristled with expressions which are discursive of consequences and thus involve 'question of law'. To take Lord Morris's example the order itself defined 'British National' in great detail and an error of construction of any part of that definition could almost certainly have been categorised as taking an extraneous consideration into account, or failing to take a relevant consideration into account which are recognised grounds to invoke the doctrine of Jurisdictional error.

Prof. H.W.R. Wade has rightly pointed, quoting with approval the remark of Lord Justice Farwell in B.V. Shoreditch Assessment Committee² the House of Lords declared a decision of the Foreign Compensation Commission to be ultra vires despite a statute saying that a determination of the commission 'shall not be called in question in any court of law'.³

The error of the commission, as the majority held, was that it misconstrued the order in council by requiring that the claimant should satisfy the provisions requiring successors in title to be of British nationality when, on a true construction, those provisions were irrelevant in a case where the claimant was the original owner. Thus the commission "made on

1) (1953) 2 Q.B. 862, 900
2) (1910) 2 K.B. 859 at 860
inquiry which the order did not empower them to make", 1 and based their decision on a matter which they had no right to take into account", 2 had no jurisdiction to put further hurdles" in a claimant's way, 3 "seeking to impose another condition, not warranted by the order." 4 By these and similar phrases the Commission's mistake is represented as something more than a mere error of interpretation, and as carrying it beyond its jurisdiction. It is to be classed with such jurisdictional error as addressing itself to the wrong question and taking into irrelevant considerations into account. 5

The ardent critics of the pure theory of Jurisdiction may point out that there can be no jurisdictional error where the tribunal has jurisdiction to embark on its inquiry in the first place. According to their view the practical result of Anisminic case is, that the Commission has jurisdiction if it decided wrongly. 6 This fallacy has been refuted on many occasions, 7 which was discussed in the Chapter - III. It is clear, that a statutory tribunal may step outside its jurisdiction in the course of its inquiry as well as at the outset, and that this transgression may result from a mistake of law in the interpretation of the statute by which its jurisdiction is conferred.

1) Lord Reid at P. 172
2) Ibid
3) Lord Pearce at P. 188
4) Lord Wilberforce at P. 210
5) Estate and Trust Agencies Ltd. v. Singapore Improvement Trust (1937) A.C. 226
6) Associated Provincial Picture House Ltd. v. Wednesbury Corporation (1948) 1 K.B. 223
8) Arman case (1963) A.C. 192 at 294
Whether there is excess of jurisdiction or merely error within jurisdiction, can be determined by construing the empowering statute which though it may not give little guidance. In this connection Prof. Griffith and Street point out that in the absence guidance the court has to make a creative choice,¹ and hence the courts have justified their stand. A tribunal must always decide the limits of its own jurisdiction, if this is disputed before it, but this necessity, in no way precludes the supervisory function of the court, if the tribunal decides wrongly and exceeds the jurisdiction.² Almost any misconstruction of a statute or order can be represented as "basing the decision on a matter with which they had no right to deal", "imposing an unwarranted condition" or "addressing themselves to the wrong questions". The practical effect of this case is, it is submitted, that any error of law can be described as jurisdictional error.

The second point of far-reaching consequences of their Lordship decision, is to take the cases of error of law on the face of the record, which have been decided since 1961 and to assign each of them to one or other of the categories listed by Lord Reid and Lord Pearce as examples of jurisdictional error.

When the court exercise its supervisory jurisdiction, its jurisdiction goes to two points; "one is the area of the

2) As in Dunbarry V. Aller: (1963) 9 Ex. 111
   R v. Allam etc, Rent Tribunal Ex. F. Jerek (1951)2 K.B.1
inferior jurisdiction and the qualifications and the conditions of its exercise; the other is the observance of the law in the course of its exercise. First part is already discussed in the Chapter I. The second point has been discussed in the preceding pages in relation to the error of law particularly the principle of error law on the face of record. It is well-established principle that error of law apparent on the face of record is an exception to the jurisdictional principle. It is discussed in detail below. It is submitted, that any error of law can be included as jurisdictional and it is further submitted that this ground of challenge has several advantages over error of law on the face of record e.g. Preclusive clause. The litigant need not concern himself whether error is patent or latent, or what constitutes record. Further, a jurisdictional defect definitely makes a decision nullity.

Lastly the question may arise. If the practical effect of Anisminic's case is to be the virtual end of error of law on the face of record and its replacement by an all-embracing category of Jurisdictional principle, can this be supported on principle. It is submitted that it is not only supportable, but actually required by principle. After all there is something rather odd about a doctrine which allows such bodies to break the law and yet remain within their jurisdiction.

Having considered the broad principles followed by the English courts, we must now consider how far these principles have an effect on the reasoning of the Supreme Court and High Courts in India and to what extent the courts in India followed the English view on this point.
The question of error of law in India can be discussed from three viewpoints, viz., (1) Jurisdictional principles, (2) error of law on the face of record and (3) lastly on a true interpretation of statute.

In India judicial control developed around the nucleus of the Jurisdictional principle. The analysis of cases law revealed the fact that the principle of jurisdiction, mostly dogmatically stated, devoutly pursued and consistently enunciated in theory had always proved elusive in practice. The statement of law reveals the distinction between the existence of jurisdiction and exercise of jurisdiction. The effect of this distinction is this: if the authority has jurisdiction to decide the issue before it but commits an error in the exercise of its jurisdiction, its determination is valid until it is set aside on an appeal or by any other course prescribed by law. It means the courts in India follow the jurisdictional principle in a narrow sense. In other words if an error is committed in the course of the proceedings, it has been treated as non-reviewable, or non-jurisdictional.

In the post-constitutional era the courts in India have followed the principle of jurisdiction as the ground of review.

In *Abdul Abubaker V. Custodian-General of Evacuee Property*,

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1) Rajah Amir Hasan Khan V. Sheo Batsa Singh (1954) 1 Ind Appt. 237  
2) Haridas Nath V. Ramchandra A.I.R. 1921 Cal. 34  
3) A.I.R. 1953 S.C. 819  
the Supreme Court affirmed the want of jurisdiction and stated that it may arise from (1) nature of the subject matter or from (2) the absence of some preliminary matter or (3) owing to the existence of some facts collateral to the actual matter which the court has to try and which are conditions precedent to the assumption of jurisdiction by it. Thus mere misconstruction of statute or notification issued by the relevant authorities under a statute did not go to jurisdiction. Where the custodian of Evacuee property held that certain persons were "Evacuees" within the meaning of S. 2(c) of the Mysore Administration of Evacuee Property the Supreme Court of India refused to review the decision on the ground that the order in question being within jurisdiction there was no reason for the High Court to interfere with it. Such a decision it was held, although erroneous, is not open to review. Here the reasoning of the Supreme Court may have been based on the distinction between question going to the merit and question pertaining to the jurisdictional principle. Thus the Supreme Court disposed of the case on the former ground. On the other hand the Supreme Court in another case, Gorkha Ram V. Custodian General of India held that the property was not "Evacuee property, though the Custodian-General decided contrary. The

3) Custodian of Evacuee Property V. Abdul Simhoor A.I.R. 1961 S.C. 1057
4) A.I.R. 1961 S.C. 1208
review was grounded on jurisdictional principle. In both cases the question before the court was the statutory interpretation of the term "Evacuee" and "Evacuee property". In one case the court refused to interfere on the ground of non-jurisdictional principle and in another case disturbed the decision of the authority on the ground of jurisdictional this ap ply proves that there is no consistency in the application of the jurisdictional principle. This leads to the controversy which ultimately reached to a peak in Ujjimbai's case in which Justice Mudholkar, whose views represented the majority opinion, expressed himself as follows on this question.

"A mere misconstruction of a provision of law does not render the decision of a quasi-judicial tribunal void (as being beyond its jurisdiction). It is a good and valid decision in law until and unless it is corrected in the appropriate manner. So long as that decision stands, despite its being erroneous, it must be regarded as one authorised by law and where, under such a decision a person is held liable to pay a tax that person cannot treat the decision as nullity and contend that what is demanded of him is something not authorised by law. The position would be the same even though upon a proper construction, the law under which the decision was given did not authorise such a levy".1

The last sentence of these observations touches the crux of the matter. Is it correct to say that a person who has no authority to function "on a proper construction of an Act" would still be within his jurisdiction if he purported to comply with that Act even though he misconstrued it? It is not possible that an authority can exercise jurisdiction by a wrong construction of a statutory provision which it does not.

1) ibid at 1621
posses at all. The majority view of the Supreme Court in this case seems to have answered the first question in the affirmative and the second question in the negative. But the truth is that the determination of whether any given fact or point of law is jurisdictional is always a matter of construction of statutes and statutory rules under which the decision is given. Thus an authority may have jurisdiction to decide certain disputes under an Act and it may make an order affecting a particular subject-matter which on a correct interpretation it cannot make. The point may be illustrated thus. A provision of the Sales Tax Act says that the sale of bidis is not taxable; but the Sales Tax Officer on his own construction of the provision holds that hand-made bidis are taxable; on a proper construction, the Act does not confer any power on the Sales Tax Officer to tax such bidis. In such a case, on one interpretation of the provision of law, he has exercised jurisdiction in respect of a subject-matter which he possess, but "upon a proper construction the law under which the decision was given did not authorise such a levy. In one sense he merely misconstrues a provision of law, but in another sense he acts without jurisdiction in taxing goods which are not taxable under the Act. According to the majority decision of the Indian Supreme Court in Ujjambal v. State of Uttar Pradesh,1 such a decision is not reviewable as it does not involve any jurisdictional question. Despite the repeated

1) A.I.R. 1962 S.C. 1621
pronouncements as to the vital distinction between jurisdictional and non-jurisdictional error, the courts' decisions are characterised by treating these two kinds of error as identical. Thus in *Union of India v. Indian Fisheries Ltd.*, where the Income Tax Officer was in error in applying S. 49K of the Income Tax Act, and setting off the refund due, the Supreme Court, unholding the decision of the High Court to exercise its jurisdiction under Art. 226 of the Constitution observed "... if we interpret S. 49K 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 order". If the distinction between errors of jurisdiction and errors within jurisdiction is so cardinal that one renders a decision a nullity and the other leaves its validity intact and an error is either of jurisdiction or of the merits, how can a decision suffer from both lack of jurisdiction and an error apparent on the face of the order? It is a contradiction in terms to say that a tribunal having no jurisdiction commits an error within jurisdiction, just as saying that a decision of the tribunal having jurisdiction suffers from jurisdictional error. A tribunal either has or has not jurisdiction to act. Therefore the error has to be one type or the other, but can not be of both. According to the Supreme Court, the error in this case was merely one of "a misconstruction of a provision, which (as the Supreme Court given us to understand in Ujjambal's case) does not render the decision of a tribunal void as being beyond jurisdiction.

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1) *A.I.R. 1966 S.C. 35 at P.37*
Yet the Supreme Court described the error in the instant case as "a clear case of lack of jurisdiction". The truth is that the court has forgotten the distinction so often declared to be vital.

Tata Iron & Steel Co. v. S. R. Sarkar 1 there the Commercial Sales Tax Officer had to ascertain, before he could order payment of tax under the Central Sales Tax Act, whether he was satisfied (a) that the goods at the time of transfer of the documents of title were in movement from the State of Bihar to the State of West Bengal, (b) that the place where the sale was effected under S. 4, Cl (2) of the Central Sales Tax Act, 1956, was within the State of West Bengal. The Commercial Sales Tax Officer failed to apply what the Supreme Court described as the 'correct tests' and made assumptions which were not warranted. The order of assessment was held to disclose an error of law apparent on its face "on a true construction of the provisions of the Central Sales Tax Act. Apparently this was a case of ultra vires being either of 'collateral fact' wrongly decided, or of irrelevant considerations being taken into account, but the Supreme Court treated it as a case of error of law apparent on the face of the record and issued certiorari under Art. 32 of the Constitution. The decision was based on the finding that the sale in question was an interstate sale, which in view of the provisions of

1) AICta 1961 S.C.C. 65
Art. 269 of the Constitution of India and S. 3 of the Central Sales Tax Act, 1956, could not be taxed by the State.

The Supreme Court with approval the decision in *Tata Iron & Steel Co. Ltd. v. S.R. Sarkar*1 in a subsequent case2 in which the same issue, namely whether the sale in question was inter-state sale and therefore liable to be taxed by the State in view of the same provisions of the Constitution and the Central Sales Tax Act, 1956, was raised, but this time the Supreme Court interfering on a different ground i.e. on the ground that the Tax Officer gave himself jurisdiction to tax the sale by deciding a collateral fact wrongly, namely the fact that the sale was not an inter-state sale. Thus the same question was treated by the Supreme Court on two different grounds in two different cases in one case as an error of law apparent on the fact of the record and in another as jurisdictional fact. The former is recognised as an error within jurisdiction, although the courts have asserted their right to issue certiorari in such a case. The distinction between errors of law apparent on the face and jurisdictional errors remains significant for many reasons. The effect of the former is to leave a decision valid, although erroneous, till it is set aside in an appropriate proceeding, while the latter renders a decision a nullity.3 Thus the Supreme Court justified review in this case in terms of 'jurisdictional fact', which is a recognised category of jurisdictional question.

1) *A.I.R. 1961 S.C. 66*
3) *22 L.C.R. (1966), 290-1*
Thus in *Wilkins v. Hamsworth* Justice Coleridge said "it is clear that the plaintiff can not succeed unless the proceeding before the justices was a nullity". The same view is submitted, is followed by the Indian Courts. It is submitted that in the above cases on the true interpretation of law mistakes were pertaining to error of law, but the court employed arbitrarily the jurisdictional principle. The reason for this arbitrary application of jurisdictional principle appears to be that in India error of law apparent on the face of record was not recognised as a principle of review in the early cases. As a result no evidence rule was held to constitute jurisdictional defects. In English law no evidence was treated as an error of law apparent on the face of record, in India it was held to go to jurisdiction. This position continued to prevail even after the adoption of the constitution.

Thus *Ram Niranjan v. Additional District Magistrate* although s. 3 of the U.P. Land Utilisation Act (V. of 1948) required a notice to the landlord, an exparte order of allotment was made without a proper notice. It was held that the finding that the landlord had been served with notice was based on evidence which was not admissible in law. The exparte order was held to be without jurisdiction. *DeSappa v. Narappa* is the first case in India in which the Supreme Court seems to suggest that

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1) (1928) 7 Ad. & S. 507
   Vedannar v. *Coll. R. Board* A.I.R. 1949 Mad. 454
4) A.I.R. 1962 All. 322
5) A.I.R. 1964 S.C. 440
absence of evidence constitutes error of law apparent on the face of record. But in subsequent cases it is definitely laid down that a finding based on no evidence suffers from error of law apparent on the face of record.  

In *Rajendra Prasad v. The Punjab State*, the Punjab High Court held that, although the High Court cannot interfere in a writ petition with an error of fact, it can correct a finding of fact based on no evidence, as that would be an error of law. The High Court set aside the order as being based on no evidence.

In *Union of India v. A.C. Gopel*, where a public servant was dismissed for having allegedly attempted to offer a bribe to the Deputy Director so that the latter might support his representation regarding his seniority to the Union Public Service Commission, the Supreme Court upheld the decision of the High Court quashing the order on the ground that it was not supported by any evidence at all. The Court did not say whether it was a case of error of law. In *Kausalya Devi v. Bachittar Singh*, however, the Indian Supreme Court said (obiter) that a finding based on no evidence is an error of law apparent on the fact of the record. Again, in *A.S. and I.E. Board of Uttar Pradesh v. Eshleswar*, the Supreme Court held (obiter) that an order passed by a tribunal holding a quasi-judicial inquiry which is based on

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5. *A.I.R. 1966 S.C. 334*
7. *A.I.R. 1964 S.C. 575*
no evidence is an order erroneous on the fact and such order is liable to be quashed by the High Court under Art. 226 of the Constitution.

The Indian courts are prepared to review not only on the grounds of no evidence but also on those of wrong evidence. Thus Syed Ishaq v. Radhakrishnan, already noted, the Supreme Court observed (obiter) that the superior court will intervene where a tribunal has refused to admit admissible evidence or has admitted inadmissible evidence. These were held to be the cases of error of apparent on the face of the record. But the court declined review in the instant case on the ground that insufficiency of evidence adduced to sustain the finding does not constitute an error of law on the face of the record. This position has been maintained by the Supreme Court in a number of cases. This is in contrast with the recent development in English law that insufficiency of evidence to sustain a finding raises an error of law which the reviewing court will correct, if it can find the error.

In India, in addition to the above two principles mentioned earlier the review is based on a true interpretation of statute, which the courts in England exercise only in appeal on the question of law if provided under the statute. In Dijambai's case the Supreme Court held that a tribunal does not exceed its jurisdiction by misconstruing a provision of law. According to this reasoning, review on a true interpretation of statute could not be based on the jurisdictional ground. On the other hand
it is important to note that a fresh determination of an issue on the true construction of the statute was not founded on the principle of error of law apparent on the face of record either. A direct impact of this reasoning and development is that the reviewing courts determine a case on the substance of issue. Thus in *Universal Import Agency V. Chief Controller*, where the authorities confiscated certain import goods on the authority of a notification, the Supreme Court quashed the order "on a true interpretation of the terms of para 6 of the said order, holding that the transactions in question were 'things done' within the meaning of this paragraph and were saved from the operation of the notification".

In India, the study of case law reveals the fact that in the realm of question of law courts have gone beyond the scope of review in English law. Under the English law the courts would interfere with the order of a tribunal because of misconstruction of a provision of law by that tribunal only if it disclosed an error of law apparent on the face of record. But there can be no review if the error is not apparent on the face of record. Indian courts, on the true interpretation of statute, issue appropriate writs and the requirement of the error to appear on the record does not necessarily come into picture. In fact it is possible to grant a review if on the true construction of a statute the courts arrive at a different conclusion. When in many cases, review was granted on the true

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1) A.I.R. 1961 S.C. 41
2) H. N. A. Wade : *Administrative Law* 2nd Edn. 1967 P. 67
construction of the statute, the question whether error was apparent on the face of record was not discussed by the judges. Although the principle of error apparent on the face of record is recognised in Indian as a ground of review, but much of its significance has been lost as a result of the development on the true interpretation of statute.

In reviewing the decisions of the inferior authority, sometimes the courts in India follow the jurisdictional principle and error of law apparent on the face of record and sometimes without referring to any principle at all. In Tata Iron and Steel Co. v. C. R. Sarkar an order of assessment (Taxation of interstate sale transaction) was quashed by the Supreme Court on the ground of Jurisdictional principle. The court, however held that the authority had no jurisdiction to tax an interstate sale because of the constitutional prohibition, and it could not give jurisdiction to itself to do so by deciding a collateral fact wrongly. It is submitted, that the court called, the question as a collateral fact, but in fact it was a question of law as it involved drawing of inference with the statutory provision and its application to the fact established. Here the question is of "Jurisdictional Law" since the facts are agreed facts and the only question is what is interstate sale and could the state impose the tax on such facts when there is a constitutional prohibiting such imposition. Further misconception or misinterpretation of law on the agreed facts

1) A.I.R. 1961 S.C. P.65
is an error of law. It is submitted that without arriving at a decision point on a collateral fact, the court could have declared the mistake as an error of law and it is a well established rule that any error pertaining to question of law is an error of jurisdiction and hence ultra vires.

Ujjainai's case the Supreme Court refused to review the assessment order of the authority on the ground of misinterpretation of the statutory provision. It is apparent that the court has given narrow meaning to the jurisdictional principle as explained in Chapter - II. The narrow view depicted in Ujjainai case, it is submitted, is not very convincing if the later developments are taken into consideration in relation to the principle of jurisdiction as fully explained in Chapter - III.

The petitioner came to the Supreme Court under article 32 as the State of Uttar Pradesh had sought to tax sale transactions of bidis manufactured by him. Whether the transactions were taxable or not depended on the interpretation of a notification issued by the government. Since the mistake involved was only that of misconstruction of law, the Supreme Court, by a majority, refused to intervene under Art. 32 on the ground that "where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is a wrong in law or fact". But Subba Rao, J.\(^1\) rightly pointed out "in such a case, on a wrong interpretation of the provisions of the Act, he has

1) AIR 1962 P 1621 at P. 1629
exercised jurisdiction to respect of a subject-matter which on a correct interpretation he does not possess. In a sense, he acts without jurisdiction in taxing goods which are not taxable under the Act. In this case imposition of tax on a wrong interpretation was considered to be an error of law and not an error of jurisdiction. The Supreme Court held that it would not entertain a petition under Art. 32 of the constitution if a quasi-judicial authority acting within jurisdiction merely misconstrued a law.

The Supreme Court decided two other important cases namely 1
Pioneer Traders and State Trading Corporation v. Mysore. In the former case the Supreme Court of India, by majority relying on Ujjambai's case refused to intervene on the ground that the authorities were discharging a quasi-judicial function and were acting within jurisdiction. The authorities might either be taking a wrong view of the facts of misconstruing the law in question, but in none of these situations the court could intervene under Art. 32. Des Gupta J., however, in a dissenting judgement took the view that the present case was not of misinterpretation of the law but of the customs authorities acting without jurisdiction. It is rightly observed by K.B. Nambiar that there is "convenient interchangeability of such labels as 'misconstruction, want of authority and Jurisdiction'." The implications of these two decisions (Ujjambai case and Pioneer Traders), can be considered in two ways. Firstly if an authority

1) Pioneer Traders v. Chief Controller of Imports and Exports
   (1963) 3 S.C.R. 756
2) State Trading Corporation v. Mysore
   (1963) 3 S.C.R. 548
acts under a valid statute, it acts in the exercise of its undoubted jurisdiction and secondly its actions are not liable to review by the Supreme Court under Art. 32. It means a tribunal or an authority may act under a valid law and yet exceed its jurisdiction by overstepping its limits as defined in the statute. The Supreme Court has refused the possibility of review by ignoring this category of ultra vires. In fact the Supreme Court could have declared the action as a error of law as it did in the Tata Iron and Steel case. Therefore, it is submitted that the decisions represent the mood of the courts to withdraw from review and return to the jurisdictional principle. The Supreme Court rules out the possibility of review under Art. 32 on the ground of error of law apparent on the face of record. The policy, a throw-back to the jurisdictional principle which revealed in Hissar and Pioneer Traders led the Supreme Court to overrule its decision given in Kailash Nath v. State of U.P. where it interfered with an assessment order owing to the misconstruction of a statutory provision by the Tribunal.

Another paradoxical result of the policy of the Supreme Court is that the ordinary legal rights of a person will be protected if he comes to the High Court under Art. 226 of the Constitution, whereas the Supreme Court under Art. 32 will not entertain any breach of fundamental rights unless the complaint is founded on 'lack of jurisdiction' which can arise only from

1) A.I.R. 1957 5.C. 790
the actions under an invalid law. Prof. M.P. Jain and Dr. S.N. Jain rightly observed that the ruling is rather difficult to appreciate. They observe, "the ruling in Ujjambai's case may be characterised as a judicial attempt to restrict its review jurisdiction over quasi-judicial bodies under Art. 32. The case has also given rise to distinctions, sometimes very hard to draw, between a case of misconstruction of law, pure and simple, and that of a mistake of law amounting to a jurisdictional error, for while the court would correct the latter under Art. 32, it would not correct the former. This had made the law of judicial review rather unnecessarily complicated." The observation of J. Muddaliar in Ujjambai case equate violation of fundamental rights with want of jurisdiction and deny that an authority can infringe these rights by misconstruing a statute. Paradoxically enough they put the ordinary rights at a higher place than the fundamental rights whose sanctity is guaranteed by the constitution.

The Supreme Court in State Trading Corporation case held that the authority had no jurisdiction to tax an interstate sale because of the constitutional prohibition, and it could not give jurisdiction to itself to do so by deciding a collateral fact wrongly. It may be pointed out that though the court called the question involved as a "collateral fact", it was a mixed question of law and fact (more a question of law than fact) as it involved drawing of inferences with

1) M.P. Jain and S.N. Jain: Principles of Administrative Law
   2nd Edn. 1973, p. 330
2) A.I.R. 1962 S.C. 1621 at p. 1625
reverence to a statutory provision and its application to the facts established. But this is obviously a jurisdictional law. It is necessary to emphasize that "despite the general habit of discussing the rule as one dealing with a certain class of facts, it extends equally to a certain class of questions of law".1

The Supreme Court observed in Dr. Chatkar Jha v. Viswanath2 that the superior court has power to interfere when the error is apparent on the face of record or when the error consists of a misconstruction of a law on which assumption of jurisdiction is made which otherwise does not exist.

The question before the court was whether the chancellor appropriated to himself jurisdiction to interfere which he did not have under Sec. 9(4) of the Act. The Supreme Court held that the Chancellor's order was without jurisdiction as it was passed on a wrong assumption of jurisdiction made on the misinterpretation of the fact and the university statute.

The above discussion reveals the fact that the decisions as in Biyamba and Pioneer Traders cases unnecessarily made distinction between jurisdictional error and error of law and made the issue more complicated. Any error in the interpretation of statutory provision is an error of law.

It seems that the attitude of the court in maintaining such decision is based on the ground that if there is an

2) A.L.R. 1970 S.C. P. 1232 at P. 1235
admitted jurisdiction in an authority an unspeaking order
disarms the jurisdiction of the superior court, whereas if
there is a defect of jurisdiction in the inferior court, the
review is applied to quash the order. An attempt has been
made in the next part of this chapter in detail to show that
in the absence of specific provision in the statute to give
reasons for its decision, the courts are insisting on the
administrative authority to give reasons for their determina-
tion. This helps the court to find out the error in relation
to the question of law.

It can be seen that in a large number of cases falling
under Art. 226, the courts have hardly bothered themselves
to decide whether the error of law concerned the jurisdiction
or the merits of the case. The courts have simply intervened
and quashed the administrative decision once they found that
the decision was not in accordance with the law as interpreted
by them. In the area of judicial review of administrative
discretion, the dichotomy between jurisdictional error and
error of law has hardly been maintained. In this context
Prof. Landis rightly observes that, "on the whole, therefore,
it would be better to give up the distinction altogether and
to bring within the review of the courts all errors of law
occurring in administrative decision."

To sum up, in a democratic country like India, & U.K.,
where the rule of law or supremacy of law prevails, it is the

1) Landis : The administrative Process (1938) P. 152
duty of the court to see that an administrative authorities are discharging their function within the law. "Our desire to have courts determine question of law is related to the belief in their possession of expertness with regard to such question". The supremacy of law demands that there shall be opportunity to have some court to decide whether an erroneous rule of law was applied. The committee on Ministers' Power endorsed the same opinion. Judicial review, in the words of Lord Denning, extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. Thus observance of law is a condition precedent to the exercise of power. Any error committed by an authority especially in the interpretation of the statutory provision is an error of law and hence amounts to jurisdictional error. In this connection the observation of Prof. Schwarts is worthy to note. He says,

"The notion of ultra vires, originally imported in to the field of administrative law for the particular case of jurisdiction in the narrow sense, could be extended to other cases notably that of error of law, for proper construction of the law is a limit that the administrator must defer to and he exceeds his power if he does not conform to the law. Further, administrative action based upon an error of law cannot be said to be within the authority conferred". 3

1) Committee on Ministers' Power, Report P.103
2) Ibid
3) Schwarts : An Introduction to American Administrative Law 2nd Edn. 1968, P.103
R V. Butler (1929), K.B. 670, 679
Error of Law apparent on the face of record:

Hence, it is observed that any interpretation of the statutory provision is exclusively the province of the court, and it is the final authority in relation to statutory interpretation. If an authority assumes jurisdiction at the outset of its inquiry and commits an error in the course of the proceedings, such error, if it pertains to the interpretation of the statutory term and its application to the facts agreed, is recognized as an error of law. Prof. Wade calls it as jurisdictional law and hence ultra vires. It means error of this type has affected the jurisdiction of the authority, because inferior authority cannot assume jurisdiction by interpreting the statutory provision wrongly. Prof. H.W.R. Wade rightly observed, "the power to make mistakes does not extend to mistakes which are self-evident on the record."\(^1\)

The Court has inherent power to review the decisions of an inferior authority. This power is based on the concept of jurisdiction, but there is however exception. The Court has power to review such decisions only where an authority has acted outside the limits of power conferred upon it by its empowering statute. The exception is that review will be issued to quash a decision where it is apparent on the face of record that the

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tribunal has committed an error of law, regardless of whether the error can be classified as jurisdictional.

Until the early Nineteenth century the court seemed to find almost any error made by a tribunal to be an error relating to the limits of jurisdiction and therefore rendered its decision ultra vires.¹ Thereafter the judicial attitude changed and a very narrow approach to the jurisdictional principle was taken in a number of cases, which is explained in Chapter 9 II and criticised in Chapter 9 III.

But we have seen that the recent developments in relation to the doctrine of jurisdictional error has undermined the Pure Theory of Jurisdiction. In the same way the principle of error of law apparent on the face of record also infringes the Pure Theory of Jurisdiction. It is also observed that the doctrine of non-evidence rule is applied when the decision is not supported by any admissible legal evidence even if the action is within the jurisdiction of the authority.

It will not be out of place to mention here again that all mistakes are not covered by the jurisdictional principles. The jurisdictional principle does not enable the reviewing court to interfere with the decision of a tribunal which is intra vires, because a tribunal does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact. Though this view is refuted on many occasions it still hold sway.

¹) Rabinstein : Jurisdiction & Illegality (1965) Ch.4
S+A de Smith : Judicial review of Administrative Action
Jaffee & Henderson : Judicial Review & Rule of Law (1986)72,
LeQeR. P.345
This leads us to see in brief the distinction between jurisdictional error and error apparent on the face of record. The point may be explained by an illustration. A provision of the Sales Tax Act says that the sale of bidis is not taxable; but the Sales Tax Officer on his own construction of the provision holds that hand-made bidis are taxable; on a proper construction, the Act does not confer any power on the Sales Tax Officer to tax such bidis. In such a case, on one interpretation of the provision of law, he has exercised jurisdiction in respect of a subject-matter which he possesses, but upon a proper construction the law under which the decision was given did not authorize such a levy. In one sense he merely misconstrues a provision of law, but in another sense he acts without jurisdiction in taxing goods which are not taxable under the Act. According to the majority decision of the Indian Supreme Court Ujjam Bai v. State of Uttar Pradesh, such a decision. Nevertheless, it is already discussed, the Indian courts have exercised review over and over again upon a proper construction of law.

Thus in Union of India v. India Fisheries Ltd., where the Income Tax Officer was in error in applying s. 492 of the Income Tax Act, and setting off the refund due, the Supreme Court,

1) The illustration was cited by Mr. Justice Saba Rao in his dissenting judgement in Ujjam Bai's case.
2) A.I.R. 1962 S.C. 1621; the case was noted in 4 J.I.L.I. (1962), 452
3) A.I.R. 1966 S.C. 35, 37
upholding the decision of the High Court to exercise its jurisdiction under Art. 226 of the Constitution, observed at P.37, "if we interpret S. 491 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 order". If the distinction between errors of jurisdiction and errors within jurisdiction is so cardinal that one renders a decision a nullity and the other leaves its validity intact and an error is either of jurisdiction or of the merits, how can a decision suffer from both lack of jurisdiction and an error apparent on the face of the order? It is a contradiction in terms to say that a tribunal having no jurisdiction commits an error within jurisdiction, just as saying that a decision of the tribunal having jurisdiction suffers from jurisdictional error. A tribunal either has or has not jurisdiction to act. Therefore the error has to be one type or other, but cannot be of both. According to the Supreme Court, the error in this case was merely one of 'a misconstruction of a provision', which (as the Supreme Court gave us to understand in Ujjam Bai's case) does not render the decision of the tribunal void as being beyond jurisdiction. Yet the Supreme Court described the error in the instant case as 'a clear case of lack of jurisdiction'. The truth is that the court has forgotten the distinction so often declared to be vital. The distinction between error of law apparent on the face of record and jurisdictional error remain significant for many reasons. The effect of the former is to leave a decision valid, although erroneous, till it is set aside in an
appropriate proceeding, while the latter renders a decision a nullity.

One can question why an authority is permitted to make mistakes of law, provided they do not display them in the record of their proceedings.

The reasons are explained by history. "From the Seventeenth Century the Court of King's Bench asserted the right to quash convictions and orders of inferior courts where the commission of an error of law was apparent from the record of the decision, and Justices were required to set out the proceedings in criminal cases in considerable detail. However in 1848 the Summary Jurisdiction Act prescribed a form of conviction which did not require details of the evidence presented, nor the reasons for the final decision. The result was that it became virtually impossible for the courts to determine from the record whether or not the Justices had erred in law. As time went on, the courts often appeared to forget that they had never had the power to quash decisions of Justices on this ground, and in one case its existence in respect of officials exercising functions of a judicial nature was actually denied.

The result of the acceptance by the courts in the nineteenth century that certiorari lay only to quash for jurisdictional defects, was that the concept of jurisdiction came to be used by the Courts "as a mere tool to preserve the powers of review".1

1) Rubinstein : Jurisdiction and Illegality P. 71-74
"What is now an exception was then a primary rule and it was
not founded on any idea of jurisdiction or ultra vires. But
if the applicant wanted to go outside the record, and bring
other evidence to show some abuse of the power, the court would
quash only where an excess of jurisdiction could be shown.
Here, of course, was the principle of ultra vires which deve-
doped so fruitfully that it overshadowed the original juris-
diction over the record, and indeed almost led to its being
forgotten." ¹

This jurisdiction used to be one of the chief weapons by
which the superior courts controlled the proceedings of justices
of the peace. At one time justices were required to furnish
elaborate written statements of evidence and reasoning, all of
which were part of the record and which afforded ample opportu-
nities for correction. But this era ended in 1848, when the
Summary Jurisdiction Act introduced a short form of conviction
which gave none of these details. This did not alter the law
of judicial control as such. What it did was to disbar its
exercise. The effect was not to make that which had been error,
error no longer, but to remove nearly all opportunity for its
detection. Instead of providing what was called a speaking
order, "the face of the record spoke no longer; it was the
inscrutable face of a sphinx." ² Indeed it is a well known fact

¹ See Re Wade : Administrative Law 1871, 3rd Edn, p.94
² The King v. Nat Bell Liquors Ltd. (1922) 2 A.C. 128, at
150 (Lord Sumner).
that the principle of ultra vires or jurisdictional principle, when invoked on undisputed facts, necessarily involves question of law i.e., questions of legal limits of power. Yet the whole emphasis of review of law is on the principle of error of law apparent on the fact of record which covers only one segment of the subject. After 1870 review on error of law on the face of record was seldom used. Ultimately its very existence was forgotten until it was revived in Northumberland's case.1

Apart from an error of law affecting jurisdiction, a decision of a quasi judicial authority can be quashed if there is an error of law on the face of record. Even in such situation the court will interfere when such error is manifest or patent even though the error does not go to jurisdiction.

According to the Supreme Court, the concept is comprised of many imponderables; it is not capable of precise definition, as no objective criterion can be laid down, the apparent nature of the error, to a large extent, being dependent upon the subjective element. Whether or not an error in question is an error of law and one which is apparent on the face of record, must always depend on the facts and circumstances of each case and upon the nature and scope of the legal provision which is alleged to have been misconstrued or contravened. A general test to apply, however, is that no error of law can be said

1) (1931) 1 All E.R. 268
to be apparent on the face of the record if it is not self-evident or manifest; or if it requires an examination or argument to establish it; or if it has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions. In other words, an error which has to be established by lengthy and complicated arguments is not an error of law apparent on the face of the record. On the other hand, the Supreme Court has stated that where it is manifest or clear that the conclusion of law recorded by an inferior tribunal is based on an obvious misinterpretation of the relevant statutory provision, or in ignorance of it, or in disregard of it, or expressly founded on reasons which are wrong in law, the conclusion can be corrected by the court through the writ of certiorari. But the test is not articulate and may fail because what may be considered by one judge as self-evident might not be considered so by another.

In Perry's and Basset's cases, we have seen that an order within jurisdiction could be quashed for an error apparent on the face of record. The ruling lays down a further condition that such error must be manifest error, that is, a patent error, and not a mere wrong decision. It can be seen in this chapter that the English law makes no distinction between an obvious error and a mere error or error difficult to detect. On the contrary, they show that orders can be quashed where the detection of error raises complicated question of law and interpretation. The word 'apparent' in the expression 'error apparent on the face of record' does not mean 'obvious' though that is
one of the meaning. Apparent means 'made manifest to the understanding' by being stated in the order. An error of law appears on the face of record if a proposition of law is stated in the order which then becomes 'speaking order', if the proposition of law is not stated then error does not become error of law. Lord Sumner says, "if (Summary Jurisdiction Act 1848) did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. The result was not to make that which had been error, error no longer but to remove nearly every opportunity for its detection. The face of record 'spoke' no longer, it was the inscrutable face of sphinx'. In the English law, there is a distinction between 'speaking order' and 'unspeaking order'.

Now it has been established in the Northumberland case that the court can set aside an award for error of law apparent on the face of it for the same reason that it quashed a rate fixed by the justices. It is submitted that the words ought to have the same meaning in India as they have in England and an order within jurisdiction can be quashed if it contains a proposition of law which on examination is found to be erroneous. The court has inherent power to quash orders of the inferior authority when they are not according to law.

The truth is that the concept has a subjective element that defied any precise definition. It is clear that the court has given a narrow meaning to the rule of error of law.

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1) Nat Bell Liquor Ltd. (1922) A.C. p.126 at p.169
2) (1961) 1 All E.2d, 268
apparent on the face of record. In English law if the reviewing court can find from the record that (1) a tribunal has determined a point of law and (2) that the determination is mistaken, the principle of error of law is invoked. It seems from the case law study that the Indian Courts follow "the reasonable basis of law" rule which is American in its origin. The English courts are very keen in seeing whether they are able to see that the error has occurred. It is, therefore, submitted that English view is more suitable for the application of the rule of error of law apparent on the face of record in the absence of any legislative attempt in India.

Prof. M.P. Jain and S.N. Jain suggests that,

"Judicial review on the limited ground of error of law apparent on the face on the record is based on the adoption by the Indian courts of the technicality of the English law concerning certiorari. There was no compulsive reason for the Indian courts to adopt this concept, as these courts were not obliged to follow the English law. As seen above, it is not always easy to distinguish between a patent and a latent error. It would be simpler if the courts were to discard the distinction between latent and patent errors and become the final judge of all errors of law; in case of review of discretionary powers, the courts have hardly bothered to find whether error of law is manifest or not; they have corrected all errors of law constituting abuse of discretion. It, therefore, does not seem sound to retain the concept and to apply the same in certain situations."  

This suggestion is in consonance with the recent development under the English law. We have seen in that in Anisminic case

there is virtually end of error of law apparent on the face of record and its replacement by an all-embracing category of jurisdictional principle. Therefore, it is submitted that nothing is wrong in following this view by the Indian courts.

In Hari Vishnu Kamath's case,¹ Venkatarama Aiyar, J., expressed the view that there was no clear cut rule by which it could be determined when an error ceased to be on error and become an error apparent on the face of record. Thus the concepts of error of law apparent on the face of record is not capable of precise definition because of its flexible nature. We shall see how this principle is applied by the Court.

In early cases in India, error of law apparent on the face of record was not recognised. Because only the jurisdictional ground was recognised to quash the order of the authority. The reason was that the courts followed the narrow meaning of the term jurisdiction i.e., existence of jurisdiction. Therefore, Prof. Gledhill points out "whether the finding of a tribunal is amenable to certiorari for error of law, we find some hesitation and uncertainty in the decisions hitherto given in India".² The observation of Prof. Gledhill seems to be based on certain other factors which worked in India. Unlike English Law, where in the seventeenth century error of law was recognised as a ground for review, in early Indian law jurisdictional

   K.M. Shaumugan V. S.M.V.S. Ltd. A.I.R. 1963 S.C. 1626
   Difficulty in defining the concept of error of law apparent on the face of record, discussed in these cases.

2) Prof. Gledhill : Fundamental Rights in India(1966) P.24
error was the only ground for certiorari. Secondly one cannot ignore the impact of the Summary Jurisdiction Act 1848 on the English cases. The inevitable result of this change was that the error of law apparent on the face of record was not recognised as a ground for review. But the error of law was treated as an error of Jurisdiction a situation analogous to the seventeenth century cases. The same view was followed barring a few examples in the pre-constitution era.

The uncertainty in the application of the rule of error of law apparent on the face of record not only continued in the post-constitutional period but also deepened after the decision in Perry's and Ibrahim's cases, which keeps the concept in perpetual uncertainty. In Perry and Co. v. Commercial Employees Association, Madras, the Supreme Court, while asserting that error of law apparent on the record was a ground for certiorari, vacated a certiorari issued by the Madras High Court for such error because according to the Supreme Court the error in that case was not apparent. This was a rather difficult case, for, the Madras High Court had stated that the interpretation of the statutory term of "over-time work" which was patent in the order was wrong. In the next Supreme Court case Ibrahim Abbe Baker v. Custodian General of Evacuee Property the grounds mentioned

1) Halsbury's L.E. 2nd Edn. Vol.9 para 149
2) Krishnaswami Aiyar V. Mohenlal Bijnani (1946)11 M.L.J.559
   Mahabaleswarappa V. Ramachandra Aso ILR 1937 Mad. 122
   This seems to be the only case on this point in preconstitutional period.
3) (1952) S.C.J. 179
4) A.I.R. 1952 S.C. 319; (1952) S.C.J. 483
for issuing certiorari, error of law was not one. This ground was not relevant in that case, but the absence of this ground among those for the issue of certiorari, when violation of natural justice was mentioned, (that ground was also unnecessary in that case) helped further to create an impression that error of law was really dropped. As a result, even after its recognition in the Northumberland case, it was not applied by the Indian Courts in the above cases. In both cases the term 'over-time work', the error was pertaining to the interpretation of the term 'over-time work'. Any misinterpretation of law in the statute is always an error of law even if the action is within the jurisdiction of the administrative authority. Such error must be apparent on the face of record. Latest case law in England show that any error in relation to statutory interpretation is an error of law. Because when both parties agreed to the fact, the next step is application of law to the agreed facts. Here the authority cannot assume jurisdiction by mis-applying the law to the finding of fact. If it does, error of law stops and jurisdictional error begins.

In Jessapp v. Naganap,¹ the Supreme Court for the first time recognised an error of law as one apparent on the face of record. In Ishward Prasad v. Registrar, Allahabad University,² Nooten J, applied the ruling given in Jessapp's case. In fact Veerappa v. Ramen & Ramen Ltd.³ is the earliest case in which the Supreme

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1) A.I.R. 1964 S.C. 440
2) A.I.R. 1965 All. P. 121
3) A.I.R. 1962 S.C. P. 192
Court referred to error apparent on the face of the record as one of the grounds on which the High Court could exercise powers under Art. 226, but it was not made clear whether the error was error of law. However, after Bapuji's case this principle was recognised by the Indian courts without any hesitation.\(^1\)

In another important decision\(^2\) the Supreme Court issued a writ of certiorari under Ar. 32 on the ground of error of law apparent on the face of record. But the court refused to apply this principle in two other important cases. Vis. Ujjambai\(^3\) and Pioneers Traders, which are already examined. The Supreme Court observed that a misconstruction of a statute not involving jurisdictional error does not infringe fundamental rights. The effect of this reasoning is that Art. 32 cannot be attracted on the ground of error of law on the face of record. However, the High Court can give relief on this ground under Art. 226 of the constitution. Here it is suffice to say that the Supreme Court followed the jurisdictional principle in a narrow sense. It is, therefore, submitted that the reasoning given in Tata Iron & Steel Ltd. case is more sound and convincing.

As pointed out earlier the reasoning given in Ujjambai's case may require reconsideration.

3) Bapuji V. V. Vyas V. Surat Borough Municipality A.I.R. 1963 Bom. 133
5) A.I.R. 1962 "(a)" S.C. 1621
6) A.I.R. 1963 S.C. 734
In Hari Vighnu Kamath v. Syed Ahmed Jhagal, 1Venkatarama
Aiyar J., reviewed the authorities, citing with approval the
passage from the judgement of Morris L.J. in Northumberland case
and held (i) that the error must be one of law and not of fact,
(ii) that an error must be a manifest error and not a mere error,
and (iii) that the test suggested by Chagla, C.J., that for an
error to be a manifest error it should be self-evident without
elaborate argument, may be a practical working test in a number
of cases, but was not a determinative test, for what may be
self-evident for one judge may not be self-evident to another.
The question must be decided on the facts of each case, since
there was an element of indefiniteness inherent in the nature of
an error apparent on the face of the record". 1 This case has been
repeatedly cited with approval and followed by the Supreme Court. 2
The reasoning employed by the court in the above case seems to be
based on Morris J's view expressed in the Northumberland case
which deals with two points, viz. (1) The word 'apparent' means
self-evident or obvious as as opposed to mere error and (2) to
correct the mere error by certiorari would be to exercise a
appellate power and not supervisory jurisdiction under the cloak
of certiorari. The first point is already discussed.

The statement that "certiorari will not issue as the cloak

1) A.I.R. 1955 S.C. 233
of an appeal in disguise". The difference between supervisory and appellate jurisdiction is to be found in the different approach involved in the exercise of these two jurisdictions. A court exercising supervisory jurisdiction through certiorari is directly concerned not with the rights of parties but with the question; has the inferior tribunal gone wrong on a point of law and thus not obeyed the law? If that it has, the order will be quashed leaving the tribunal to determine the rights of the parties. In exercising this jurisdiction, the court does not re-hear the case, or receive fresh evidence, or try to appreciate the evidence for itself, but it merely gets the order out of the way if it contains an error of law on its face. In exercising appellate jurisdiction the approach of the court is wholly different. The question to be decided is not: has the tribunal obeyed the law? but "is the appellant entitled to the rights which he has claimed and which the judgement under appeal has denied to him? The supervisory jurisdiction of the court is concerned directly with the conduct of the tribunal in obeying the law, the appellate jurisdiction of the court is concerned directly with determining the rights of parties. An unspeaking order disarms the court's supervisory but not its appellate jurisdiction for the appellate court can decide the matter for itself. Prof. Wade rightly pointed out that the court's have

assumed an appellate jurisdiction by reviewing the decision of a tribunal on a point of law which is within its jurisdiction.\(^1\)

The observation of Sinha, J., in *Assam Tea* case that certiorari is not meant to take the place of an appeal where the statute does not confer a right of appeal only reflects a judicial policy of a narrower view of this principle. The court converted the question of law into question of fact which resulted in the curtailment of the power of the Supreme Court and High Court to correct the error of law apparent on the face of record by writ of certiorari.

In order to avoid repetition the term 'error of law apparent on the face of record' may be analysed in three parts, namely (1) error of law (2) apparent (3) on the face of record. The first part is already discussed in the first section of this chapter. For the purpose of convenience the term 'on the face of record' is discussed first followed by the second part i.e., 'apparent' because it is closely associated with the principle of "speaking order".

**Meaning of Record:**

Once error apparent on the face of record is accepted as a principle for the purpose of review, difficulty arises about the contents of the term. Naturally a question may arise as to what is 'record'.

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1) H.W.K. Wade: *Certiorari - Error of Law* C.L.J. 1959 P.148
It has been said that the term 'record' consists of all those documents which are kept by the tribunal for a permanent memorial and testimony of its proceedings.\(^1\) The record has to set out the adjudication but it is not necessary to set out reasons unless the statute provides so. Lord Denning L.J., in *Northumberland case*, says "the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence nor the reasons, unless the tribunal chooses to incorporate them. If the evidence does state the reasons and those reasons are wrong in law, certiorari lies to quash the decision".\(^2\)

It is established that "the record" includes the documents which are the basis of decision as well as the statement of the decision itself. In *R v. Patents Appeal Tribunal Ex. F. Swift & Co.*\(^3\) the court has given wider meaning to the term 'Record'. It was held that the court was entitled to look not only to the tribunal's decision itself but also at the application and specification which formed the basis of decision.

The Indian law as it stands today, has a restricted meaning of the term 'record'. It does not extend to any document other than the decision impugned in a given case.

\(^1\) Blackstone's Commentaries Vol 3 p. 24
\(^2\) (1962) 1 K.B. 338 at p. 332; Fullbury L.R. XI 1965 edition accepts the position about the term record.
\(^3\) (1962) 2 Q.B. 647
It seems that the above narrow meaning is based on the observation made by Lord Sumner in Nat Bell Liquor Ltd. The reason for adopting this narrow view seems to be that before Nagappa v. Nagappa the principle of error of law apparent on the face of record was not fully recognised in India. The only ground for quashing the order of an inferior authority was the jurisdictional principle. If the determination is not supported by any legal evidence, the courts quash the order on the ground of jurisdictional principle and not only on the ground of error of law. The English law recognised an error to the 'No evidence' as an error of law. There may be another reason for following the narrow view viz., the distinction between an appeal and review which is explained earlier.

In S.K. Bitt v. A.I. Jute Mill Co. The court adopted the definition of Record given by Lord Denning in Northumberland case cited above.

It is interesting to note that the Full Bench of the Punjab High Court broadened the meaning of 'Record' so as to include not only the reasons of forming the basis of the order (The impugned order was made by the revenue authorities) but also certain additional documents. It is submitted that the Supreme Court may adopt the broad meaning of Record as given by the

1) (1922) 2 A.C. 122 ; See D.N. Gordon : Administrative Tribunals & Courts (1933) 49 L.Q.R. at P. 437
2) A.I.R. 1957 Cal. 514
4) A.I.R. 1964 S.C. 440
Punjab High Court. In English law oral reasons are treated as record. On the Indian side there does not seem to be any case to the effect that oral reasons are included in record. In fact on many occasions the Supreme Court has suggested a contrary view. In *Baldwin & Francis Ltd. v. Patent Appeal tribunal*, the court said "it would indeed be regrettable in present times, when certiorari lies to so many tribunals dealing with scientific matters, if the court's are precluded from considering whether there was an error of law on the face of record because they did not know the meaning of certain technical terms". There seems to be no Indian case on this point. In fact the Supreme Court, in *Narendra Nath Lora's case*, has taken a very narrow view. As Sinha J. observed, that certiorari is not meant to take the place of appeal where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law which it was meant to administer. More formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction.

From the above discussion it is evident that the future prospect of error of law apparent on the face of record as a

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1) *R v. Chartsey justices* (1961) 2 Q.B. 152
2) *(1956)* A.C. 663 at 679-80
3) *(1966)* S.C.R. 1249 at P. 1270
principle of review will be determined by the judicial policy particularly in relation to the term 'record'. It is therefore, suggested and is desirable also that there is nothing wrong in broadening the meaning of record when there is no statute in India like the English Tribunals and Inquiries Act of 1968. In India in many statutes provision to give reason is also absent. Therefore, it becomes very difficult for the court to detect an error from the record. This difficulty can be solved by the legislature by passing a general statute on the lines of the Tribunal & Inquiries Act 1968. Sometimes one is at a loss why the legislature has not enacted a law on this point. In the absence of such law the courts are exercising their creative choice in compelling the administrative authorities to give reasons for their determination. It seems that the legislature is satisfied with the creative choice of the court and hence no enactment. This will not solve the problem. It can be solved only by passing legislation. It will help the court to find out whether proposition of law is correctly applied in a case or whether the reasons given for their determination are warranted in that case or not. It will help in avoiding the intellectual exercise in relation the distinction between speaking order and unspeaking order, mere error of law and error of law apparent on the face of record, latent error and patent error etc.
Speaking Order:

Once the rule on the 'face of record' is introduced into law, the principle of error of law comes into trouble. The review is not granted unless the order is a 'speaking orders', an expression coined by Earl Cairn L.C.\(^1\) According to Lord Cairn a speaking order is an order which tells its own story.

There is no general rule of English law that reasons must be given for administrative decisions.\(^2\) Error of law will not usually be disclosed unless the tribunal has given reasons for its decisions. But an error of law may sometimes be held to be apparent on the face of the record even though the tribunal has not set out, or has not fully set out, its process of legal reasoning. Thus, if a tribunal merely sets out its findings of primary fact and the inferences drawn from those findings together with its decision are such as no reasonable body of persons properly instructed in the law applicable to the case could have made. If the order purports to incorporate all the relevant evidence, error of law will be apparent if there is no evidence in support of a recorded finding of primary fact or in support of any material fact, or if the record shows that inadmissible evidence was admitted or admissible evidence rejected.

As we have already observed, the concept of error of law is a

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1) Wall Overseers v. L & N W Railway Co. (1872) 4 App. Case 30 at 40;

2) Halstbury L.E. II Edn. XXIV 514 note (q), S.M. de Smith: Judicial review of Administrative Action III Edn. P.128
flexible one and in practice the courts are able to exercise a wide discretion in classifying erroneous findings and inferences as errors of law or errors of fact.\(^1\) If reasons are voluntary given and these disclose that an erroneous legal approach has been followed, the superior court can not aside the decision on the ground of error of law on the face of record. In certain other situations there may be an implied duty to state the reasons for a decision.\(^2\) If the administrative authority is free to give decisions without having to support them with reasons, they will act arbitrarily or on extraneous consideration. Temptation to abuse the authority is inevitable in the absence of a rule requiring statements for reasons for administrative decision.

The court in Northumberlan\textsuperscript{d} case held that certiorari can be issued to quash the decision of the statutory authority for error of law apparent on the face of record although the tribunal is not a court of record and though the error does not go to jurisdiction. This decision led to the extension of the scope of judicial review both in England and India. This judgement is a landmark in the history of review in the sense that an error committed by the authority which is within his jurisdiction can be corrected on the ground of error of law on the face of record, even though the error does not

\begin{itemize}
\item \textsuperscript{1} S.A. de Smith: Judicial Review of Administrative Action 3rd Edn. 1972 p.360
\item \textsuperscript{2} Michael Ancrum: Statements of Reasons for Judicial and Administrative decisions (1970) 33 M.L.R. p.154
\end{itemize}
go to his jurisdiction. Prior to this judgement, the narrow meaning to the jurisdictional error prevailed. The inevitable result of this view was that the defect in the authority must be pertaining to jurisdictional error. It is equally true that error of law was also ground for issuing review but such error must be apparent on the face of record. Mere error of law was not a ground for review. It is now recognised as an exception to the jurisdictional error.

The position was changed by introducing significant changes in the Tribunals and Inquiries Act 1958. Section 12 of the Act provides that each of the tribunals specified in the first Schedule must furnish a statement, either oral or written, of reasons for its decision, if requested to do so. A similar obligation is imposed on the ministers in respect of matters which could be made the subject of statutory inquiry. Again any statement of the reasons for a decision given by any of the specified tribunals or by a minister 'shall be taken to form part of the decision and accordingly to be incorporated in the record. The meaning of record has been widened to include oral reasons. In English law, therefore, judicial review on the ground of error of law apparent on the face of the record is very wide. Prof. de Smith beautifully summarises the application of the principle in the following words

1) See page of this chapter for detail reasons
2) S.A. de Smith: Judicial Review of Administrative Action 3rd Edn. 1973 P. 357
"Taking stock in 1966, one could say that recent factors favourable to the expansion of certiorari had been (i) the resurgence of the speaking order doctrine, (ii) the enlargement of the concept of a record, particularly through the extension of duties to give reasons, (iii) the statutory nullification of no-certiorari clauses, (iv) generally the greater readiness on the part of the courts to assert their supervisory jurisdiction in respect of matters which were only marginally "indeed" and determinations which did not "affect rights" in the strict sense and (v) the decision that certiorari would issue to a non-statutory body exercising public functions. On the other hand, the reach of certiorari had been curbed by (i) the extension of rights of appeal to the courts, (ii) the substitution of an exclusive statutory procedure for challenging a wide range of important orders and determination made by Ministers, and (iii) the growth of declaratory proceedings as alternative remedies. Since then, (i) the importance of the speaking order doctrine has diminished because of the Ainsminic decision, according to which almost any error of law, patent or latent (including the error of law detected in the Northumberland case) may be held to go to jurisdiction; but (ii) the scope of certiorari has, if anything, been extended because of the factors mentioned at (iv) and (v) above. The courts have also been prepared to allow proceedings commenced by way of appeal to be heard as if they were applications for certiorari where it has appeared that allegations of jurisdictional defects or breaches of natural justice are in issue."

On this background, it is proposed to discuss the rule of 'speaking order' and its effects in India. Like the English law, there is no general rule in India that reasons must be given for administrative decisions, unless the statute makes such a provision. In the absence of a provision to give reasons, administrative authorities are not bound to give reasons for their determinations.

Error of law will not usually be disclosed unless the tribunal has given reasons for its decision. The duty to give reasons is a safeguard against arbitrariness. The rule of speaking order is based on the requirement of justice itself. If exemption is given from the requirement of giving reasons, it could lead to the temptation of giving a perverse decision. The court has power to do justice insisting upon the administrative authorities to give reasons for their determination justice itself may be treated as a source of law.

As regards the requirements of speaking order in Hari Harar Sugar Mills Ltd. v. Shan Sunder, the Supreme Court held without hesitation that the order of the Deputy Secretary reversing the decision of the Board of Directors of a company was bad in as much as he did not give any reasons for the decision. The court simply based its decision on the ground that it could not exercise its appellate jurisdiction under Art. 136 of the Constitution without knowing the reasons for the decision under appeal.

In Sardar Govind Rao v. State of M.P. the Supreme Court went one step further by holding that the applicant who had applied for the award of a grant of money or pension to the State Government was himself entitled to know the reasons for the rejection of his application by the State Government. These grounds compelling the quasi-judicial authorities to give reasons for their decisions did not

1) A.I.R. 1961 S.C. 1669
2) A.I.R. 1966 S.C. 1222
rest specifically on the provisions of the Constitution or of the statute concerned.

The significance of the decision in Northumberland case lies in the re-discovery that certiorari is available for correcting errors of law in speaking orders. Such an error of law is referred to as an error apparent on the face of the record. Such an error is amenable to correction by certiorari.

The decision in J.V. Northumberland Compensation Appeal Tribunal has been followed in India. In Hari Vishnu V. Savad Ahmed2 Venkatrama Iyer, J., observes: "It may be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record".

So in India also speaking orders may be quashed by certiorari when there is an error of law. The further question is whether the administrative tribunals are under a duty to pass a speaking order.

In India there is a discretionary power in the Supreme Court to grant special leave for an appeal to it from the decisions of every Tribunal or Court. Does this mean that every Tribunal is bound to pass a speaking order? In M.K. Inustries V. Union3 this question was considered. In that

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1) 1981] 1 K.B. 711; 1 All B. R. 268
2) 1965] S.C. 233
case the petitioner for leave under Art. 136 was an applicant for renewal of a mining lease from the Government of Maharashtra. His application had been rejected. A revision petition submitted to the Central Government under R. 55 of the Mineral Concession Rules was also rejected by the Government. The Central Government was acting a Tribunal in the exercise of its revisional power. So special leave was sought under Art. 136.

The contention was that no reasons were given by the Government in the order rejecting the application and so the order is liable to be set aside. Subbarao J., was prepared to accept this contention and observed: "If Tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a potent weapon for abuse of power. But if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard."

The two other learned judges, Bachawat and Madhokar, JJ., were of the view that since the Maharashtra Government's order under revision gave reasons, the Central Government's order in revision agreeing with it need not give any further reasons for rejecting the revision application. The earlier decision of the Supreme Court in Harinagar Sugarc Mills Ltd. v. Suresh Sunder, 1

1) (1962) 2 S.C.R. 330
was distinguished as a case where the order of the Central Government reversed that of the State Government. Shah, J., had observed in that case: "If the Central Government acts as a tribunal exercising judicial powers and the exercise of that power is subject to the jurisdiction of the Court under Art. 136 of the Constitution, we fail to see how the power of this Court can be effectively exercised if reasons are not given by the Central Government in support of its order".

Subbarao, J., was prepared to apply this reasoning whether the order in question was one of affirmation or one of reversal. Assuming that there is a difference between the two kinds of orders, it should be observed that Bachawat and Mudholkar, JJ., are prepared to read into the order of affirmation the reasons given in the earlier order which is thereby affirmed. So this decision should be considered as having laid down the requirement that the order of a tribunal should necessarily be a speaking order, whether considered in itself or in conjunction with the order which it affirmed or reversed.

It is respectfully submitted that to constitute an error of law apparent on the face of the record all that is necessary is that the court should find in the impugned order "a legal proposition which forms the basis of that order". This test has been accepted by Shelat J., in Bharat Barwal Co. v. Bose.¹

¹) 1967] 1 S.C.R. 736 at 750
It is an objective test and steers clear of the view which makes this question turn upon the acuteness or perceptivity of the individual judge seized of the certiorari proceeding. This view is in harmony with the present current of decisions in England as well.

In Enarot Bala V. Union of India,¹ quashing the order and differing from the opinion in H.R. Industries case, the Supreme Court pointed out that when the authority whose decision is to be reviewed gives reasons for its conclusion and the reviewing authority affirms the decision for the reasons given by the lower authority, one can assume that the reviewing authority found the reasons given by the lower authority as acceptable to it; but, where the lower authority itself fails to give any reasons other than that the successful applicant was an old lessee and the reviewing authority does not even refer to that ground, this Court has to grope in the dark for finding into reasons for upholding or rejecting the decision of the reviewing authority. After all a tribunal which exercises judicial or quasi-judicial powers can certainly indicate its mind as to why it acts in a particular way and when important rights of parties of far-reaching consequence to them are adjudicated upon in a summary fashion, without giving a personal hearing where proposals and counter proposals are made and examined, the least that can be expected is that the tribunal should tell the party why the decision is going against him in all cases where the law gives a further right of appeal.

¹) A.I.R. 1967 S.C. 1606 at 1613
In Travancore Rayon v. Union of India, the Court required the giving of detailed reasons. The Supreme Court expressed thus:

"Necessity to give sufficient reasons which disclose proper appreciation of the problem to be solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency".1

It can be observed from the above case law that after 1963 in a number of cases the courts insisted upon giving reasons. But in Bhagat Ram v. State of Punjab,2 the Supreme Court took a different view. It departed from the well-settled principle of speaking order laid down in an earlier case. This case did not shake the foundation of the reasoned decision rule. It has been commented by M.P. Jain, that,

"the ruling in the above case cannot be regarded as satisfactory. The Government file may contain reasons for taking an action, but the person affected had no access to the file. He cannot, therefore, know the reasons unless the same are communicated to him. There appears to be, in this case, a climb down from the position adopted by the Court in the Travancore Rayon case. This cannot be regarded as a happy development. The courts, it is submitted, should not countenance any argument which in any way seeks to dilute the efficiency of the principle of reasoned decisions by the administration as well elaborately argued out by the Supreme Court in the Travancore Rayon case".3

1) A.I.R. 1971 S.C. 362 at 365-66
2) A.I.R. 1972 S.C. 1571
The present position as it exists now in relation to the 'speaking order' in India is that the courts insist that the quasi-judicial authority must give reasons for their decision. There is another development in the rule of 'speaking order' which is very healthy. This trend which is clearly affirmed in [Name of case] is that if detailed reasons are given by the lower authority and the appellate authority and indicated that it is agreeing with the former reasons, it is not necessary for the latter to give reasons again. In addition to this, the best thing, it is submitted, would be that an adjudicating body should give its own reasons irrespective of whether or not the lower body has given its reasons. Because the court may agree with the views of the tribunal but may not necessarily agree with all its reasons. Further it ensures that the appellate authority has considered that the case and had applied its mind. By insisting on giving reasons the courts are in a better position to exercise its control over the error of law on the face of record. The recent trend in India is that the concept of natural justice is employed by the court in the rule of speaking order. This will be discussed in Chapter VI. It is sufficient to say here that the court has extended the doctrine of ultra vires with a view to include the principles of natural justice.

The present trend in India is that the courts are insisting on the administrative authority to give reasons. This development can be seen in [Name of case] and subsequent
important cases decided by the Supreme Court on this point. This is a development for which the courts are to be commended. In fact this helps the court to expand the frontier of the rule of error of law apparent on the face of record in general and the rule of speaking order in particular.

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