SHARVANANDA, J.

Since a division of the Supreme Court was "of the opinion that the orders made by the learned High Court and District Court Judges on the face of the records appeared to be illegal in view of the provisions of section 24 of the Interpretation Ordinance as amended by the Interpretation (Amendment) Act No. 18 of 1972" the Petitioners/Plaintiffs in the several cases were noticed to appear and show cause as to why the said orders should not be set aside in the exercise of the powers of revision of the Supreme Court in terms of section 354(1) of the Administration of Justice Law No. 44 of 1973.

The impugned orders consist of orders granting an injunction to the Petitioners, by the High Court in the exercise of its jurisdiction under section 21 of the Administration of Justice Law, and orders granting interim injunction to the Plaintiff by the District Court in the exercise of its powers under sections 662 and 664 of the Civil Procedure Code read with section 42 of the Administration of Justice Law, against the Hon. H. S. R. B. Kobbekaduwa, Minister of Agriculture and Lands, restraining him, his agent or officer, from taking further steps or proceedings towards acquisition of the properties (referred to in the schedule to their petition or plaint) and from ejecting the Petitioner/Plaintiff from the said properties. On the application

of some of the parties noticed, that the questions that arise for consideration in these cases are fit and proper questions for authoritative decision by the Supreme Court, as they are of fundamental importance in regard to the right of the citizen to obtain interim injunction against a Minister of State or State Officer in the circumstances set out in the several plaints in the said cases, the Hon'ble the Acting Chief Justice made order under section 4(3)(c) of the Administration of Justice Law that the matters in dispute be heard and decided by a Bench of nine judges of the Supreme Court as they are of general and public importance.

The main question in issue that was canvassed in this Court was whether an injunction under section 21 of the Administration of Justice Law or interim injunction under sections 662 and 664 of the Civil Procedure Code read with section 42 of the Administration of Justice Law or a permanent injunction could be issued or granted against a Minister or an officer of the Crown, in view of the prohibitive provisions of section 24 of the Interpretation (Amendment) Act No. 18 of 1972.

The general allegation of the plaintiffs/petitioners finding each his cause of action for a declaration that the purported acquisition is a nullity is that the Minister had misused the powers vested in him by the Land Acquisition Act for the purpose of political revenge and/or personal vendetta. This allegation was supported by affidavits which were considered sufficient by the various Courts to justify the issue of the interim relief viz. interim injunction prayed for. Objections filed by the Respondent Minister to have the injunction dissolved have either been rejected or are awaiting further inquiry.

It is only as an issue of pure law that the question arises whether the Court is barred by the provisions of section 24 of the Interpretation (Amendment) Act from issuing an injunction whether interim or perpetual, under whatever circumstances, against the Minister or officer of the Crown and in particular even when there is colourable exercise or abuse of his power by the Minister or officer. This section reads as follows:

> "24(1) Nothing in any enactment whether passed or made before or after the commencement of the ordinance shall be construed to confer on any Court, in any action or other civil procedure, the power to grant an injunction or make an order for specific performance against the Crown, a Minister, a Parliamentary Secretary, the Judicial Service Commission, the Public Service Commission, or of any member or officer of such Commission, **in respect of any act done or included or about to be done by any such person or authority in the exercise of any power or authority vested by law in any such person or authority.**

Provided, however, that the preceding provisions of this subsection shall not be deemed to affect the power of such Court to make, in lieu thereof, an order declaratory of rights of parties.

(2) No Court shall in any civil proceeding grant an injunction or make an order against an officer of the Crown if the granting of the injunction or the making of the order would be to give relief against the Crown which could not have been obtained in proceedings against the Crown."

Does this provision provide a blanket exclusion of injunction against the Crown, Minister, etc. and officers of the Crown and afford to them a charter of immunity from any restraint by way of injunction whether the powers exercised by them are validly or *bona fide* exercised or not? The learned Solicitor-General appearing for the Minister went to the length of stating that section 24 precludes the Court from granting any injunction interim or permanent against a Minister whatever the legal quality of his action be and that the Minister's *fiat* is a complete answer to the Plaintiffs/Petitioners application for interim injunction. On the other hand counsel appearing for the plaintiffs argued that the immunity conferred by section 24 attaches only to acts of the Minister done in legal and *bona fide* exercise of the powers vested in him. These two approaches reflect two conflicting philosophies or attitudes and point to opposite directions of future development in legal thinking.

I approach the consideration of the issue in these cases with the anxious care which Judges of the Court have always given, and, I am confident will always give, to questions where it is alleged that the liberty and rights of the subjects have been unjustifiably interfered with. It is well to remember that the jurisdiction of the Courts has always been the only refuge of the subject against the unlawful acts of the Executive and its erring officers. Courts exist for the administration of justice and have an inherent power to review the exercise by the executive of its statutory powers which impinge on the citizens' rights and interests. An independent judiciary to which our constitution has entrusted the judicial power of the people is at once a guarantee and a bulwark of the freedom and rights of the subjects. The concept of Rule of Law assumes that the judicial power of the State extends to the review of judicial, quasi-judicial and executive acts and that any restriction on this power of review is a threat to the Rule of Law. Hence there is a presumption against ousting the jurisdiction of Courts to determine the extent of statutory powers. The exclusion of the jurisdiction of the Court is not to be readily inferred but such exclusion must be either explicitly stated or clearly implied. A Court of Law, naturally, approaches in a critical spirit any legislation which is calculated to impede a Court in the discharge of its duty to administer justice. Hence a Court will be disposed to construe any section, if possible, so as to avoid that result.

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words. That is a 'fundamental rule' from which I would not for my part sanction any departure" — per Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing.*[151]

Sachs, J. in *Commissioner of Customs and Excise v. Cure and Deeley Ltd.*[152] referred this well-known rule that a statute should not be construed as taking away the jurisdiction of the Courts in the absence of clear and unambiguous language to that effect. This leaning rests in a reluctance to deny to the subject access to the seat of justice. This denial can find expression in a complete deprivation of remedy or even in the substitution of a restricted remedy. The learned Solicitor-General conceded that this presumption operates when a complete ouster or removal of jurisdiction is aimed at, but not when only a remedy is suppressed. He compared sections 22 and 24 of the Interpretation (Amendment) Act and stated that as section 24 preserves the subject's right to a declaration of his rights, while seeking to extinguish the remedy of injunction, this presumption does not lie. I regret that I cannot appreciate this distinction. The presumption operates whenever there is a complete or a restricted ouster of the traditional jurisdiction of the Court. Any erosion of the Court's jurisdiction to determine a cause or to grant any particular remedy which an aggrieved person is ordinarily entitled to is not to be lightly presumed. In Ceylon declaratory relief challenging administrative action is generally sought with an injunction (both interim and permanent). An injunction will be granted to restrain a public officer from doing or threatening to do a wrongful act in the colourable exercise of his statutory powers — *Buddhadasa v. Nadarajah*, (supra). Coercion is generally necessary to ensure that law is obeyed. Prevention is better than cure. An injunction restrains a threatened wrong before it takes place. An interim injunction effectively stops the executive from using its powers, *pendente lite* for unauthorised purposes causing irreparable danger or mischief. The efficacy of the injunction is indisputable. A civil Court, in the exercise of its ordinary civil jurisdiction has the jurisdiction to grant the remedy of interim and permanent injunctions in all appropriate cases to prevent or arrest the threatened wrong. If such a valuable remedy is to be denied to a complainant of injustice committed by the executive there must be express or clear statutory language of exclusion. The presumption is against such legislative intent to take away the preventive jurisdiction of the Court.

Rule of law is the very foundation of our Constitution and the right of access to the Courts has always been jealously guarded. Rule of law depends on the provision of adequate safeguards against abuse of power by the executive. Our Constitution promises to usher in a welfare state for our

[151](1960) A.C. 260 at 286 .

[152](1962) IQB 340.

country. In such a state, the Legislature has necessarily to create innumerable administrative bodies and entrust them with multifarious functions. They will have power to interfere with every aspect of human activity. If their existence is necessary for the progress and development of the country the abuse of power by them, if unchecked, may defeat the legislative scheme and bring about an authoritarian or totalitarian state. The existence of the power of judicial review and the exercise of same effectively is a necessary safeguard against such abuse of power.

> "It is characteristic feature of modern democratic government in the Commonwealth that unless a statute provides to the contrary, officials or others are not exempted from the jurisdiction of the ordinary tribunals . . . Behind Parliamentary responsibility lies legal liability and the acts of Ministers no less than the acts of subordinate officials are made subject to the Rule of Law . . . and the ordinary Courts have themselves jurisdiction to determine what is the extent of his legal power and whether the orders under which he acted were legal and valid"— per Dias S.P.J. in re **Agnes Nona** (supra).

Review by the Courts of an act or decision of an administrative agency has always been based on an allegation that the agency has exceeded or abused its powers and has acted *ultra vires*. When a power is exceeded or abused any acts done in such excess or abuse of the power is done without authority. The *ultra vires* doctrine effectively controls those who exceed or abuse the administrative discretion, which a statute has given.

Administrative power derives from a statute and is circumscribed by it. The Courts will intervene not only to prevent powers being exceeded, but also to prevent their being abused by the application of the *ultra vires* doctrine. If the repository of a power exceeds or abuses its authority, the purported exercise is a nullity. For the proper or lawful exercise of a statutory power, there should not only be a compliance with the substantive formal and procedural conditions laid down for its performance but also with implied requirements governing the exercise of discretion. A power is generally associated with the exercise of a discretion. All statutory powers must be exercised in good faith and for the purpose for which they were granted. The repository of power must act fairly and have regard to relevant considerations and not allow itself to be influenced by irrelevant considerations.

> "It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. **It must act in good faith and must act reasonably**" — per Lord Macnaughten in *Westminster Corporation v. London & N.W. Railway Co.* (supra)

"It is in this field of the extent of the powers of government that the Courts have a traditional and important part to play in the control of administrative agencies" Garner 'Administrative Law' (3rd edition) at page 104.

"Their (Courts') task is to contain administrative activity within the bounds of delegated power; to apply to administrative action the test of locality . . . " — vide article of Professor L.L. Jaffe and Edith G. Henderson "Judicial Review and the Rule of Law (1956) 72 L.Q.R. 345.

It is to be borne in mind that the *ultra vires* doctrine is not confined to cases of plain excess of power; it also governs abuse of power as when a power is granted for one purpose is exercised for a different purpose or for a collateral object or in bad faith. In law the consequences are exactly the same; an improper motive or a false step in procedure, will make an administrative act just as illegal or invalid as does a flagrant excess of authority — see Wade, Administrative Law (2nd edition) 47.

"An act is no less valid because it is an abuse of power than because it is an excess of power in the narrow sense of the term" — de Smith, Judicial Review of Administrative Action, 2nd edition at 302.

Thus abuse of power or discretion constitutes a ground of invalidity independent of excess of power. An Act or thing done in abuse of power is *ultra vires* that authority and thus becomes in law a nullity. The power is in effect regarded as not having been exercised.

"The exercise of a power for an improper purpose is not an exercise of power conferred for purposes defined in the statute which confers it" — Wade and Phillips, Constitutional Law (7th edition) 647.

Mr. Jayewardene contended with force that when a statute refers to the exercise of power it contemplates that the power shall be exercised in good faith and that it is inconceivable that the Legislature should have intended to sanction the exercise of powers otherwise than in good faith. The burden of his argument was that there is always a presumption that when the Legislature creates statutory powers and invests persons or bodies with authority to exercise such power, the Legislature intended such acts to be performed *bona fide* for the purpose for which the authority or power is created. If therefore the Legislature seeks to give protection to such acts by making persons who exercise such powers immune from action, then such immunity must necessarily apply only to the acts done *bona fide* in the exercise of such powers. Authorities from advanced systems of jurisprudence generally support this proposition urged by him. In my view, this proposition is well founded in law as the following citations demonstrate.

A provision that the decision of a Board of Tribunal "shall not be challenged, appealed against, quashed or called in question or be subject to prohibition, mandamus or injunction, in any Court on any ground whatsoever" has been held by the High Court of Australia as making jurisdictional defects invulnerable **provided that the Board's decision was a bona fide attempt to exercise its power**, that it related to the subject-matter of the legislation and that it was reasonably capable of reference to the power given to it. *R v. Hickman, ex parte Fox and Clinton* (supra). This statement of the law has been quoted with approval and generally followed in the Australian Courts.[153, 154]

It is of the utmost importance to uphold the right and indeed the duty of the Courts to ensure that powers shall not be exercised unlawfully which have been conferred on a local authority or the executive, or indeed anyone else, when the exercise of such powers affect the basic rights of an individual. The Courts should be alert to see that such **powers conferred by statute are not exceeded or abused** — per Salmon L.J. in *Rex v. Barnet and Camden Rent Tribunal.* [155]

> "In considering whether there has been a valid reference it is necessary to consider whether on the facts of the case there has been a valid and **bona fide exercise** of the power conferred by Parliament on them . . . . . It will be within the power and duty of this Court so as to interfere in cases where there is not a *bona fide* exercise of the powers given by Parliament" — per Lord Goddard, S.J. in *R v. Paddington Rent Tribunal.*[156]

In *Demetriades v. Glasgow Corporation*[157] the House of Lords in applying regulation 51(2) of the Defence (General) Regulations 1939 which provided that: "While any land is in the possession of a competent authority . . . the land may be used by or under the authority of the competent authority for such purpose and in such manner as that authority thinks expedient" held that under the regulation the competent authority had an unrestricted discretion with regard to the use of requisitioned property provided that it *bona fide* considered that the use to which the property was being put or the manner in which it was being used was necessary and expedient to effect the purpose of the requisition and that in the absence of averments of **bad faith, ulterior motive, or possibly perverseness,** on the part of the authority, the jurisdiction of the Court was excluded as the competent authority was the judge of the use which it should make of the land.

[153] King v. Muray *et al.* (1948) 77 CLR 387.
[154] Coal Miners Industrial Union of Workers of W. Australia v. Amalgamated Collieries of W. Australia (1960) 104 CLR 437.
[155] (1972) 1 All E.R. 1185 at 1188.
[156] (1949) 1 All E.R. 720 at 725.
[157] (1951) 1 All E.R. 457.

> "To pretend to use a power for the purpose for which alone it was given, yet in fact to use it for another, is an abuse of that power and amounts to *mala fides*. For to profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act in *fraudem legis* . . . . such an use is a mere simulatory pretext" — per Davis, S.J. in *Van Eck v. Etna Stores* (supra).

The Supreme Court of India stated in *Somawanti v. State of Punjab* (supra) (an appeal involving acquisition proceedings under their corresponding Land Acquisition Act) that the declaration of the Government that the land is needed for a public purpose will be final, subject however, to one exception. That exception is, that if there is a colourable exercise of power, the declaration will be open to challenge at the instance of the aggrieved party. If it appears that what the Government is satisfied about is not a public purpose but a private purpose or no purpose at all, the action of the Government is colourable as not being relatable to the power conferred upon it by the Land Acquisition Act and its declaration will be a nullity. To such a declaration the conclusiveness of section 6(3) of the Act will not extend. For, the question whether a particular action was the result of fraud or not is always justiciable . . . The condition for the exercise of the power by the State Government is the existence of a public purpose and if the Government makes a declaration under section 6(1) in fraud of the powers conferred upon it by that section, the satisfaction on which the declaration is made is not about a matter with respect to which it is required to be satisfied by the provision and therefore its declaration is open to challenge as being without any legal effect. (This judgment of the Indian Supreme Court is apposite to the instant cases before this Court. The provisions of section 6 of the Indian Land Acquisition Act correspond to the provisions of section 5 of our Land Acquisition Act and the law set out therein applies equally well to our section 5). This view was approved in the later cases of *Rajah Anand v. State of U.P.*, (supra).

In *Union Government v. Fakir*[158] the Appellant Division of South Africa was confronted with a provision of their Immigration Regulation Act No. 22 of 1913 which read as follows:

> "No Court of law in the Union shall . . . have jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act, order or warrant of the Minister, immigration officer or master under this Act and relating to the restriction or detention . . . of a person who is being dealt with as a prohibited immigrant."

Counsel for the Minister argued *in limine* that even if there had been *mala fides* on the part of the immigration officer, the Court would have no jurisdiction to interfere or make a restraining order. The Court held that:

[158] (1923) S.A.L.R. AD 466.

"wide though the language may be, it does not exclude the jurisdiction of the Courts under every circumstance. Cases may be conceived in which interference would be justified. If there was a manifest absence of jurisdiction or if an order were made or obtained fraudulently a competent Court would be entitled to interfere . . . The contention advanced on behalf of the immigration authorities on this point is far too wide. The fact that an order purports to be done under the act will not exclude the interference of the courts where there was no jurisdiction to deal with the matter at all or where it has been dealt with not *bona fide* but fraudulently."

In *Roncarelli v. Duplessis* (supra) Rand, J. of the Supreme Court of Canada stated:

"There is no such thing as absolute and untrammelled discretion, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator, no legislative act can, without express language, be taken to contemplate an unlimited or arbitrary power, exercisable for any purpose, however capricious or irrelevant regardless of the nature or purpose of the statute. Fraud and corruption in the commissioner may not be mentioned in such statutes. but they are always implied as exceptions. **Discretion necessarily implies good faith in discharging public duty:** there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."

Giving the judgment of the Privy Council in *Francis v. Chief of Police* Lord Pearson stated at page 257:[159]

"The object (of the act in question) is to facilitate preservation of public order. That being the object of the Act, he (the Chief of Police) must exercise his powers *bona fide* for the achievement of that object *Roncarelli v. Duplessis* (supra) — per Rand J.

"Parliament commits to the executive the discretion to decide and with that discretion, **if *bona fide* exercised**, no Court can interfere. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the Legislature and to see that those powers are exercised in good faith" — per Lord Greene, M.R. in *Carltona Ltd. v. Commissioner of Works* (supra).

"For such an order to be validly made the Permanent Secretary must in my view form an opinion in good faith . . . If of course he acts in bad

[159] (1973) 2 All E.R. 251 at 257.

faith in making an order under Regulation 18(1), the provisions taking away the right of the Court to call the order in question would not apply. In such an event the Court's jurisdiction to interfere remains untouched because, when the Permanent Secretary acts in bad faith, he has obviously not made the order for detention because he is of opinion that the person in respect of whom the order is made is likely to act in a manner prejudicial to the public safety and that he should be prevented from so acting but because the Permanent Secretary has some other obvious (oblique) reason" — per G. P. A. de Silva, S.P.J. in *Hirdaramani v. Ratnavale* (supra).

In the very same case, Samarawickrema, J., at page 119 quoted with approval a passage from S. A. de Smith – Judicial Review of Administrative Action (2nd edition) page 315 which states:

"If a discretionary power has been exercised for an unauthorised purpose it is generally immaterial whether its repository was acting in good faith or in bad faith. But where the Courts have disclaimed jurisdiction to determine whether the prescribed purpose have in fact been pursued, because the relationship between the subject-matter of the power to be exercised and these purposes are placed within the sole discretion of the competent authority (as where a power is exercisable if it appears to be the authority or expedient for the furtherance of those purposes) they have still asserted jurisdiction to determine whether the authority has in **good faith** endeavoured to act in accordance with the prescribed purposes" and concluded as follows — "I am therefore of the view that regulation 55 will not apply to the case of a person unlawfully detained under an invalid detention order made in abuse of the powers conferred by Regulation 18(1)" — page 120.

"I do not see how the order of an executive officer . . . which is *mala fide* can be distingushed. Here too he would be acting outside his jurisdiction as the Regulation clearly contemplates an order based on an opinion formed *bona fide*. It may well be that in the result an inquiry into the question of *mala fide* may end in a blind alley . . . but that does not mean that this Court should shut its door to a person who on the face of his petition has a *prima facie* case of bad faith showing that the respondent had acted dishonestly and/or with an ulterior and/or collateral purpose and therefore in fact he had not exercised his opinion as contemplated under the Regulations" — per Wijayatilake, J. *in Gunasekera v. Ratnavale* (supra).

In *David v. Abdul Cader* (supra) the Privy Council held that an applicant for a statutory licence can have a right to damages if there had been a malicious misuse of the statutory power to grant the licence. The Court held that the plaintiff was entitled to have his claim for licence subjected to a ***bona fide* determination** by a public authority.

In *Partap Singh v. State of Punjab,* (supra) the Supreme Court of India observed:

> "The two grounds of *ultra vires* and *mala fide* are thus most inextricably mixed. Treating it as a question of *ultra vires*, the question is what is the nature of the power which has been granted to achieve a definite object in which case, it would be conditioned by the purpose for which it is vested. Taking the present case of the power vested in Government to pass the impugned orders, it could not be doubted that it is vested in Government for accomplishing a defined public purpose viz. to ensure probity and purity in the public service. The nature of the power thus discloses the purpose. In this context the use of that power for achieving an alien purpose — wreaking the Minister's vengeance on the officer would be *mala fide* and a colourable exercise of that power and would therefore be struck down by the Courts."

Further, according to certain judgments of our Supreme Court good faith has been held to condition the right to the notice under section 461 of the Civil Procedure Code and also to entitle a Police Officer to claim the benefit of section 83 of the Police Ordinance — vide 9 N.L.R. 138, 16 N.L.R. 49, 3 C.W.R. 121, 23 N.L.R. 192 and 29 N.L.R. 139 (supra).

Thus in carrying out their task of enforcing the law, the Court presumes that bad faith cannot be said to have been authorised by a statute and insists on powers being exercised truly for the purpose indicated by Parliament and not for any ulterior purpose. The Court is solicitous that when the agency exercises the power, it shall not act *mala fide* or frivolously or vexatiously but shall act in good faith and for the achievement of the objects the enactment had in view. The Court intervenes to prevent not the use of powers but the misuse of power. When the exercise of the discretion is not a lawful exercise of the discretion because the powers are exceeded or abused, then it is considered that there has been no exercise of the statutory powers or discretion in terms of the law.

The learned Solicitor-General did not challenge the general proposition that statutory powers must be exercised *bona fide*; but contended that for the purpose of section 24 of the Interpretation (Amendment) Act any exercise of powers whether *bona fide* or *mala fide* falls within the ambit of section 24 as there is no express limitation of the kind of exercise. He states that the intention of the legislature was to prevent the Court granting injunction and staying acquisition proceedings because it was found by experience that though large numbers of acquisition proceedings were stayed by issue of interim injunction on grounds of *mala fides*, not one case had over the years succeeded on that ground. He admitted that he had not, however, taken into account the number of acquisitions which were abandoned or withdrawn

after institution of action, challenging such acquisitions. He further referred us to the speech made by the Minister of Justice, when he introduced the Interpretation Amendment Bill, to show the intention behind section 24 and argued that the Minister's speech furnished a guide to the construction of the section.

The primary rule of construction is to intend the Legislature to have meant what they have actually expressed. The object of all interpretation, is to discover the intention of the Legislature.

> "but the intention of Parliament must be deduced from the language used" – per Lord Parker, C.J. in *Capper v. Baldwin.*[160]

The duty of the Court is to interpret the words the Legislature has used and not to travel outside on a voyage of discovery.

> " A mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used, if they are literally interpreted, is no sufficient reason for departing from the literal construction" – per Lord Haldane in *Lumsden v. Commissioner of Inland Revenue.*[161]

If the words properly construed admit of only one meaning, the Court is not entitled to deny to the words that meaning, merely because the Court feels that the result is not in accordance with the intention of the Legal Draftsman or the Minister. Proper construction necessarily involves certain built-in assumptions which ordinarily apply unless excluded. The Legislature intends statutory powers to be exercised in good faith and for the purpose for which they were conferred. It is entirely repugnant to the intention of the Legislature that the statutory power which it grants should be abused.

> "Enactments which confer powers are so construed as to meet all attempts to abuse them . . . Though the act done was in execution of the statutory power and within its letter it would nevertheless be held not to come within the power, if done otherwise than honestly and in the spirit of the enactment" — Maxwell on Interpretation of Statutes 11th edition at 116, 117.

> **"The rule of improper purpose is essentially an implied maxim of statutory interpretation that even though a discretion is expressed in unqualified terms the statute must be taken to read that the discretion must be exercised for the purpose contemplated by the statute"** – Principles of Administrative Law by Griffith and Street (4th edition 225 – 226)

[160](1965) 1 All E.R. 787 at 791.

[161] (1914) A.C. 877 at 892.

> "There are certain fundamental assumptions, which without explicit restatement in every case, necessarily underlie the remission of the power to decide, such as the requirement that a decision must be made in accordance with principles of natural justice and **good faith**" — per Lord Wilberforce (1969) 1 All. E.R. 208 at 244 (supra).

Thus it is a fundamental rule of construction that all statutory powers must be exercised in good faith and to promote the objects of the enabling Act. It is the basis of the grant of power to any administrative agency. The Court will read implied limitations into an ostensibly unfettered grant of power. **"Fraud and corruption may not be mentioned in statutes but they are always implied as exceptions."** These limitations are implicit in the nature and character of the power itself.

> *"Mala fides* will be an implied exception to any exclusionary provision of this nature which on the face of it precludes a Court from questioning the validity of an order made thereunder" — per G. P. A. de Silva. S.P.J. in *Hirdaramani v. Ratnavale* (supra).

In the case of *Padfield v. Minister of Agriculture* (supra) where the discretion that was conferred on the Minister was "to act as he thought fit," the House of Lords held that the discretion was not wholly unfettered in that it had to be used to promote the policy and the objects of the Act in question. Thus, those rules of construction set out above militate against the construction of section 24 of the Interpretation (Amendment) Act as contended for by the Solicitor-General. It is well that such a construction cannot be accepted, or otherwise, the door will be open for unfettered abuse of power by administrative bodies. As was said by Achner, J. in *Clinch v. I.R.C.* (supra).

> "One of the vital functions of the Courts is to protect the individual from any abuse of power by the executive, a function which nowadays grows more and more important as governmental interference increases."

Every legal power must have legal limits. Where discretion is absolute, man has suffered. Absence of arbitrary power is the first essential of the Rule of Law. In view of these revered principles of statutory interpretation clear or express words are required to convince me that the Legislature intended to immunise *mala fides* or *ultra vires* acts of the executive from the corrective of injunctions. An intention to deprive a subject of an effective, equitable remedy like an injunction cannot be gathered from inconclusive or ambiguous language. Explicit words are necessary to achieve that purpose. But then, the counsel for the Minister states that acquisition proceedings and other urgent schemes are held up by stay orders issued by Courts and the delay is frustrating. He vehemently protested that the interests of the State

should be preferred to the interests of a few individual landowners, to whom it might cause hardship. His argument assumes that judges are in the habit of granting injunction for the mere asking. I regret that experience of the orginal Courts does not warrant this facile assumption. Interim injunctions are issued only when the Court is satisfied on the material placed before it that there is a strong *prima facie* case in support of the right which the plaintiff is asserting and that there is a substantial question to be investigated and that matters ought to be preserved in *status quo* until the question can be finally disposed of. Acceptance of the Solicitor-General's argument will result in a person aggrieved being unable to invoke the jurisdiction of the Court to restrain the Minister and his officers from inflicting irreparable damage on private rights by abuse of powers entrusted to them. A blanket exclusion of injunctive relief is hard to justify as Courts can be trusted to see that their jurisdiction to grant injunction is not abused. A scheme of democratic government like ours no doubt at times feels the lack of power to act with complete all-embracing swiftly moving authority. No doubt a government with distributed authority subject to be challenged in a Court of law, at least long enough to consider and adjudicate the challenge, labours under restrictions from which other types of government are free. It has not been our tradition to envy such governments. The Rule of Law involves such restrictions. The price is not too high in view of the safeguards which these healthy restrictions afford. In any event, in the matters of delay complained of by the Solicitor-General the Government is not helpless. The delay can however, be reduced or eliminated by the highest priority being given to the hearing and disposal of the Land Acquisition cases, as contemplated by section 2 of the Land Acquisition (Amendment) Act No. 20 of 1969. Counsel's argument that the overriding public interest should prevent the issue of injunction despite alleged illegality of the acquisition also overlooks the fundamental rights of equality before the law and equal protection of the law which are enshrined in section 18 of our Constitution and fundamental principles of our Common Law. If section 24 intended favoured treatment to government agencies language more precise has to be employed to manifest such intention.

The sheet-anchor of the Solicitor-General's submission that the Legislature has by the provision of section 24 sought to give finality and security from challenge, as far as any issue of injunction is concerned, to acts done or intended to be done by any authority in the exercise (whether *bona fide* or *mala fide*) of any powers vested in him in the majority decision of the House of Lords in the case of *Smith v. East Elloe Rural D.C.* (supra). The facts in that case are as follows— The validity of a compulsory purchase order confirmed by a Minister could be challenged by the owner within six weeks of the date of the order on the ground that its authorisation was not 'empowered' to be granted under the enabling Act. After six weeks had

elapsed according to clause 16 of the statute, it could not be questioned "in any legal proceedings whatsoever." The property owner brought an action a long time after the prescribed period, claiming a declaration that the order was void because it had been fraudulently procured. The House of Lords held by a majority that the plain words of the Act precluded judicial review after the expiry of the six weeks period, and some of their Lordships were of the view that even within the six weeks' period, the order could not be challenged on the ground of bad faith. The majority of the Law Lords held that there was nothing ambiguous about clause 16. Viscount Simonds said there was no justification for the introduction of limiting words such as "if made in good faith" and there is the less reason for doing so when these words would have the effect of depriving the express words "in any legal proceeding whatsoever" of their full meaning and content." Lord Radcliff affirmed that "Courts of Law have always exercised a certain authority to restrain the abuse of statutory powers . . . It is an abuse of power to exercise it for a purpose different from that for which it is entrusted to the holder, not the less because he may be acting ostensibly for the authorised purpose. Probably most of the recognised grounds of invalidity could be brought under this head; the introductions of illegitimate considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage, or the gratification of personal ill-will" but stated:

> "But if so, I do not see how it is possible to treat the provisions of paragraph 15 and 16 of Part IV of the Schedule 1 of the Act as enacting anything less than a **complete statutory code** for regulating the extent to and the conditions under which Courts of Law might be resorted to for the purpose of questioning the validity of a compulsory purchase order within the protection of the Act . . . I should think paragraph 16 concluded the matter, and that it did not leave to the Courts any surviving jurisdiction."

This case really turned on the interpretation of a statutory expression. It held that an allegation of bad faith was not sufficient to overcome a statutory provision expressly excluding any possibility of judicial review. This decision was a majority one (3-2) and Lord Reid who dissented was of the view that the general words in a statute should be read so as not to deprive the Court of jurisdiction where bad faith is involved. (at page 868). This decision can be supported only on the basis that the statutory language in the context there excluded jurisdiction to review the *vires* of an order since a limited period has been prescribed by statute for challenging its validity and substantial prejudice to other interest would be sustained if the order were to be invalidated after the period had expired. This decision is today of doubtful value in view of the observations of the House of Lords in *Anisminic v. Foreign Compensation Commission* (supra). In the later case, their Lordships

expressed serious reservations about the majority decision in *Smith v. East Elloe R.D.C.* (supra) in so far as the case stands as authority for the principle that after the expiry of the statutory period for challenge an order protected by such a formula cannot be impugned even on the ground that it was procured by fraud. The principle enunciated in the Anisminic case was that a statute, by providing that a determination or an order of an authority cannot be challenged in legal proceedings, does not prevent the Courts from holding a determination or an order to be a nullity for being outside the jurisdiction of the authority. (Bad faith is a special facet of *ultra vires* doctrine, a body vested with discretionary powers acts *ultra vires* if it acts in bad faith or for a wrong purpose. S. A. de Smith — Constitutional and Administrative Law (1971) at page 549). Professor Wade in his article on Aspects of Anisminic Case 85 L. Q. R. 198 at 207 commenting on the *East Elloe* case (supra) remarked:

> "It cannot be often that the House of Lords decides as appeal without any mention of the main principle of law which ought to be in issue. Had reference only been made to the decisions holding that a no certiorari clause will not bar certiorari in case of fraud, the whole case would have been put in a different light."

It is to be noted that the Supreme Court of India, had prior to the House of Lords decision in *Anisminic* case, expressed its reservation about the correctness of the *East Elloe* case — (supra) vide A.I.R. 1963 S.C. 151 at 169 — Somawanti's case.

The judgments of their Lordships Reid, Pearce, and Wilberforce in the Anisminic case (supra) contain a lucid exposition of the general principles governing determination of tribunals and judicial review thereof. They afford guidance in resolving the contentions raised in the instant case. Those principles are of universal validity and apply equally well to orders of a Minister or executive officer. As was stated by Lord Reid:

> "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 the list to be exhaustive"— (pages 213-214).

Commenting on the legal significance of a preclusive clause, Lord Wilberforce observed:

> "The question what is the tribunal's area, is one which it has always been permissible to ask and answer, and it must follow that examination of its extent is not precluded by a clause conferring conclusiveness, finality or unquestionability on its decisions. Those clauses in their nature can only relate to decisions within the field of operation entrusted to the tribunal. They may, according to the width and emphasis of their formulation, help to ascertain the extent of that field, to narrow it or enlarge it, but unless one is to deny the statutory origin of the tribunal, and of its powers, they cannot preclude examination of that extent. It is sometimes said that the preclusive clause does not operate to decisions outside the permitted field because they are a nullity . . . The Courts, when they decide that a decision is a nullity, are not disregarding the preclusive clause, just as it is their duty to attribute autonomy of decision of action to the tribunal within the designated area, so as the counterpart of this autonomy, they must ensure that the limits of that area which have been laid down are observed. (page 244).

As stated earlier, the only instance in which the Court can interfere with an act of an executive body which is, on the face of it regular and within its powers, is when it it proved to be in face *ultra vires*. Issues of bad faith, misuse of power, oblique motives, unreasonableness and collateral and indirect objects and so forth furnish examples of matters which if proved to exist establish the *ultra vires* character of the act in question. The power of the Court to interfere in such cases is not that of an appellate authority to override a decision or act of the executive authority, but is that of a judicial authority which is concerned and concerned only to see whether the executive has contravened the law by acting in excess of the powers which the Legislature has confided in it. The Court does not pass judgments on issues of policy nor review an exercise of discretion but pass judgment on the legality or validity of acts of government. The jurisdictional principle serves as the main plank of judicial review. If an act or decision is outside jurisdiction, it is null and void for all purposes. There are no degrees of nullity. If an act is a nullity, it is automatically null and void and there is no need for an order of the Court to set it aside though it is sometimes convenient or prudent to have the Court declare it to be so.

> "No legally recognised rights found on the assumption of its validity should accrue to any person even before the act is declared to be invalid or set aside in a Court of Law" — Hailsham (4th edition) vol. 1 para 27.

> "You cannot put something or nothing and expect it to stay there, It will collapse" — per Lord Denning.[162]

[162] Macfoy v. United Africa Co., Ltd. (1961) 3 All E.R. 1169 at 1172.

An act done in ostensible exercise of statutory powers but dishonestly or in bad faith is not in truth an exercise of the powers and is a nullity. The statement of Lord Radcliffe in the *East Elloe* case (supra) at page 871 that:

> "an order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset it will remain effective for its ostensible purpose as the most impeccable of orders"

does not fully describe the complete effect of a null and void act. The fact that legal proceedings will have to be resorted to, for a declaration of nullity does not alter the fact of "no act," in the legal sense. Such declaration operates retrospectively and restores parties to the *status quo* and confirms that in the eyes of the law the void acts or orders are not acts or orders of the authority done in the exercise of a statutory power. When an act that is done without jurisdiction is quashed for that reason, the position is the same as if no act had been done at all. In the eyes of the law there is no exercise of the power unless the repository of the power had acted in good faith and within the framework of the law. The exercise must be a true or real exercise and not a purported or apparent exercise. An apparent or purported exercise has, in the eyes of the law, no existence as it is a nullity and the act done in pursuance of it is also a nullity. Section 24 of the Interpretation (Amendment) Act thus can apply and relate only to **acts done in the exercise of a power conferred by law.** If the impugned acts are acts not done in the genuine or true exercise of the statutory power then they are not done in the "exercise of a power conferred by law" and are a nullity and section 24 does not protect them. The ascertainment of the question whether the act is in the exercise of the statutory power or not is a task for the Court and not for that authority. The Court determines the jurisdictional limits of executive power. If the executive determination on this question is final, it will sap the judicial power as it exists under our Constitution and establish a government of bureaucratic character.

> "The essence of the decision in the Anisminic case is that the ouster clause would not prevent the determination of the Foreign Compensation Commission being set aside by the Courts if it was outside the Commissioner's jurisdiction but that it could not be questioned on the ground of mere error within the jurisdiction" — per Dr. Wade 85 L.Q.R. at 209.

The House of Lords in the Anisminic case correctly held that nullity is the consequence of all kinds of jurisdictional errors e.g. breach of natural justice, bad faith, failure to deal with the right question and taking wrong matters into account. These principles militate against my accepting the argument of counsel for the Minister that section 24 catches up within its ambit all acts

whether *intra vires* or *ultra vires* or done in good faith or bad faith. Applying the principles enunciated in the Anisminic case I am of the view that the orders of acquisition made by the Respondent-Minister, if not made by him in the *bona fide* or proper exercise of the power vested in him under the Land Acquisition Act are not orders made in the exercise of authority vested in him by law and that in the circumstances section 24 has no application and does not inhibit the Court granting the relief of interim injunction. The restriction placed in subsection (2) of section 24 is subject to the limitation contained in clause 2 in subsection (1) because subsection (2) does not give the public officer greater protection than is given to the Crown, Minister, etc. A public officer can also be restrained by injunction if he acts *mala fide.* In my view the orders made by the respective subordinate Courts on the material placed before them are legal and can be sustained. Neither principle nor authority compels me to the conclusion that section 24 affords a charter of immunity to the executive from being restrained in appropriate cases, by injunction from invasion of a subject's rights.

Before concluding I wish to state with all respect to the Judges who decided the case of *Hewawasam Gamage v. Minister of Agriculture and Lands* (supra) that the case was not correctly decided for the reasons set out above. The Court was not justified in excluding from its consideration the allegation of *mala fides* on the part of the Minister. If the acquisition had been motivated by political reasons and/or reasons extraneous to the Land Acquisition Act, the validity of the acquisition can be questioned in a Court of Law. Further, in my view, the case of *Karunanayake v. de Silva* (supra) was correctly decided and should be followed in appropriate cases.

In view of the above conclusions I do not think it is necessary to go into the question whether in any event section 24 bars the issue of interim injunction. I see the force of Mr. Thiruchelvam's argument that on an analysis of section 24 it would appear that only permanent injunction is contemplated; for, the proviso to the section speaks of granting an order declaratory of rights of parties, in lieu of granting an injunction and the making of a declaration is the final act of the Court. In lieu of an interim injunction an order declaratory of the rights of parties cannot be made. As against this submission the learned Solicitor-General contends that the intention of the Legislature was to prohibit the issue of both interim and permanent injunction and to bring the law in line with the provisions of the English Crown Proceedings Act 1947. He drew our attention to the words of the English Act:

"Where in any proceedings against the Crown . . .
the Court shall not grant an injunction."

These words were held to exclude the grant of interlocutory injunction or an interim declaration. *Underhill v. Ministry of Food* (supra). *International Electric Co. & Customs and Excise Commissioner* (supra) I reserve the consideration of this aspect of the matter for another appropriate occasion.

Mr. Jayewardene alleges that certain irregularities have taken place in the way the instant matters have been brought by way of revision before the Supreme Court. Since there has been a proper reference by the learned Acting Chief Justice under section 14(3) (c) of the Administration of Justice Law and this Court, as is presently constituted is validly seized of the matter, I do not think it is necessary to go into the question of the alleged irregularities. In passing I wish to say that counsel's analysis of the various sections of the Act impressed on me the importance of the open Court rule embodied in section 7 of the Law. There is a duty laid upon every Court or Tribunal to sit in public and administer justice, unless otherwise provided by law. But calling for the record for the purpose of examining it is not a judicial act which should be performed while sitting with open doors.

In my view, the notices issued on the Plaintiffs/Petitioners should be discharged and the records should be sent back for trial or inquiry to proceed in due course.

In the special circumstances, each party will bear his own costs in this matter.

Section 24 of Interpretation
Ordinance
is not applicable
where the act of the Minister is without
jurisdiction, ultra vires
or is in bad faith.