Supreme Court of India
Madanlal Fakirchand Dudhediya vs Shree Changdeo Sugar Mills Ltd on 20 March, 1962
Equivalent citations: 1962 AIR 1543, 1962 SCR Supl. (3) 973
Author: P Gajendragadkar
Bench: Gajendragadkar, P.B.

PETITIONER:
MADANLAL FAKIRCHAND DUDHEDIYA

Vs.

RESPONDENT:
SHREE CHANGDEO SUGAR MILLS LTD.

DATE OF JUDGMENT:
20/03/1962

BENCH:
GAJENDRAGADKAR, P.B.
BENCH:
GAJENDRAGADKAR, P.B.
SARKAR, A.K.
WANCHOO, K.N.

CITATION:
1962 AIR 1543 1962 SCR Supl. (3) 973

ACT:
Company-Agreement to pay commission from profits beyond specified limit-Validity-Companies Act, 1956 (1 of 1956), s. 76(1) & (2).

HEADNOTE:
There was an agreement between the respondent company, which was incorporated as a Private Limited Company in 1939, and its promoters, the appellant and the rest of the respondents, that in consideration of the promoters having each purchased sharers worth 1-1 1/2 lakhs of the company, the company would pay them 12-1/2% of the net profits every year. That agreement was put in art. 3 of the Articles of Association of the company. In 1941 there was a second agreement between the company, its promoters and a firm, and by it the said firm was appointed as the managing agent of the company and the commission payable to the promoters was reduced to 6-1/40' and art 3 amended accordingly. There was litigation between the parties and the consent decrees passed. there in left the promoters' commission in tact. Meanwhile the Companies Act, 1956, came into force and the company served a notice to the appellant saving that the promoters' commission was no longer lawful and that art. 3

would be deleted. The appellant then brought the suit, out of which the present appeal arose, for a declaration that the agreement to pay commission was valid and for an injunction restraining the company from deleting the said art. 3. It was urged on behalf of the company that s.76(1) and (2) of the said Act had made the agreement invalid and unenforceable. The trial court found in favour of the company and dismissed the suit. The court of appeal agreeing with the trial court dismissed the appeal-
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Section 76 of the Companies Act, 1956, before it was amended in 1960, was in its material parts as follows

"(1). A company may pay a commission to any person in consideration of

(a) his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in, or debentures of the company, or

(b) his procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in, or debentures of, the company, if the following conditions are fulfilled, viz.

(i) the payment of commission is authorised by the articles;

(ii) the commission paid or agreed to be said does not exceed in the case of shares, five per cent. of the price at which the shares are issued or the amount or rate authorised by the Articles, whichever is less, and in the case of debentures, two and a half per cent.-of the price at which the debentures are issued or the amount or rate authorised by the articles, whichever is less;

(iii) the amount or rate per cent. of the commission paid or agreed to be paid is in the case of shares or debentures offered to the public for subscription, disclosed in the prospectus; and I

(iv)

(2) Save as aforesaid and save as provided section 79; no company shall allot any of its shares or debentures or apply any of its capital moneys, either directly or indirectly, in payment of any commission, discount or allowance, to any person in consideration of

(a) his subscribing or agreeing to subscribe, whether absolutely or conditionally for any shares in, or debentures of, the company or

(b)

By Amending Act 65 of 1960 the word 'capital' occurring in that s. 76(2) deleted.

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Held, (per Gajendra-adkar, and Wanchoo, JJ.) that s. 76 of the Act must be construed by itself, in the light of its own scheme and object and not by reference to what the English law on the point may be. So judged there can be no doubt that s. 76(1) clearly prescribes the payment of commission, whatever the source from which it is paid may be. It is not merely an enabling provision, but also prohibits payment beyond the prescribed ceiling. It is clear that the section covers commission paid both out of capital and profits.

Hilder v. Dexter, (1902) A.C. 472, explained.

The Ooregum Gold Mining Co. of India Ltd. v. George Rover and Charles Henry Wallroth, (1892) A.C. 125, considered.

There can be no repugnancy between s. 76(1) thus construed and s. 76(2). The Legislature was aware that capital money was often applied to payment of commission under the garb of ostensible lawful payments. In view of the devices adopted to defeat the limit imposed by s.76(1), it is provided by s. 76(2) that such devices must also conform to the prescribed limit The two subsections constitute in integrated provision one of the objects of which was to impose a limit on the Payment of commission whether for shares or for debentures in order to save the property of the company.

The deletion of the word 'capital" from s. 76(2) by the Amending Act of 1960 made the intention of the Legislature clear that the limit imposed on the payment of commission in respect of shares and debentures applies as much to commiss- ions paid out of capital as to those paid out of profits.

Per Sarkar,.J There is nothing in, S. 76(1) of the Companies Act, 1956, to suggest that it intended in any way to change the preexisting law under which a company was free to pay any commission it liked out of its profits to any person subscribing for shares in it, and the proper way to construe that sub-section would be to confine its terms to payments or commission out of capital.

Hilder v. Dexter, (1902) A. C. 474, held applicable.

Oorgeoum Gold Minning Co. of India Ltd. v. George Roper, (1892) A.C. 125, referred to.

The words ,it shall be lawful" used in s. 105(1) of the Indian Companies Act, 1913, and the word 'may' used in s. 76 (1) of the Companies Act, 1956, mean the same thing and both these sections were enabling provisions that intended to legalise something which was previously illegal.

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JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 64 of 1959.

Appeal by special leave from the judgment and decree dated July 24, 1957, of the Bombay High Court in Appeal No. 23 of 1957.

A. V. Viswanatha ,Sastri, Jaswantlal Mathubai and I. N. Shroff, for the appellant.

C. B. Agarwala, I. P. Dadachanji, O. C. Mathur and Ravinder Narain, for respondent No. 1.

1962. March 20. The Judgment of Gajendragadkar and Wanchoo, JJ., was delivered by Gajendragadkar, J., Sarkar, J., delivered a separate Judgment.

GAJENDRAGADKAR, J.-The principal question which arises in this appeal relates to the construction of s. 76(1) and (2) of the Companies Act, 1956 (1 of 1956) (hereinafter called the Act) before the amendment of sub-s.(2) in 1960. That question arises in this way. The appellant, Madanlal Fakirchand Dudhediya, and respondents Nos. 2 and 3 and the father of respondents Nos. 7 to 10 were the promoters of the 1st respondent Co., Shree Changdeo Sugar Mills Ltd. The said Co. was incorporated in 1939 as a Private Limited Company. It was, however, converted into a Public Ltd. Co. in 1944. At the time of the original incorporation of the Co., a Promoter's Agreement was arrived at whereby the Co. agreed during its existence to pay a sum equal to 3-1/80% every year out of its net profits to each of the four promoters. As a result of. this agreement, the aggregate consideration payable every year to the promoters came to 12-1/2% of the not profits of the Co. Article 3 of the Articles of Association of the Co. justified the making of this agreement. In 1941 the Co. came into financial difficulties and in consequence, on the 22nd April, 1941, a tripartite Agreement was arrived at between the Company, M/s. Ardeshir Hormusji Bhiwandiwalla & Co., and the Promoters. Under this agreement, it was agreed inter-alia, to appoint the said firm of Bhiwandiwalla & Co. or its nominee as the Managing Agents of the Co. for 10 years with an option to the Co. to extend the said period upon certain terms. At this time, the earlier agreement as to the payment of the promoters' commission was modified and the said commission payable to the promoters was reduced to 6-1/4% and Art. 3 of the Articles of Association was accordingly amended. Three years later, dispute arose between the parties and they led to three suits filed on the original side of the Bombay High Court. All the said suits were compromised and decrees by consent were passed in them. One of the terms of the compromise was that the promoters' commission payable to the four promoters which was Rs. 1-9-0 to each of them and which came 6-1/4% in the aggregate payable to them under the agreement entered into between them and the Managing Agents shall remain in force as in the Agreement and the promoters' right of commission shall continue accordingly. Thus. as a result of the compromise, the promoters' commission which was payable to them under the earlier Agreement was saved. After the Act came into force on the 1st of April, 1956, the appellant received a letter from respondent No. 1 informing him that respondent No. 1 had been advised that as from the date of the commencement of the, Act, the agreement between the parties as to the payment of the promoters' commission had become illegal and void and that the 1st respondent would not, therefore, pay any more, commission,% after April, 1956. In October, 1956 the appellant received a notice from the let respondent that an extraordinary general meeting of the shareholders of the 1st respondent Co. was going to be held, inter alia, for the purpose of amending certain Articles of Association of the Co. One, of the amendments proposed to be put before the said meeting was to delete Article 3 from the Articles of Association of the Co. On receipt of this notice, the appellant filed the present suit on the 13th December 1956. By his plaint, he claimed a declaration that the agreement between the parties was valid and legal and he asked for an injunction restraining respondent No. 1 from passing any resolution deleting Article 3 of the Articles of Association of the respondent Co. or from taking any action on the basis that the said agreement had become illegal and void. Respondent No. 1 resisted this suit. It was urged on its behalf that as a result of the provisions of section 76(1) and (2) of the Act, the agreement in question had become void and could not be en. forced. Respondents Nos. 2 to 10 are the other beneficiaries under the said agreement and they ,supported the appellant. The learned Judge who tried the suit held that the defence raised by respondent No. 1 was well-founded and that the agreement in question having become void and unenforceable under the relevant provisions of the Act, no declaration could be granted or no injunction could be issued in favour of the appellant as claimed by him. In the result, the appellant's suit was dismissed with costs. The appellant then preferred an appeal challenging the correct- ness of the decision of the Trial. Court. The Court of Appeal, however, agreed with the view taken by the learned Trial Judge and dismissed the appeal preferred by the appellant. The appellant then applied for and obtained a Certificate from the High Court and it is with the said certificate that he has come to this Court by his present appeal. That is how the principal point which has been raised for our decision in the present appeal is about the construction of section 76(1) and (2).

Mr. Sastri contends that in coming to the conclusion that the appellant's claim to enforce the agreement in question in respect of the profits made by respondent No. 1 is affected by s. 76, the Courts below have misconstrued the provisions of the said section. It is conceded by Mr. Sastri that the promoters have so far received an aggregate amount of over 'Rs. 5,80,000 which is far in excess of the maximum amount now permissible under a. 76(1).But his argument is that the statutory provision imposing the limit in regard to the payment of commission on which respondent No. 1 relies is inapplicable to a case where the said commission is claimed not out of capital but out of the profits of the Company.

Before dealing with this point, however, it would be convenient to dispose of another objection raised by Mr. Sastri. He contends that the agreement in question is really outside the purview of s. 76. Section 76 refers inter alia, to the commissions payable to any person for his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of a Co. That being so, since the presents agreement has been 'entered into for consideration other than those specified in s. 76, its enforcement cannot be resisted on the ground that it is hit by a. 76. The decision of the question naturally depends upon the construction, of the two agreements. The first agreement of 1939 provides that for the help rendered and pains taken by the promoters and because each of them had agreed to purchase and had purchased shares worth Rs. 1-1/2 lakhs out of the Co.'s capital, the Co. was entering into an agreement with them for the payment of the commission. The agreement provided that the said commission would be payable as long as the Co. was in- existence. It is thus clear that though the help rendered by the promoters and pains taken by them are incidentally referred to the agreement is substantially, if not entirely, based upon the fact that the promoters had agreed to purchase and had purchased shares worth As. 1-1/2 lakhs and so there cm be no doubt that this agreement clearly falls within the mischief of s.

76. It is, however, urged that the completion of the first agreement changed completely when the second agreement was entered into in 1941. In this latter agreement which was entered into between the promoters and the new Managing Agents, the former agreed to receive 6-1/4% as promoters' commission instead of 12-1/2% ,,as provided in our respective agreements with the Company." That is the substance of the agreement. However, Mr. Sastri relies on the other recitals in the document in support of his argument that the latter agreement was not in consideration for the purchase of shares by the promoters. These recitals refer to the fact that the promoters had resigned their office and surrendered and renounced their rights to act as the Managing Director or Managing Directors of respondent No. 1 and it was in consideration of this fact that the agreement was made. We are not impressed by this argument. It is true that before this agreement was made, the new Managing Agents were appointed and that was no doubt the occasion for the making of the agreement. But the essential part of the new agreement was the reduction made in the commission payable to the promoters; for the rest, the earlier agreement continued and so, in determining the scope and nature of this latter agreement, we have inevitably to go back to the &A agreement. As we have just pointed out, the operative clause in the agreement, in terms refers to the earlier agreements between the respective parties and avers that Instead of 12-1/20% as provided by the said agreement 6-1/4% would hereafter be paid. Therefore, we are satisfied that the payment claimed by the appellant is payment by way of commission to which s. 76 would apply.

Then it is argued that though the purchase of shares by the promoters may partly be the consideration for the agreement, the service rendered by them and the pains taken by them in promoting the Co. were also set out in the first agreement as forming part of the consideration and even if the agreement as to the payment of commission may fall within s. 76 part of the agreement which is based on other considerations would be outside a. 76 and the two parts being severable, it is necessary to determine how much the appellant would be entitled to claim under the part which is valid. In our opinion, this argument is not open to the appellant at this stage. It appears that in the trial Court, an attempt was made on behalf of the appellant to lead oral evidence for the purpose of saying that the two considerations could be severed and so, the amount payable to the appellant in respect of that part of the agreement which was valid, should be determined. The learned Trial Judge did not allow oral evidence to be led as suggested by the appellant because he found that the case sought to be made by adducing the said oral evidence was not made out by any averments in the plaint nor was any attempt made to raise any issue in that behalf at the time when the issues were framed. Indeed, it appears from the judgement of the learned Trial Judge that the attempt made by the- appellant in that behalf was feeble and half-hearted. Thus, in the Trial Court, the appellant was not allowed to make out this case and when he went before the court of Appeal, he, appa- rently made no grievance about the decision of the Trial Court; otherwise the Appeal Court would have dealt with this point. Therefore, we do not think that the appellant can be permitted, to raise this point before us in this appeal. That takes us to the principal point of controversy, between the parties in regard to the construction of section 76(1) and (2) of the Act.-- Mr. Sastri contends that in construing the relevant statutory provisions, it would be necessary to bear in mind that the provisions of the Indian Company Law are substantially based on the provisions of the English Company Law and so it would be necessary to enquire what the corresponding provision of the English Law has been construed to mean. The pattern of the Indian Company Law is set by the English Company Law and the principles enunciated by English decisions in dealing with the corresponding provisions of the English Company Law should be followed when we are interpreting the provisions of the Indian company Law. This argument proceeds on the assumption that the ,Corresponding provision of the English Company Law permits the payment of commission for subscribing for shares out of the profits of the Co. with out any limitation. It is, therefore, necessary to examine briefly this argument.

The provision in the Company Law in regard to the payment of commission for subscribing for any shares was introduced in the English Companies Act in the form of an enabling provision in 1900 and it became necessary to make the said enabling provision because of an earlier decision of the House of Lords in The Ooregum Gold Mining Co. of India, Ltd. And George Roper and Charles Henry Wallroth (1). In that case, the House of Lords had held that a company limited by shares, formed and registered under the Act of 1862, had no, power to issue shares as fully paid up for a money consideration less than their nominal value. It appears that the memorandum of association of a company registered under the, Act of 1862 stated that the capital of the company was 125,000 divided into 125,000 shares of pound 1 each, and that the shares of which the original or increased capital might consist might be divided into different classes and issued with such preference, privilege, or guarantee as the company might direct. The company being in want of money (1) (1892) A.C. 125.134.133.

and the original shares being At a great discount, the directors in accordance with resolutions duly passed issued preference shares of E1 each with 15s. credited as paid, leaving a liability of only 5s. per share. A contract to this effect was registered under the Companies Act of 1867 s.25. The transaction was bona fide and for the benefit of the company. In an action by an ordinary shareholder to test the validity of the issue, it was held that reading the Companies Acts of 1862 and 1867 together, the issue was beyond the powers of the company, and that the preference shares so far as the same were held by original allottees were held subject to the liability of the holder to pay to the company 'm cash the full amount unpaid on the shares. In his ,speech, Lord Halsbury observed that "Two things were manifest in s. 25 of the Act of .1867. The shares to be held &abject to the payment, and the payment is to be in cash. The amount is to be paid and the whole amount to be paid in cash, and to me it appears, looking at the latter part of the section whereby a contract made and filed may. qualify and cut down the form of payment, and that it may be in goods or in value received in some. form, instead of in cash, it must nevertheless be payment." He also added that "the capital is fixed and certain, and every creditor of the company is entitled to look to that capital as his security." Thus, as a result of this decision, it become obvious that no commission could be paid to any person for his subscribing to the shares of the Company out of the capital of the Co.

It was as a result of this decision that section 8 was enacted in the Act which was passed to amend the Companies Act, in 1900. Section 8(1) provided that "Upon any offer of share to the public for subscription, it shall be lawful 'for a company to pay a commission to: any person in consideration of this subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions whether absolute or conditional, for any shares in the company, if the payment of the commission and the amount or rate per cent. of the commission paid of agreed to be paid are respectively authorised by-the articles of association and disclosed in the prospectus, and the commission paid or agreed to be paid does exceed the amount or rate so authorised."

Sub-see. (2) provided that:

"'Save as aforesaid, no company shall apply for any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise."

Sub-sec.(3) added that "But nothing in this section shall affect the power of any company to pay such broke. rage as it has heretofore been lawful for a company to pay."

It would thus be seen that the difficulty created by the decision of the House of Lords in the case of The Ooregum Gold Mining Co.' of India Ltd. was overcome by this statutory provision and in consequence, it became lawful for the company to pay commission subject to the conditions specified in the section. It was because the legal difficulty created by the decision of the House of Lords was intended to be cured that the Legislature enacted the section by providing that it shall be lawful for the company to pay commission on the terms specified. That is the genesis of the expression "it shall be lawful for a company to pay" with which the section begins. Then followed the Consolidating Act of 1908. S. 89 of this Act dealt with the power of the company to pay commission and discounts. This section is more elaborate than s.8 of the Act of 1900, but in substance, the pattern. remained the same.

Sec. 43 of the Act of 1929 introduced an important change by making an additional provision by which the. commission paid or agreed to be paid was not to exceed 10% of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is the less. In other words, in 1929, a ceiling was placed on the payment of commission at 10% of the price. After this Act was passed, commission paid could not exceed 10% of the price at which the shares were issued.

The Companies Act, 1948 by s.53 has maintained the same provisions as those contained in s.43 of the earlier Act. That, in brief, is the position of the corresponding provisions in the English Companies Acts. Mr. Sastri contends that the relevant provisions of the English Companies Act have been construed to mean that the ceiling on the payment of commission to which they refer is payment of co ion out of capital and not out- of profits. In other words, the argument is that the payment of commission out of profits is outside the mischief of the relevant English provisions. In support of this argument reliance has been placed on the decision of the House of Lords in Hilder And Dexter (1). In that case, to raise working capital a company offered shares at par to the appellant and some other persons with an option to take further shares at par within a certain time. The appellant subscribed for shares, and the market price having risen to a premium, desired to take up the further shares. It was held : "that this was not an application of shares of capital money directly or indirectly in payment of commission, discount, or allowance within the meaning of the Companies Act, 1900, s.8. Sub-s. 2 and (the transaction being otherwise unobjectionable that the appellant was entitled to exercise the option," It would be noticed that what the House of Lords was called upon to consider was whether an application made by the appellant for further shares offended against the provisions of s. 8(2) of the English Act and the House of Lords held that it did not. It is true that the shareholder would have been able to sell his shares at a premium and thereby obtain a benefit, but the said benefit cannot be said to have been obtained by him at the expense of the company's capital. Thus, the application made by the appellant was outside the prohibition contained in s. 8(2). In other words, this decision is directly a decision the construction of s.8(2). It has, however, been urged by Mr. Sastri that in dealing with the construction of s. 8(2), Lord Davey in his speech has considered s. 8(1) and observed that : "this sub-section permits a limited application of the company's capital in payment of a commission." The whole of the appellant's argument is base on this sentence. It is suggested that this sentence amounts to a decision that the provisions of a. 8(1) have reference to the payment of commission out of capital and, therefore, have no reference to the payment of commission (1) (1902) A.C. 474, 479.

out of profits. We are not inclined to accept this contention. It is clear that in the case of Hilder, the House of Lords bad no occasion to consider whether or not commission could be paid out of profits. That point simply did not arise in that litigation. The question which arose was whether that was a case of payment out of capital which was prohibited by s. 8(2) and it is in that context and while dealing with the narrow controversy between the parties that an observation has no doubt been made that section 8(1) permits an application of the company's capital in payment of a commission in a limited way. This statement cannot be taken to be an exhaustive interpretation of s. 8(1) so that it should be possible to hold that by necessary implication it was intended 'to lay down that payment of commission out of profit was not within the purview of this section. Therefore, we are not prepared to accept the assumption made by the appellant that this decision is a direct authority on the' point that payment of commission out of profits is not covered by a. 8(1) or by the-relevant provisions in the subsequent English Companies Acts. It is then argued that authoritative text. books on Company Law support the view that payment, of commission out of profits is not prohibited by the English Companies Law. In the "Handbook on Joint Stock Companies" by Gore-Browne, it is observed : that there is no prohibition against paving commission unconditionally `out of profits', 'and this would seem to be lawful unless contrary to any stipulation in the, Articles.," (p. 191). Buckley Oil the Companies Acts' observes that : ',the prohibition is against application of "shares or capital money,' and payment of commission out of a fund of undistributed profit is not, a all events not expressly, forbidden by the section." (p. 132). It in clear that this statement is somewhat cautious and not as unqualified as the statement in Gore Browne's Handbook. In Palmer's Company Precedents it is observed that the provisions of s. 53(2) of the Act of 1948 "leave it company at liberty to apply any of its `profit' in paying commissions in accordance with the practice above referred to as existing before the Act of 1900." (p. 179). In Palmer's Company Law, however, the position is stated somewhat differently. Referring to section 53(2), it is observed that : "if the words used are intended to restrict sub-sec.(1) so as to make it only lawful to pay commission out of the newly issued ,shares or capital money, received for them, the payment of commission out of profits would appear to be prohibited by a. 54 which prohibits a company to give any financial assistance in connection with, inter alia, the subscription of its own shares. If, on the other hand, sub-sec. (2) does not intend to restrict sub-sec.(1) but contains a separate and independent provision, the application of profit of the company within the limits of sub-section (1)(b) of s.53 would be permissible. It is thought that the latter interpretation is correct and that the words, in sub-sec.(2) of s.53 are intended to make it clear that the former practice may be continued under which a company could use its profits for the payment of commission within the permitted limits." (p. 200). It would thus appear that the last observation seems to support the view that the prohibition contained in s.53(1) applies as much to payments made out of capital as to payments made out of profits.

It is thus clear that the views expressed by the different writers on Company Law disclose a difference of approach and do not appear to be based on any judicial decision. In fiat, though Mr. Sastri conceded that there was no direct decision on this point, he contended that the absence of any judicial decision shows, that the point was never disputed. On the other hand, Mr. Aggarwala contends that the absence of any judicial decision speaks for the fact that nobody ever thought that payment of commission could be made out of profits beyond the limits prescribed by the relevant statutory provision. However that may be, in view of the material placed before us, we do not think it would be safe for us to assume that the position under the English Law is established either one way or the other and for obvious reasons, we would be reluctant to embark upon an enquiry on that point by seeking to interpret the relevant English provisions ourselves. Let us, however, assume that the true legal position under the relevant provision of the English statute is as the appellant contends. Does it follow therefrom that we should approach the problem of construing s. 76 with the pre- conceived notion that s. 76 provides exactly for the same position ? In our opinion, the answer to this question has to be against the appellant. Lot us first read a. 105 of the. Indian Companies Act of 1913 and s. 76 of the Act of 1956 side by side. Section 105 reads thus :-

> "Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc. (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolute or conditionally, for any Shares in the cow any, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the-payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised and if the amount or rate per cent. of the commission paid or agreed to be paid is-
>
> (a) in the case of shares offered to the public for subscription, disclosed in the prospectus; or
>
> (b) in the cases of share not offered to the public for subscription, disclosed in the statement in lieu of prospectus. or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the Registrar and, where a circular or notice, 'not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid and save as provided in a. 105A, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in con- sideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company. where the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company. or the money be paid out of the nominal purchase-money or contract price, or otherwise."

Section 76(1) and (2) reads thus :

"(1) A company may pay a commission to any person in consideration of

(a) his subscribing or agreeing to subscribe, whether absolutely or condi- tionally, for any shares in, or debenture, of, the company, or

(b) his procuring or agreeing to procure subscriptions, whether absolute or conditional for. any shares in, or debentures of, the company, if the following conditions are fulfilled,

(i) the payment of the commission is authorised by the articles ;

(ii) the commission paid or agreed to be paid does not exceed in the case of shares, five per cent of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is less,, and in the case of debentures, two and a half per cent of the price at Which the debentures are issued or the amount of the rate authorised by the articles, whichever is less ;

(iii) the amount of rate per cent. of the commission paid or agreed to be paid is-in the case of shares or debentures offered to the public for subscription, disclosed in the pro- spectus : and in the case of shares or deben- tures not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in 'the prescribed form signed in like manner as a statement in lieu of prospectus and filed before the payment of the commission with the Registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares or debentures, is issued, also disclosed in that circular or notice ; and

(iv) the number of shares or debentures which persons have agreed for a commission to subscribe absolutely or conditionally is disclosed in the manner aforesaid (2) Save as aforesaid and save as provided in section 79, no company shall, allot any of its shares or debentures or apply any of its capital moneys, either directly or indirectly, in payment of any Commission, discount or allowance, to any person in consideration of-

> (a) his subscribing or agreeing to subscribe, whether absolutely" or condi- tionally for any shares in, or debentures of, the company or,
>
> (b) his procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in, or debentures of, the company, whether the shares, debentures or money be so allotted or applied by being added to the Purchase money of any property acquired by the company or to the contract price of any work to be executed for the company or the money be paid out of the nominal purchase money or contract price, or other-

A comparison of the two sections will show that a. 76 has made three departures from s. 105 ; first it begins by saving that "a company may pay a commission" and this expression has substituted the earlier expression "it shall be lawful for a company to pay commission". It is true that this change is not very significant; but it cannot be treated as of no significance at all and it may be that by adopting the present expression, the Legislature wanted to indicate that s. 76 unlike its predecessor a. 105, was not intended to be merely an enabling provision. Then it would be noticed that the substantial part of a. 105(1) has now been put more categorically and definitely in the form Of conditions in s. 76 and that may suggest that what a. 76(1) purports to, do is to authorise the payment of commission but subject only to the limitations prescribed by it. In other words, it is a section which enables payment to be made and prohibits payment being made beyond the limit prescribed. The third change which is very material is that debenture are included within its purview. It is common ground that so far as, commission payable on debentures is concerned, there never was any prohibition in the- English Law or in the Indian Law; and so, if s. 76(1) was intended merely to be an enabling provision it was hardly necessary to include debentures within its scope. The inclusion of debenture marks an important departure from the position under s. 105 of the. earlier Act as well as from the position under the corresponding Provisions of the English statute. Therefore, having regard to the scheme of the present s. 76(1), it would, we think, not be legitimate to attempt the task of construing the said provision with a preconceived notion as suggested by the appellant for it may well be that the object intended to be achieved by this sub- section is different from the object intended to be achieved by the corresponding provision in the English Law. Besides, it would be relevant to recall that one of the objects of the Act clearly was to impose stringent restrictions upon payments out of profits 'of the company to the Managing Agents, Directors, Managing Directors, and others concerned with the management of the affairs of the company. This object has been expressly achieved by several provisions in the Act, such as sections 348, 352 and

387. The anxiety of the Legislature to save the profits made by the company and to prevent extravagant payments being made out of them which is a distinguishing feature of the Act, also shows that it would not be safe to assume that s.76(1) must have intended to achieve exactly what the corresponding provision in the English statute intended to achieve. Therefore, we do not think it would be right to assume at the very outset that the payment of commission out of profits is outside the provisions of s. 76 because it is not included in the corresponding provision in the English law. After all, the question which has been raised before us in the present appeal must be determine by us on a fair and reasonable construction of s.76(1) and (2) and it is to that problem that we must now turn.

In construing section 76 (1) and (2), it would be necessary to bear in mind the relevant rules of construction. The first rule of construction which is elementary, is that the words used in the section must be given their plain grammatical meaning. Since we are dealing with two sub- sections of s. 76, it is necessary that the said two sub- sections must be construed as a whole "each portion throwing light, if need be, on the rest." The two sub-sections must be read as parts of an integral whole and as being inter- dependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. if repugnancy cannot possibly be avoided, then a question may arise as to which of the two should prevail. But that question can arise only if repugnancy cannot be avoided.

The important part in s. 76(1) with which we are directly concerned is the one that provides that the commission paid or agreed to be paid does not exceed the limit therein prescribed. One of the conditions which has to be satisfied in the matter of payment of commission to a person subscribing for any shares is' that the said commission shall not exceed 5% of the price at which the shares are issued or the amount or rate authorised by the articles, whichever is less. It is significant that this provision seeks to place an absolute ceiling on the payment of commission and in doing so, it refers to the commission generally as such and does not refer to the commission paid either out of capital or out of profits, so that a. 76(1) read by itself unambiguously and clearly prescribes a ceiling on the payment of commission what ever may be the source from which the said commission may be paid. We have already seen that a. 76(1) cannot be treated merely as an enabling section. This position has been conceded by the appellant before us, and so there can be no doubt that the ceiling placed on the payment of commission is intended to act as a prohibition against the payment of any commission beyond the said ceiling. Therefore, s. 76(1)(i)(ii) leaves no doubt that it covers commission paid either out of capital or out of profits. Section 76(1)(b)(i) prescribes another condition that the payment' of commission is authorised by the articles. Since the payment of commission. which is referred to in this clause is commission payable either for the shares or for the debentures, it may be relevant to consider whether the commission here referred to can be commission only out of capital. Ordinarily, commission paid for debentures would be commission out of debenture money or profit* though, of course it is conceivable that the commission on debenture may also be paid out of capital. 'But if commission on debentures can be paid out of profits. then it would not be unreasonable to assume that the Raid provision refers to commission payable not only out of capital but out of profits as well. The inclusion of debentures within the scope s. 76 suggests that the commission mentioned scope 76(1) (c)(i) would not on a reasonable construction be confined to a commission payable out of capital alone.

Clause (iii) of s. 76 (1)(b) seems to suggest the same conclusion. Under this clause, the condition imposed is that the amount or rate per cent of the commission paid or agreed to be paid is in the case of shares or debentures not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed before the payment of the commission with the Registrar. In construing this clause, it may be useful to refer to section III of the Act of 1913. Under that section, particulars in case of commission on debentures had to be filed and it cannot be disputed that the said particulars would also refer to particulars of commission paid out of profits. Now that debentures have been brought under s. 76, would it be unreasonable to assume that under the particulars required to be filed under condition (iii), particulars in regard to commission payable out of profits are also required to be filed? In other words, the word ,commission" used in cl. (i) and (iii) seems to refer to commission paid not only out of capital but also out of profits in relation to debentures. That incidentally supports the construction that the word "commission" used in clause (ii) cannot be confined only to the commission payable out of capital. Indeed, if s. 76(1) is read by itself, there can be no doubt or difficulty in coming to the conclusion that commission there contemplated is commission payable both out of capital as well as profits. The argument, however, is that if this construction is accepted, there would be repugnancy between the two sub- clauses of, a. 76. It is therefore, necessary to examine s' 76(2) because as we have already seen, before determining the true scope and effect of a. 76(1) and (2) we must read them together as parts of an integral who e. Now what does S. 76(2) provide? It provides that no company shall allot any of its shares or debentures or apply any of its capital moneys, either directly or indirectly, in payment of any commission, discount or allowance, to any person in consideration of the objects therein specified, save as aforesaid and as provided in a. 79. In other words, what is prohibited by sub-s. 2 is gave as aforesaid in s. 76(1) just as it is save as provided in s. 79. That means that prohibition enacted by s. 76(2) has to be worked out in the light of s. 76(1) and s. 79. The prohibition imposed by s. 76(1) is in general terms and it includes payments from any source or fund. The Legislature knew that payment of commission may be made by adopting several devices and what sub-s. (2) intends to achieve is to prohibit the adoption of such devices by making it clear that whatever be the nature of the device adopted, if the object of the device is to pay commission, then it must conform to the limit prescribed by s. 76(1), It is well-known that sometimes shares or debentures are allotted or capital money is applied in payment of commission. Similarly, under the garb of what 'may ostensibly be lawful payments, for instance, in respect of purchase money of any property acquired by the company or the contract price of 'any work to be executed for the company, commission may be paid; the purchase price of any property or the contract price of any work may be fixed so as to include something more than its real value the difference being intended to be paid as commission. It was in view of these devices which the Legislature knew were being adopted for the payment of commission that s. 76(2) has been inserted in the form which it has taken. As has been observed by Craies "On Statute Law', provisos are often inserted "to allay fears" or to remove misapprehensions. Just as s. 76(2) has to be read in the light of s. 79 and subject to its provision, so it has to, be 'read in the light of s. 76(1) and subject to its provision. In other words, in order to clarify the position in regard to the devices which may be adopted to defeat the limit imposed by s. 76 (1), the Legislature has provided by s. 76 (2) that these devices are also subject to s. 76(1) and payments can be made under those garbs or devices, provided they do not exceed the limit prescribed by 8. 76(1). In our opinion, therefore, far from there being any conflict or repugnancy between s. 76(1) and a. 76(2) they constitute one integrated provision, one of the objects of which is to impose a limit on the payment of commission either in respect of shares or in respect of debentures. The anxiety to save the profits of the company is as much in evidence in s. 76(1) as it is in other sections to which we have already referred. Mr. Sastri however, contends that the proper way to read a. 76(1) and (2) would be to treat s.76(2) as the main provision and s. 76(1) as a proviso to it. His argument was that s. 76(2) puts a blanket ban on the allotment of any shares or debentures or the application of any capital moneys and s.76(1)relaxes the ban by allowing the payment to be made within the limits prescribed and subject to the conditions therein specified. The ban imposed by s. 76(2) is in respect of capital and not in respect of profits and so the relaxation from the ban prescribed by a. 76(1) must likewise be confined to capital and cannot be extended to profits. In our opinion, this is an argument of desperation. What we are asked to do by Mr. Sastri is in substance, to rewrite the two subsection of s. 76 and that we cannot legitimately do, particularly when on the alternative construction it is found that there is no repugnance between the two sub-sections. On the appellant's view, we have to ignore the opening words in a. 76(2) and substitute the said words in s. 76(1). That clearly is the function of the Legislature which enacts laws and not of the Court which interprets them. Therefore..' in our opinion, the learned Judges of the High Court were right when they held that a claim for commission out of the profits of the company which the appellant seeks to make in the present suit is hit by is. 76(1) and cannot be entertained. In this connection, there are two other points which have been urged before us by Mr. Aggarwala. He contents that if s. 76(1) and (2) are read as confined to the payment of commission from out of the capital, there would be no provision for payment of commission out of profits at all and so the plaintiff's claim would have to be dismissed on that ground. The argument is that the Act is a Consoli- dating Act and as such, it would be legitimate to assume that the relevant provisions of s. 76 deal exhaustively with the topic of the payment of commission in respect of shares and debentures. If that be so, whatever is not provided for by s. 76 could not be claimed after the passing of the Consolidating Act. Similarly, it is urged that if commission payable out of profits in respect of dividends was intended to be saved a provision would have been made in s.. 76 corresponding to the provision made by s. 76(3) in regard to brokerage. a. 76(3) provides that nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay. There is no such provision in respect of payment of commission out of profits in relation to debentures. There may be some force in these contentions.

Before we part with this subject, it would be relevant to state that in 1960, s. 76(2) has been amended by s. 22 of the Amending Act (No. 65 of 1960) and as a result of this amendment, the word 'capital' has been deleted. It is common ground that after this amendment was effected, a. 76(1) and (2) both refer to payment of commission out of profits as well as out of capital. As. we have already seen, the whole of the argument urged by the appellant on the construction of' s. 76(2) was substantially based on the use of the expression "any of its capital moneys". The word "capital" having been deleted, the provision of s. 76 (2) is wide enough to include profits. Therefore, there can be no doubt that after 1960, the limit imposed on the payment of commission in respect of shares and debentures applies as much to commissions out of capital as to those which are paid out of profits. It May be permissible to assume that by the amendment made in 1960, the Legislature hat; attempted to remove doubt that may have arisen owing to the use of the .word "capital" in s. 76(2) and has now made its intentions clear beyond any doubt. This amendment along with several others which were made in 1960 was presumably the result of the recommendation of the Committee appointed in that behalf. In its report, the Committee observed that "in order to remove any doubt, we would recommend the deletion of the word "capital" from s. 76(2)", Thus, it is clear that the point raised in the present appeal cannot arise under the amended provisions of s. 76.

That leaves one minor point-still to be considered. It was urged in the Courts below that the provisions of a. 76 cannot be invoked against the appellant because the agreement on which the appellant rests his claim was made prior to the 1st April, 1956 when the Act came into force. The contention appears to have been that in' invoking the provisions of s. 76, respondent No. 1 was seeking to make the said provision retrospective which it is not. In our opinion, there is no substance in this argument. Section 9 of the Act is a clear answer to this contention. Under s. 9(a) any. agreement executed by' the company cannot I prevail if it is inconsistent with the provisions of the Act and under a. 9(b) the articles shall likewise not prevail if they are inconsistent with the' provisions of the Act. Section 645 leads to the same conclusion.

The result is, the appeal fails and is dismissed with costs.

SARKAR., J.-The respondent Shri Changdeo Sugar Mills Ltd. was incorporated as a 'private company on September 1, 1939. The appellant, the respondents Nos. 2 and 3 and one Kasturchand Srikrishna, since deceased, had promoted its formation. On December 18, 1939, the respondent company entered into separate agreements with the promoters providing that "In consideration of the help given and trouble taken by you promoters and in consideration of each of you having agreed to take shares of the value of one and half lac of rupees in the capital of the company and having taken the said shares the company enters into an agreement with you as well as with other three promoters as follows: (1) The company.............. will .... pay a sum equal to 3- 1/8 per cent out of the net profits of the company to each of you promoters or his heirs and representatives, executors, administrators or assigns". The promoters duly took the shares mentioned in the agreements and became entitled to receive, taken all together, 12-1/2 per cent of the profits of the respondent company. Article 3 (of the Articles of Association of the respondent company provided that it would enter into the aforesaid agreements with the promoters.

In 1941, the respondent company was involved in financial difficulties and on April 22, 1941, a tripartite agreement was made between it and a firm called Ardeshir Harmusji Bhiwandiwalla and Co. and the promoters under which it was provided that the firm or its nominee would become the managing agent of the respondent company and the promoters all together would receive "6-1/4 percent as promoters' commission instead of 12-1/2 per cent as provided in our respective agreements with the company" that is to say, the agreements of December 18, 1939. In terms of this agreement article 3 of the Articles of Association of the company was duly amended. An agreement was also specifically entered into by the respondent company with each of the promoters. In 1944,the respondent company was converted into a public limited company. On June 10, 1944, Kasturchand Srikrishan died and his interest under the agreements is now represented by respondents Nos. 7 to 10. Presumably respondent No. 3 had taken the shares and entered into the agreements as representing a joint family, for it is not in dispute that on a partition between respondent No. 3 'and his co-sharers, respondents Nos. 4 to 6 became entitled to participate in the interest of respondent No. 3 under the agreements and in the shares.

In September 1944, three suits were pending in the Hi, Court at Bombay between the respondent company, the beneficiaries under the agreements and the said Bhiwandiwalla & Co. to the details of which it is unnecessary to refer for the said suits were however compromised. The terms of settlement provided that (a) all the suits would be mutually withdrawn; and, (b) "The promoters commission payable to us four which is Rs. 1-9-0 to each of us and which comes to 6-1/4 percent in the aggregate payable out; four under the agreement shall remain in. force as in the agreement and our right of commission shall continue accordingly". The word us' in the terms of settlement means the beneficiaries under the agreements.

The respondent company paid the commission at the said rate of 6-1/4 percent to the beneficiaries under the agreements upto September 30, 1955. On October 1, 1956, the respondent company informed the appellant and the other beneficiaries that as from April 1, 1956, when the Companies Act, 1956, had come into force, the agreements had become illegal and void. It was said that so; 76 of the Companies Act, 1966, prohibited all payment of commission for subscribing for shares in excess of 5 per cent of the price at which the shares were issued. It is not in dispute that what the appellant and the other beneficiaries had been paid as commission exceeded five per cent of the price, at which the shares had been issued. The respondent company therefore contended that the appellant and the other beneficiaries were not entitled to any further commission.

The appellant disputed the contention of' the respondent company and filed a suit in the High Court at Bombay against it in which the other beneficiaries were also made defendants for a declaration that the agreements of December 19, 1939, as modified on April, 22, 1941, were valid and for an injunction restraining the respondent company from passing a resolution deleting article 3 of its Articles of Association as it-proposed to do and from acting on the footing as if the said agreements were illegal. The appellant contended that s. 76 of the Companies Apt of 1956 prohibited payment of commission for subscribing for shares beyond the limit specified out of capital only and as the agreements provided for payment of the commission out of profits, they were not affected by that section at all. The suit was contested by the respondent company but the other defendant supported the appellant's case. The respondent company contended that the section applied to payment of commission both out of capital as well as out of profits. The suit was heard in the first instance by S. T. Desai, J, and was dismissed. An appeal to an appellate Bench of the High Court was also dismissed. The present appeal is against the judgment of the Appellate Bench by special leave granted by this Court.

I shall have presently to refer to the provisions of a. 76 but before doing so. I think it necessary to refer to the previous state of the law.. In England, prior to the Companies Act of 1900, there was no statutory provision concerning payment of commission for subscribing for shares and such a provision was first enacted by s. 8 of that Companies Act. Even before the Act of 1900, however, the law was that anybody subscribing for shares in a company had to pay the amount of the shares in frill. That was considered to be one of the fundamental principles of Company law. Ooregum Gold Mining Co. of India Ltd, V. George, Roper (1) was a case which turned on the law as it stood before 1900. There a company had issued shares of pound 1 each with 15s credited as paid up leaving a liability of only 5s per share. A shareholder brought an action to test the validity of the issue. It was held that the issue was invalid. Lord Halsbury observed (p.) "It seems to me that the system thus created 133, by which the shareholder's liability is to be limited by the amount unpaid upon his shares, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with their shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been,, in accordance with the Act of Parliament, fixed, at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing". The provision referred to by Lord Halsbury was the section which required the memoran- dum of association to state the amount of the companies capital as divided into shares of a certain fixed amount. Such a provision of course occurs in our Companies Act too. This decision made it impossible for a company to pay out of its capital any commission to any person for subscribing for its shares. It was felt that this created some inconvenience to a company in the management of its affairs and therefore a. 8 was incorporated in the Companies Act, (1) (1892) A.C. 125, 133.

with the intention of granting some relief against that inconvenience. Sub-section (1) of this section provided that it would be lawful for a company to pay commission to a person in consideration of his subscribing for any shares in the company if the amount or rate of it were respectively authorised by the Articles of Association and disclosed in the prospectus and the commission paid, did not exceed the amount or rate so authorised. Sub-section (2) provided that save as aforesaid no company could apply any of its capital money, either directly or indirectly, in payment of any commission to any person in consideration of his subscribing for any shares in the company. This provision came up for consideration before the House of Lords in Hilder v. Dexter (1). There a company had in consideration of person taking up some of its shares entered into an agreement with him that he would have an option to take further shares at par within a certain time. A little later the price of the shares 'went up and the person then exercised his option. An action was thereupon brought by a shareholder to test the validity of this agreement, and it was held by the House of Lords that the agreement was valid. Lord Davey observed, "In this case the question is as to the powers of the company itself, and not as to the due exercise of the directors' powers. I have come to the conclusion from a consideration of the language of s. 8, sub-s. 2, that the prohibition therein contained extends only to the application, direct or indirect, of the company's capital in payment of a commission by the company, and the transaction impeached in this case is not within it. It is satisfactory to find that the conclusion to which I have come will not have the effect of extending the prohibition to transaction which were legitimate before the Act, and not, so far as I am aware, open to objection on any other around." He also said referring to sub-s. 1 of s. 8 ,This subsection, therefore,, permits a limited application (1) (1902). A.C. 474,481, 479.

of the company's capital in payment of a commission". Now there is no doubt to the Act of 1900 there ,was nothing to prevent the payment of commission for subscribing for shares out of a company's profits. The decision in the Ooregum Gold Mining Company case (1) only laid down that the amount of the shares must be paid in full. It. would not be so paid if the capital was utilised for payment of commission for subscribing for shares. It was, therefore, the legitimacy of transactions providing for payment of the commission out of profits that Lord Davey was happy to feel that his decision would not affect. It is hence, plain that the House of Lords was of the opinion in Hilder v. Dexter (2) that s. 8, sub-s. 2 of the Act of 1900 was not concerned with payment of commission out of profits. That is how that case has been understood in England:' see Palmer's Company Precedents, 17th ed; vol. I p, 179, Palmer's Company Law, 20th ed. p. 200. See also Sarkar & Sen's. Indian Companies Act, 1913, p. 302.

It seems to me that no other view is possible. There is nothing in any Companies Act, except where it expressly does so, to. restrict in any way the power of a company to deal with its profits. A company is, therefore, free to enter into any agreement entitling any person to a part of its profits in consideration of his subscribing for shares in it. That was the law as it existed before the Act of

1,900. The view taken in Hilder v. Dexter (2) was that there was nothing in s. 8 of that Act which effected a change in the pre-existing law. In spite therefore of that Act, a company retained fully its powers to pay out of its profits commission for subscribing for shares in it. I think it right. to remind here that we are dealing with the powers of a company and not of its directors.

Section 8 of the Act 1900 was replaced by a. 89 of the English Companies Act of 1908 and this (1) (1892) A.C. 125, 133. (2) (1902) A.C. 474,481, 479.

in its turn was substituted by s. 43 of the English Companies Act of 1929 and the corresponding provision is now contained in s. 53 of the English Companies Act of 1948. Substantially the provision in this regard has remained the same in England throughout from 1900 except. that in 1929 a further restriction was put on the right to pay commission for subscribing for shares by providing that the commission paid shall not exceed 10 per cent of the price for which the shares were issued or the amount or rate authorised by the articles whichever was less. That restriction could not have effected a change in the law as it previously existed in England in regard to payment of commission out of profits.

Now in our country a. 105 of the Companies Act of 1913 for the first time introduced the provision corresponding to that contained in s. 8 of the English Act of 1900. Both, therefore, on the general principles underlying Company law, under which a company, except in cases where an express provision to the contrary is made, is free to deaf with its profits in such manner as it likes and on the authority of Hilder v. Dexter (1) which in my view would be fully applicable to our Companies Act of 1913, a company in our country could enter into a valid agreement to pay any commission it liked out of its profits to any person for subscribing for shares in it. I may here add that s. 105 of the Companies Act, 1913 was in terms substantially the same as s. 8 of the English Companies Act of 1900. It contained no provision restricting the amount of the commission to be, paid.

I now turn to a. 76 of our Companies Act 1956. It provides by sub-s. (1) that "a company may pay a commission to any person in consideration of his subscribing......... for any shares in or debentures of the company......... if the following conditions are fulfilled." These conditions are, (1) (1902) A.C. 475, 481, 479.

(i) the payment of the commission is authorised by the articles.,

(ii) the commission-paid does not exceed in the case of shares, 5 per cent of the price at which the shares are issued or the amount or rate authorised by the articles. whichever is less, and in the case of debentures, 2-1/2 per cent of the pride at which the debentures are issued or the amount or rate authorised by the articles, whichever is less;

(iii) the amount or rate of the commission paid ...... is, in the case of shares or debentures offered to the public for subscription, disclosed in the prospectus, in the case of shares or debentures not offered to the public for subscription, disclosed in the statement in lien of prospectus, or in a statement in the prescribed form. and duly signed and filed before the payment of the commission with the Registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares or debentures is issued, also disclosed in that circular or notice.

Now, the question that arises is whether this sub-section has made any alteration in the law which previously existed and which, for the reasons earlier stated, I think permitted commission to be paid freely out of profits. In other words, does this sub-section, as it stands, Prevent a company from paving any commission it likes out of its pro- fits to any person for subscribing for shires in it? I find nothing in it to indicate that a change in the law was intended. It is said that the permission granted by sub- s.(1) is not expressly confined to payment of commission out of capital only. Neither, however, does it say that the enabling provision contained in it is to be applied to payment of commission out of profits also. How then is this sub-section to be construed? Now one of the established rules of construction of statutes is that it is to be presumed "that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implications, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, of depart from the general system of law, without expressing its intention with irresistible clearness. and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest; their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however with and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act." (Maxwell on Interpretation of Statutes, 10th ed., p.(81-82).

I have earlier stated that under the Act of 1913 a company was free to pay any commission out of its profits it liked to persons subscribing for shares in it. I find nothing in sub-s. (1) of a. 76 to indicate that rule of law which is based on the fundamental principles of Company law, was intended to be affected by it. The only substantial de- parture made in s. 76(1) of the, Act of 1956 from the provisions in a. 105 of the Act of 1913, except another to which I will later refer, is the imposition of a restriction on the amount of commission that can be paid. That cannot, to my mind, furnish any reason for holding that the pre- existing 'law giving full liberty to a company to pay commission out of profits was intended to be changed. That restriction will have full scope if applied to payment out of capital and does not itself indicate any source out of which the restricted commission is to be paid. Therefore, it seems to me that the proper way of reading sub-s. (1) of s. 76 is to restrict its general words so as not to affect the preexisting law. So read the terms contained in it has to be confined to payment of commission out of the capital moneys of the companies.

Again, in s. 105(1) of our Companies Act of 1913 it was said, "It shall be lawful for a company to pay a commission to any person in consideration of his subscribing' for shares in it. The words ,it shall be lawful" are enabling words. They are used in a statute when it is intended to permit something to be done which previously could not legally be done. In Craies on Statute Law, 5th ed. at p. 263, it has been said, "-Statutes passed for the purpose of enabling something to be done are usually expressed in permissive language, that is to say, it is enacted that "it shall be lawful", etc., or that such and such a thing may be done". In Julius v. Bishop of Oxford (1) it was said, "The words it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power." It would follow from the use of the words it "shall be lawful" in a. 105(1) of the Act of 1913 that the legislature intended to make that payment of commission for subscribing for shares legal, which was not so before. The legislature, therefore, intended to permit and make legal the payment of commission out of capital to a person on his subscribing for shares in a company which payment was previously illegal. Payment of such commission out of profits had always been legal and there was no necessity for any statutory provision to make such payment legal or paw an enabling enactment in regard to it. It would follow that s. 105 was not concerned with putting any restriction on a company's power to pay commission out of profits. (1) (1880) 5 A.C. 214,222.

Now sub-s (1) of s. 76 of our Companies Act of 1956 uses instead of the words "it shall be lawful" the word "may". That however makes no difference. As has been stated in the passage in Craies which I have earlier read, both mean the same thing. They are both used in a statute to indicate that something may be done which prior to it could not be done. It would follow that s. 76(1) of the Act of 1956 was intended to have the same effect as a. 105(1) of the Act of 1913, namely, the legalising of a payment of commission out of capital which-before the Act of 1913 was illegal and which became illegal on the repeal of that Act by the Act of 1956. That would be another reason for saying that a. 76(1) of the Act of 1956 was not concerned with any payment of commission out of profits.

I pass on now to sub-s. (2) of a. 76 of the Act of 1956. That sub-section says:-

> "'Save as aforesaid and save as provided in section 79, no company shall allot any of its shares or debentures or apply any of its capital moneys, either directly or indirectly, in payment of any commission, discount or allowance, to any person in consideration of--
>
> (a) his subscribing or agreeing to subs- cribe, whether absolutely or conditionally, for any shares in or debentures of, the company, or
>
> (b) his procuring. of agreeing to procure subscriptions, whether absolute or conditional, for any shares in or, debentures of the company, whether the shares, debentures or money be so allotted or applied by being added to the purchase money of any property acquired by the company, or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract]price, or otherwise."

This sub-section strongly suggests that subs. (1) is to be read as confined only to payment of commission out of capital, for it says that save to the extent provided by sub-s. (1) no commission shall be paid out of the capital moneys of the company. If sub-s. (1) were exhaustive of the powers of a company to pay commission both out of its capital and its profits so that nothing could be paid' as commission either out of capital, or out of profits or out of any other moneys of the company except as therein provided, as the respondent company is contention is then sub-a. (2) would-be wholly redundant; the prohibition contained in it would in that case be totally unnecessary. It was said that sub-s. (2) is used only to make sure that the limits prescribed by sub-s. (,I) would not be departed from by indirect method. But surely it was not necessary to make any provision for that purpose only. What could not be done directly could also not be done indirectly. Furthermore; if it was necessary to provide, as sub-s. (2) is said to do, that the capital moneys of the company should not be used indirectly for payment of commission, why was it not provided that the profits should not also be used for the same purpose indirectly. This clearly, for the same reason should have been done if sub-a. (1) dealt with payment of commission out of profits also. The reason suggested on behalf of the respondent company for the enactment of sub-a. (2) 'does not therefore seem to me to be well founded.

Furthermore, the two sub-sections must be read together. Sub-section (2) contains a general prohibition of payment of commission out of capital and an exception to it is provided in sub-a. (1). That seems' to be the inevitable result of the words "save as aforesaid", that is, save as provided in sub-a. (1), with which sub-s. (2) opens it necessarily follows that sub-s. (1) contains an exception to the general prohibition of payment of commission out of the capital. It, therefore, has nothing to do with payment of commission out of profits.

The other substantial feature in which s. 76 of the Act of 1956 has departed from the provisions of a. 105 of the Act of 1913, is by inclusion in the former of a Provision for the payment of commission for subscribing for debentures. While a. 105 dealt only with payment of commission for subs- cribing for shares, s. 76 deals with payment of commission both for subscribing for shares as well as debentures. An argument was based on this innovation made in a. 76. It was pointed out that in regard to debentures a company was before the Act of 1956 free to pay any commission it liked for subscribing for them, either out of its capital or out of its profits and only certain particulars had to be filed as required by s. 111 of the Act of 1913. It has, therefore, been contended that the inclusion of debentures in a. 76 of the Act of 1956 would show that the power to pay commission whether out of capital or profits for subscribing for shares as well as debentures was exhaustively contained in subs. (1) of that section. I am unable to' accept this argument.

If I am right in my view that sub-s. (1) of s.76 of the Act of 1956 is only an exception to the general prohibition contained in sub-s. (2), it would follow that the restriction imposed by sub-a. (1) is confined to payment of commission for subscribing for debentures out of capital only. It is true that so read there would after the Act of 1956 be no power in a company to pay out of its capital any commission for subscribing for its debentures, except as provided in a. 76 (1) of that Act. The law would no doubt thereby have been changed but it would have been so changed because the Act of 1956 made that change in express words by the prohibition contained in sub-s. (2) of a. 76. But suppose sub-s. (1) is exhaustive as regards a company's power to pay commission for subscribing for debentures whether out of capital or profits, then also the subsection would clearly be altering the pre-existing law; it would then be putting a restriction on the' power to pay commission for subscribing for debentures out of profits which power was previously free of all restrictions. If it were not so, then sub-s. (1) in so far as it relates to payment of commission for subscribing for debentures out of profits would become infructuous. Therefore, it would have in that case to be-read as altering the pre-existing law by a necessary implication. It is of some interest to point out here that a. 111 of the Act of 1913 provided that an omission to file the particulars as required by it would not affect the validity of the debentures issued and, therefore, perhaps, the validity of the agreement to pay commission on them. Coming back now to the point under consideration find it impossible to say that a necessary implication of sub-s. (1) of s. 76 of the Act of 1956 is to alter the previous law which permitted payment of commission for subscribing for shares freely out of profits. In regard to payment of commission out of capital for subscribing for shares, it was only an enabling section and not a restrictive one, though in regard to payment of commission for subscribing for debentures whether out of capital or out of profits, on the assumption that we have made, it would be a restrictive and exhaustive provision with no power to pay such commission except in accordance with its terms. In regard to payment of commission out of capital for subscribing for shares, the section being only an enabling provision, it cannot affect the pre-existing power to pay out of profits a commission for subscribing for shares. The fact that in regard to payment of commission for subscribing for debentures the section may have to be read at; restrictive, that is, as containing exhaustively the power in regard thereto, is no reason for saying that it has the same effect in regard to payment of commission for subscribing for shares. the considerations applicable to the two cases are entirely different and the effect therefore, of the section on them has to be different.

For these reasons, in my opinion, s. 76 of the Act of 1956 does not affect a company's right to pay out of its profits any commission it likes for subscribing for shares in it. I therefore think that the agreements for payment of commission for subscribing for shares in the respondent company out of its profits with which this appeal is concerned were not affected by s. 76 (1) of the Act of 1956. They remained perfectly valid after the coming into force of the Act of 1956:

I would, therefore, allow the appeal.

BY COURT: In accordance with the opinion of the majority, the appeal fails and is dismissed with costs.