

(1965) 09 KAR CK 0003
In the Karnataka High Court

Canara Workshops Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-09-1965

Acts Referred:

Companies Act, 1956 — Section 198, 309 (4), 310, 637 A

Citation : (1966) 36 CompCas 553 : (1965) 2 MysLJ 520

Hon'ble Judges : M. Sadasivayya, J;K.R. Gopivallabha Iyengar, J

Bench : Division Bench

Advocate : V. Krishna Murthy, for the Appellant; T. Krishna Rao, for the Respondent

Judgement

Sadasivayya, J.—The petitioner in this case is Messrs. Canara Workshops Ltd., a public company having its registered office at Kodialbail, Mangalore-3. One V.S. Kudva was the managing director of the said company till March 31, 1956. From April 1, 1956, till March 31, 1960, he was acting as technical adviser of the petitioner- company on a remuneration of Rs.750 per mensem. On April 20, 1960, the company passed a resolution increasing the remuneration of V.S. Kudva to Rs.2,000 per mensem from April 1, 1960, subject to the approval of the Central Government. On January 2, 1961, the respondent sent the communication, exhibit "C", approving the increase of remuneration of V.S. Kudva from Rs.750 per mensem to Rs.1,000 per mensem, with effect from 1st April, 1960, for his acting as the director-cum-technical adviser of company. A copy of the communication issued in this connection by the respondent is marked exhibit "C". Accordingly, V.S. Kudva was paid remuneration at Rs.1,000 per mensem, with effect from April 1, 1960. But, on November 17, 1962, the respondent wrote to the petitioner pointing out that the monthly payment of remuneration at Rs.1,000 to V.S. Kudva working as a part time director rendering technical advice to the company cannot be so paid to him after December 28, 1960, in view of the provisions of the Companies Act, 1956, as amended by the Amending Act of 1960 is hereinafter referred to as the Act). On 24th November, 1962, the petitioner company sent a reply (exhibit "E") stating that the payment

of remuneration to V.S. Kudva is not again the provisions of section 309(4) of the Act and also suggesting that the company will take necessary action to conform to the provisions of section 309(4), if they are so advised. The respondent in its communications, exhibit "F" dated January 2, 1963, and "G" dated April 26, 1963, reiterated the stand that the payment of the monthly remuneration to a part-time director after the 1960 amendment of the Companies Act, 1956, is contrary to the provisions of section 309 of the Act. The respondents also stated that it is open to the company to regularities the matter by refixing the remuneration of V.S. Kudva with effect from December 28, 1960, in manner laid down in sub-section (4) of section 309, i.e., by passing a special resolution and taking approval of the Central Government. After this correspondence the company passed two resolutions of 28th June, 1963, which are contained in exhibit "I" and which are as follows :

"THE CANARA WORKSHOPS LIMITED, MANGALORE-3.

2nd August, 1963.

Special resolution passed in the extraordinary general body meeting of the company dated 28th June, 1963.

Resolved :

1. That with effect from 28-12-1960, the remuneration of director Sri V.S. Kudva as the part time technical adviser of the company be fixed at the rate of 3/4% of the net profits of the company in accordance with section 309, sub-section (4), of the Companies Act 1956;

2. that with effect from 1-4-1962, Sri V.S. Kudva be also paid an additional remuneration of 1/2% of the net profits of the company as the increased activities of the company have required work of directorial nature from him."

2. The first one provides for remuneration from December 28, 1960, to March 31, 1962, at 3/4% of the net profits of the company, to V.S.Kudva as part-time technical adviser of the company, while the second provides for payment of additional remuneration at 1/2% of the first net profits of the company from April 1, 1962, to V.S. Kudva in respect of work of directorial nature. These resolutions were forwarded by the company with all the requisite documents and information to the respondent on 19th August, 1963. From the communication, exhibit "K", dated September 19, 1963, it is clear that this application was referred to the advisory commission as required u/s 411(b) of the Act. Presumably, after the receipt of the report of the advisory commission, the respondent sent the letter a copy of which is marked exhibit "L" dated January 13, 1964. The Central Government gave approval with certain limitations and restrictions. With regard to the first resolution, the communication, exhibit "L" , from the Under Secretary to the Government of India states:

"In continuation of the Ministry of Industry"s letter of even number dated 9th October, 1963, I am directed to say that the Central Government has pleased to

approve u/s 310 of the companies Act, 1956, the increase in the remuneration payable to Sri V.S. Kudva, the director/chairman and part time technical adviser of your company, by refixing it at a commission of 3/4% (three fourth per cent), on the net profits of the company with effect from 28th December, 1960, subject to the condition that his remuneration by way of commission shall not exceed Rs.9,000 (Rupees nine thousand only) per annum."

3. The second paragraph of that letter pertains to the period subsequent to April 1, 1962, and deals with the increased remuneration proposed in both the resolutions. It is as follows:

"The Central Government has also been pleased to approve u/s 310 of the Companies Act, 1956, the increase in the remuneration of Sri V.S. Kudva, the part time technical adviser of your company, by paying him a commission of one per cent.(instead of 1-1/4% as proposed by you) on the net profits of the company with effect from 1st April, 1962, subject to the condition that this remuneration shall be reduced to the extent of the remuneration drawn by him from M/s. Canara Sales Corporation Ltd., the sole selling agents of the company, and further to the extent of the share in his own name, in the name of his wife, son/sons and unmarried daughters, if any, in the net profits of the said sole selling agents of the company as are relatable to the business in the goods of your company."

4. The petitioner is aggrieved with the above said qualified approval accorded by the respondent. He has, therefore, filed this writ petition for the issue of a writ in the nature of certiorari or any other appropriate writ or order in respect of exhibit "L" and to prohibit the respondent from interfering with the rights of the petitioner company to pay the remuneration to V.S.Kudva as fixed in the resolutions as per exhibit "I".

5. From the facts disclosed before us, it may be mentioned that the Canara Sales Corporation Ltd. referred to in exhibit "L" is a public limited company, having a total issued share capital of 70,033 shares of Rs.10 each out of which 9,512 shares were held by V.S. Kudva, his wife and sons, the rest being held by others. The Canara Sales Corporation are the sole selling agents for some of the products manufactured by the petitioner-company and in respect of some areas only. V.S. Kudva is the managing director of Canara Sales Corporation Ltd.

6. It is clear from the facts of the case that it is the petitioner that sought for approval of the respondent under provision of section 310 of the Companies Act. Though it is so Sri V.Krishna Murthy, the learned advocate appearing for the petitioner, contends that the provisions of sections 309 and 310 of the Companies Act do not apply to the resolutions under exhibit "I" and therefore it was unnecessary for the petitioner to seek the approval of the Central Government. He submits that the approval was sought at the suggestion of the respondent as is clear from their letters, exhibits "F" and "G", and the petitioner was prompted by the consideration that if it complied with the suggestion of the

Central Government, there would be no difficulty for the company giving effect to the two resolutions. It is stated that it is in these circumstances that the company sought for the approval of the Central Government and that at the worst the company was under a misconception of law in seeking the approval and that the same should not be construed to the prejudice of the petitioner. I will consider in due course the question of the applicability of the provisions of the said two sections.

7. The main contentions of Sri Krishna Murthy, the learned advocate for the petitioner, are three-fold: Firstly, it is urged that neither of these two resolutions required the approval of the Central Government under any of the provisions of the Act though under some mistaken belief such approval was sought by the company.

8. Without prejudice to the above contention, it is nextly urged that at least the first resolution, which pertains to remuneration proposed to be paid to V.S. Kudva for his services as technical adviser, does not require any such approval.

9. Thirdly, it is contended that, in any event, it is not competent for the respondent to have imposed the conditions and restrictions set out in annexure "L".

10. On behalf of the respondents, it is contended by Mr. Advocate-General that the approval of the Central Government is necessary under sections 309 and 310 and that it was competent for the respondent, u/s 637A(1), to have imposed the said restrictions and conditions.

11. Special resolution No.2 pertains to an additional remuneration proposed to be paid to V.S. Kudva in respect of "work of directorial nature". It seems to be convenient, before proceeding to other matters in controversy, to consider whether this resolution does or does not require the approval of the Central Government, under the provisions of the Act. V.S. Kudva is neither a director in the whole-time employment of the company nor a managing director; his remuneration, at the time when these two resolutions were passed, did not include anything by way of a monthly payment, though, it would appear, that sitting fee at the rate of Rs.100 per meeting, was being paid to the directors. He is a director such as the one contemplated by sub-section (4) of section 309 and the remuneration to him and to other directors like him, which may be authorised by special resolution, should not exceed the limit of one per cent. of the net profits as required under clause (a) of sub-section (4) the company being one which has a managing director. Assuming that the remuneration authorised by special resolution No.2 and the remuneration which was payable to other directors like him, together did not exceed the said limit of one per cent., then, no approval of the Central Government u/s 309 may have been necessary. But, this does not mean that section 310 would not be attracted. It is stated in special resolution No.2 that it is an additional remuneration. It was pointed out by the learned Advocate-General that this would, in fact, be additional remuneration, as it was

in addition to the remuneration that was being received by way of sitting fee. In this view of the matter, it was an increase in the remuneration of, at least, this particular director and thus attracted the provisions of section 310 which made it necessary that in such cases the approval of the Central Government should be obtained. Therefore, the contention of Sri V. Krishna Murthy that the approval of Central Government was not necessary, cannot be sustained in respect of special resolution No.2.

12. I will now consider the question of the competency of the respondent to impose the conditions and restrictions found in exhibit "L". The relevant provisions with reference to which the question pertaining to the control by the Central Government will have to be examined are sections 309, 310 and 637A(1). Section 637A(1) is as follows:

"637A. (1) Where the Central Government is required or authorised by any provision of this Act, -

(a) to accord approval, sanction, consent, confirmation or recognition to or in relation to, any matter;

(b) to give any direction in relation to any matter; or

(c) to grant any exemption in relation to any matter,

then, in the absence of anything to the contrary contained in such or any other provision of this Act, the Central Government may accord, give or grant such approval, sanction, consent, confirmation, recognition, direction or exemption subject to such conditions, limitations or restrictions, as it may think fit to impose and may, in the case of contravention of any such condition, limitation or restriction, rescind or withdraw such approval, sanction, consent, confirmation, recognition, direction or exemption."

13. It will be noticed that the power u/s 637A(1) is really an incidental power, in the sense that the Central Government can exercise this power only when it is required under any provision of the Act, to accord approval, sanction, consent, confirmation or recognition to or in relation to, any matter. Therefore, when the Central Government has the competence under some other provisions of the Act to accord its approval, sanction, consent, confirmation or recognition, then, while granting the same, the Central Government may attach such limitations or restrictions as it may think fit. This does not mean that the competence of the Central Government to impose such conditions, limitations or restrictions is either arbitrary or unlimited. Being an incidental power, it is necessary that the limitations or restrictions should be relevant to, or bear relation, to the matter in respect of which the Central Government has been given the competence to accord approval, sanction, consent, confirmation or recognition. In that way, the purpose for which the approval, sanction, consent, confirmation or recognition is necessary under any concerned provision of the Act, will be a relevant consideration while imposing the conditions, limitations or restrictions u/s

637A(1), because the incidental power to impose the latter cannot travel beyond the said purpose. In the present case, it is not stated before us that the competence of the Central Government to grant approval to the two resolutions arises under any provision of the Act other than sections 309 and 310. Therefore, there is no need to go beyond those two sections in order to ascertain the validity of the conditions and restrictions which have been imposed as per exhibit "L".

14. A careful perusal of the provisions of section 309 makes it clear that the purpose, as can be gathered from the language of that section, is to place a limitation on the ceiling of the remuneration payable by a company to its directors and to provide that when the company seeks to remunerate any director over and above that limit, it must secure the approval of the Central Government. According to sub-section (5A) if any director draws or receives, directly or indirectly, by way of remuneration any sums in excess of the said limit, without prior sanction of the Central Government, where it is required, he is liable to refund such sums to the company. (The expression "remuneration", in this connection, includes all those items of expenditure mentioned in the Explanation of section 198. Leaving apart the case of a director who is either in whole-time employment of the company or a managing director (or is one covered by the proviso to sub-section (2)), the main purpose of this section is to ensure that a director shall not receive remuneration on a monthly basis and that the remuneration paid to him should not exceed (unless authorised by the Central Government) the prescribed percentage of the net profits of the company. Therefore, the net profits of the company has bearing on the remuneration payable to a director in this connection. Section 310 requires that any provision or resolution purporting to increase or having the effect of increasing, whether directly or indirectly, the remuneration of a director shall not have any effect unless approved by the Central Government and further that the same shall become void if, and in so far as, it is disapproved by the Central Government. In the setting of section 310, it would not be inappropriate to infer that in approving or disapproving any such proposed increase in the remuneration of any director, the Central Government will have in view the limit of remuneration payable to a director u/s 309 read with section 198, and also the other obligations enjoined in section 309. It may also be stated that the question of any extra efforts or labours on the part of the directors in the management of the company may also be a relevant consideration while according or refusing the approval. It seems to me that it is in the light of what has been stated above, that the validity or otherwise of the conditions and restrictions imposed in exhibit "L" have to be considered.

15. Under paragraph 2 of the letter as per exhibit "L", the Central Government has combined the remunerations covered by both the special resolutions, and have imposed conditions thereon. The total of the remunerations under both the resolutions has been limited by the Central Government to one per cent. of the net profits of the company. Further, that one per cent. has subjected to the

condition that it "shall be reduced to the extent of the remuneration drawn by him from Messrs. Canara Sales Corporation Limited, the sole selling agents of the company, and further to the extent of the shares in his own name, in the name of his wife, son/sons and unmarried daughters, if any, in the net profits of the said sole selling agents of the company as are relatable to the business in the goods of your company." The contention of Mr. Krishna Murthy is that the imposition of these conditions is quite arbitrary and that no authority to do so is given to the Central Government under any of the provisions of the Act. It is stated that the Canara Sales Corporation Limited is an independent company and that any remuneration drawn by V.S. Kudva from that company has no bearing on any remuneration payable by the petitioner-company. It is similarly contended that any share to which either V.S. Kudva, his wife, son or unmarried daughters may be entitled to in the net profits of Canara Sales Corporation Limited, could have no relevance to the remuneration payable by the petitioner-company to V.S. Kudva whether for his services of directorial nature or as part-time technical adviser to the petitioner-company. There is much force in the contention advanced by Mr. V. Krishna Murthy and it must be stated that no provision in the Act has been pointed out to us on behalf of respondent, which would enable the Central Government to impose a condition of this nature on a consideration of the fact that some income from another independent company is earned by V.S. Kudva and the members of his family. considerations of this kind, which are not authorised by the provision of the Act and which have no bearing on the financial condition of the petitioner-company, would be irrelevant. In these circumstances, it must be held that the condition above referred to is arbitrary and unauthorised and is liable to be struck down.

16. In so far as the second resolution pertaining to the remuneration payable to V.S. Kudva for the directorial work done by him is concerned, it would be open to the Central Government to consider the question afresh and impose such conditions, if any, as it may consider necessary, in the light of what has already been stated above in regard to the powers u/s 637A.

17. The next question is whether the remuneration allowed to V.S. Kudva by special resolution No. 1 for his work as part-time technical adviser requires the approval of the Central Government u/s 309. It may be mentioned that in this case, it is not stated on behalf of the respondent that this resolution is a mere device to confer an unmerited benefit on V.S. Kudva to the detriment of the company and that on that ground the Central Government seeks to exercise control to safeguard the interests of the company. Therefore, this question will have to be approached uninfluenced by any consideration of the control being exercised for the protection of the company.

18. The contention of Mr. Advocate-General is that this remuneration, even though it is stated to be for the work of part-time technical adviser, is still remuneration payable to a director and that it falls within the ambit of sub-section (4) of section 309. It is argued that as the total of the remuneration

payable under the two special resolutions exceeds the limit of one per cent. (of the net profits) prescribed in clause (a) of sub-section (4), the approval of the Central Government is required for such a resolution and that therefore it will be within the competence of Central Government to attach conditions or restrictions u/s 637A. On the other hand, the contentions of Mr. V. Krishna Murthy are to the effect that special resolution No.1 pertains to remuneration payable for work done by V.S. Kudva in his capacity as part time technical adviser and that such remuneration does not come within the mischief of section 309 which, according to the learned advocate, pertains to managerial remuneration payable to the directors of a company. It is not disputed by him that section 309 does not expressly state that it is confined to managerial remuneration payable to the directors; but he seeks to substantiate his contention from the setting of section 309, the relation which it bears to section 198 and the fact that the office of technical adviser is an officer of profit which a director is allowed to hold u/s 314 of the Act.

19. The position is not one which is free from difficulty. But, for reasons which will be presently stated, it appears to me that the contentions urged by Mr. Krishna Murthy are well-founded. Section 309 is the first section under the heading "Remuneration of Directors". Some salient features of that section, which are relevant for the present purpose, will now be briefly referred to. Sub-section (1) provides that the remuneration payable to the directors of a company shall be determined either by the articles of the company, or by a resolution, or, if the articles so require, by a special resolution passes by the company in general meeting. It is specifically stated in the sub-section, that such determination of the remuneration shall be in accordance with and subject to the provisions of section 198 and section 309. Sub-section (2) provides that a director may receive remuneration by way of a fee for each meeting of the board, or a committee thereof attended by him. Where immediately before the commencement of the Amendment Act of 1960 such fees were being paid on a monthly basis to a director, the proviso to sub-section (2) allows the continuance of payment on that basis only for a period of two year after such commencement or remainder of the term of officer of such a director, whichever is less. Sub-section (3) pertains to the remuneration of a director who is either in the whole-time employment of the company or managing director. It allows their remuneration to be paid either by way of monthly payment, or at a specified percentage of the net profits of the company, or partly by one way or partly by the other. The proviso states that except with the approval of the Central Government, such remuneration shall not exceed five per cent. of the net profits for one such director, and if there is more than one such director ten per cent. for all of them together. Sub-section (4) pertains to the remuneration of a director who is neither in the whole-time employment of the company, nor a managing director and whose remuneration does not include anything by way of a monthly payment. By implication, a director who, under the proviso to sub-section (2) is in receipt of the fees on a monthly basis, will be excluded from the purview of

sub-section (4). To a director to whom this sub-section applies, (or where there is more than one such director, to all of them together), the company may, by special resolution, authorise payment of remuneration as follows: (a) if the company has a managing or a whole-time director, a managing agent, secretaries, or treasurers or a manager, of a commission not exceeding one per cent. of profits; (b) in any other case, of a commission not exceeding three per cent. of the net profits. The proviso states that the company in general meeting may, with the approval of the Central Government, authorise the payment of commission at a rate exceeding one per cent. or as the case may be, three per cent. of its net profits. Sub-section (5A) provides that if any director draws or receives, directly or indirectly, by way of remuneration, any such sums in excess of the limits prescribed by section 309 or without the prior sanction of the Central Government where it is required, he shall refund such sums to the company and until such sums are refunded, hold it in trust for the company.

20. It is mainly on the strength of the above provisions of section 309 that it has been contended on behalf of the respondent that any remuneration when payable to a director for services of whatever kind and rendered in whichever capacity, would be covered by the said section. But the section itself does not say so; it pertains merely to the remuneration payable to the directors of a company; it does not purport to deal with any remuneration payable to a director on account of services rendered by him in any capacity other than that of director. That the legislature was aware of the possibility of remuneration becoming payable for services rendered in some capacity other than that of director (or managing agent, as the case may be), is clear from the language of some of the sections which will be presently referred to. While dealing with the matter of remuneration of managing agent, section 348(1) states that a company shall not pay to its managing agent, by way of remuneration, whether in respect of his services as managing agent or in any other capacity, any sum in excess of ten per cent. of the net profits. Section 318 deals with compensation for loss of office, sub-section (5) provides that nothing in that section shall be deemed to prohibit the payment to a managing director or a director holding the office of a manager, of any remuneration for services rendered by him to the company in any other capacity. Section 314(1) provides that except in the case of certain offices specified in that sub-section, no director shall hold any office or place of profit under the company, unless the company has accorded previous consent by a special resolution. Sub-section (3)(a) of section 314 states that any office or place shall be deemed to be an office or place of profit under the company within the meaning of sub-section (1), in case the office or place is held by a director, if the director holding it obtained anything by way of remuneration over and above the remuneration to which he is entitled as such director. These provisions make it clear that the legislature was aware of the possibility of remuneration becoming payable for service rendered to the company, in a capacity different from that of director or managing agent, as the case may be. Further, in the context of a director holding an office of place of profit, the legislature has

recognised the fact of such director obtaining from the company remuneration over and above that to which he is entitled as such director. Now, if it was the intention of the legislature that even such remuneration as was attributable to any officer or place of profit validly held under the company, should also be within the limit specified in section 309(4), then it would only be reasonable to expect that it would have been plainly stated so, either in section 309 or in section 314. In a case, *Ramaben A. Thanawala Vs. Jyoti Ltd. and Others*, , the High Court of Bombay had to consider the question as to whether the salary of Rs.3,000, which was being paid to a director for work done by him as technical adviser, fell within the limits specified in sections 198 and 309. Chagla C.J., who spoke for the Bench, came to the conclusion that the remuneration paid for service rendered as technical adviser did not come within the mischief of section 309 and that the limit of eleven per cent. fixed in section 198 in respect of managerial remuneration did not apply to remuneration paid for service of technical adviser. It is true, that this decision was prior to Amending Act of 1960, by which there has been an amendment of section 309. But, it seems to me that the principles of interpretation relied upon by that learned Chief Justice for construing the relevant provisions for reaching that conclusion, are still applicable for ascertaining the true position, particularly when, in spite of that decision, it is nowhere plainly stated in the amended Act that the remuneration obtained by a director of his validly holding an office of profit, should also come within the limit specified in section 309(4). It was pointed out in that decision that the limit of eleven per cent. specified in section 198 was for the purpose of controlling the cost of management. At that time, as sub- section (1) of section 198 stood, it did not expressly state that the limit of eleven per cent. referred to the total of managerial remuneration; that sub-section spoke merely of the total remuneration payable by the company to its directors, etc. It was only in the marginal note to that sub-section that indication had been given that what was sought to be controlled the was overall maximum managerial remuneration. While rejecting the view that the salary of Rs.3,000 which was being paid to the director for work done by him as technical adviser should also fall within the limit of eleven per cent., the learned Chief Justice stated as follows (in paragraph 4 at page 216) *Ramaben A. Thanawala Vs. Jyoti Ltd. and Others*, :

"The question that is raised is whether the amount of Rs.3,000 paid to the third defendant as a technical adviser and not as a director is included in the limit of eleven per cent. fixed by section 198...What was sought to be controlled was the cost of management, and if what was sought to be controlled was the cost of management, then what had to be considered was managerial remuneration and not remuneration paid for any other purpose."

21. It is, presumably, in acceptance of the above view of the Bombay High Court, that when section 198 was subsequently amended, express mention was made in sub-section (1) of the total managerial remuneration and that it should not exceed the limit of eleven per cent. It should also be noted that so much of the previous marginal note (to the former unamended section) as pertained to the

overall maximum managerial remuneration, has been retained in the marginal note to the amended section. In these circumstances, it would be quite proper to understand that the purpose of section 198(1) is to impose a limit only on the cost of management. The various provisions which pertain to remuneration payable by the company to the different categories of managerial personnel and the directors have been so designed as to ordinarily keep the total cost within the limit of eleven per cent. (of the net profits) specified in section 198(1). A scrutiny of section 309 reveals certain unmistakable indications that the remuneration payable to the directors, as dealt with therein, is only managerial remuneration of any other kind. Firstly, the very fact that sub-section (1) requires the remuneration to be determined in accordance with and subject to the provisions of section 198, gives the indication that the legislature had in view only managerial remuneration which is the only kind of remuneration that has been dealt with in section 198 (including the provision for remuneration to directors in case of absence or inadequacy of profits) Secondly, the remuneration that is permitted under sub-section (2) is clearly for work done as a director, being remuneration by way of a fee for each board or committee meeting attended by him. That is clearly managerial remuneration, which would, in the ordinary course, have fallen within the limit of eleven per cent. specified in section 198(1) but for the exclusion directed in sub-section (2) of section 198. Sub-section (3) of section 309 pertains to the remuneration payable to a director in the wholtime employment of the company or a managing director. This has to be read with sub-section (3) of section 198. There cannot be any doubt that the remuneration contemplated in sub-section (3) of section 309 is only in respect of the work done in the capacity of wholtime director or managing director.

22. In the context of the previous sub-sections, there is no reason to assume that the remuneration dealt with in sub-section (4) of section 309 pertains to any work done by a director otherwise than in his capacity as such director. The director to whom this sub-section relates is not a wholtime director; nor does he receive any remuneration by way of a monthly payment. It is conceivable that he may be in a position to render to the company services otherwise than in his capacity as a director; this sub-section does not say that the remuneration for such services should also be controlled by the specified limits. On the other hand, the fact that the applicability of one or the other of the alternative limits set out in clauses (a) and (b) depends upon the existence or otherwise of the specified categories of managerial personnel, is an indication that the remuneration contemplated could only be in respect of work done by him in his capacity as a director. If the work done or the services rendered by him to the company are not such as could be attributable to his capacity as a director then he should be remunerated therefor, in the same way as any other person would have been, had he done the work or rendered the service to the company.

23. Where the intention of the legislature was that the remuneration earned in whatever capacity should be brought within a particular limit, it has been so expressed in clear terms; section 348(1), which pertains to the remuneration of

managing agent, is an example. If the limit of 11 per cent. specified in section 198(1) was intended to cover every kind of remuneration earned in whatever capacity, then there would have been no need to enact the prohibition contained in section 348(1). It is because the limit of 11 per cent. is confined only to managerial remuneration and does not extend to any other kind of remuneration, that there was the necessity for section 348(1). In my view, the remuneration payable to directors u/s 309 is part of the managerial remuneration dealt with u/s 198 and that the limitations in section 309 do not extend to any other kind of remuneration earned in a capacity different from that of director.

24. In order to determine whether a place of office held by a director is a place or office of profit, the test that is laid down in sub-section (3) of section 314 is that he "obtains from the company anything by way of remuneration over and above the remuneration to which he is entitled as such director." Therefore, the remuneration derived from an office of profit permitted u/s 314 to be held by a director is distinct from the remuneration to which he is entitled as director. (The remuneration to which he is entitled in his capacity as director, is that covered by section 198 and 309). There is nothing in section 314 to the effect that the limits specified in section 198(1) and section 309(4) should govern the remuneration derived by a director holding an office of profit permitted u/s 314. In the absence of any express provisions to the contrary, there is no principle on the basis of which such a director could be denied remuneration for such work or services; equally, there would be no reason to extend to such remuneration the limit of percentage mentioned in section 309(4), when the law does not expressly state that the said limit would be applicable to remuneration attributable to services rendered or work done in some capacity other than that of a director.

25. My conclusion in regard to this aspect of the case is that by being appointed as a part-time technical adviser V.S. Kudva was holding an office of profit (permitted under sub-section (1) of section 314, and that the remuneration payable to him for services rendered by him in his capacity as technical adviser does not come within the mischief of section 309 of the Act. Therefore, no approval of the Central Government is necessary in respect of the remuneration payable to him for his services as part-time technical adviser. It follows that the incidental powers u/s 637A cannot be availed of in respect of special resolution No.1 and the remuneration payable thereunder to V.S. Kudva.

Gopivallabha Iyengar, J.

26. I have had the advantage of perusing the judgment proposed by my learned brother Sadasivayya, J. The facts of the case have been set out in detail in the said judgment, and it is unnecessary for me to set them out again. I am in agreement with the view expressed therein that the approval of the Central Government should be obtained by the petitioner company in respect of resolution No.2 in exhibit "I". Secondly, I am also in agreement with the observations relating to the scope of section 637A(1) of the Companies Act. I also agree that the validity or otherwise of the conditions and restrictions

imposed in exhibit "L" have to be considered in the light of the observations made in the judgment to the scope of section 637A(1) of the Act.

27. But, I regret my inability to share the view of my learned brother on the question whether the remuneration allowed to V.S. Kudva by special resolution No. 1 for his work as part-time technical adviser requires the approval of the Central Government u/s 309. I therefore propose to consider the arguments advanced by the learned counsel pertaining to resolution No.1 and the conditions imposed in exhibit "L" in respect of it.

28. The first contention of Sri V. Krishna Murthy, the learned advocate for the petitioner, in this regard is that the remuneration paid to V.S. Kudva as part-time technical adviser of the company does not come within the purview of the provisions of section 309 of the Act and, therefore, it is unnecessary to apply for the approval of the Central Government under the provisions of sub-section (4) of section 309.

29. The second contention of Sri Krishna Murthy is that, even if the provisions of section 309(4) should be considered as applicable to the abovesaid remuneration, even then the approval of the Central Government is unnecessary inasmuch as the rate of percentage of the net profits payable to the part-time director-cum-technical adviser is less than 1 per cent.

30. The third contention of Sri Krishna Murthy is that the additional remuneration stipulated in resolution No. 2 is payable to V.S. Kudva as director from April 1, 1962, and therefore it should not be added on to the 3/4 per cent. referred to in resolution No.1 payable to him as technical adviser from December 28, 1960, and hence, the Central Government's order in exhibit "L" combining the two remuneration of two different categories is unjustifiable and the conditions set out in paragraph 3 of exhibit "L" are unsustainable in law.

31. The learned Advocate-General on the other hand contends that any remuneration paid by the company to its director or directors is controlled by the provisions of section 309 of the Act; and so far as the provisions of section 309 are concerned, there is no scope for differentiating the remuneration paid to the director as director or in any other capacity. He submits that section 309 is a code in itself covering the subject of payment of remuneration to the directors of a company.

32. In support of the first contention on behalf of the petitioner, Sri V. Krishna Murthy strongly relies on the decision of the Bombay High Court in *Ramaben Thanawala v. Jyoti Ltd.* ([1957] 27 Com Cas. 105) and also on the several provisions of the Act indicating that there is a distinction made between remuneration received by a director as such and the remuneration received by him in any other capacity. Sri Krishna Murthy invites our attention to the provisions of section 271 of the Act which makes a distinction between a director and a technical director. I do not think that the provisions of that section in any manner help the petitioner. The petitioner is not a technical director. The

resolution in question is with reference to him as a technical adviser. The next section which Sri Krishna Murthy refers to is section 314 of the Act, which deals with the prohibition against a director holding any office or place of profit. He invites our attention to the provisions of section 314(1)(b) under which the application of the section to a particular category of offices including that of the technical adviser is excepted, and to clause (3) which makes a reference to a director obtaining from the company remuneration over and above the remuneration to which he is entitled as such director, whether as salary, fees, commission, perquisites, the right to occupy free of rent any premises as a place of residence, or otherwise. It cannot be disputed that a director can also hold an office of profit. The question that arises for consideration in this case is not whether a director can hold an office of profit or not but whether the remuneration paid to him on that account comes within the provisions of section 309(4). The same observations apply to the provisions of section 318(5) of the Act to which Sri V. Krishna Murthy draws our attention. The provision u/s 318(5) contemplates the payment to a managing director or director holding the offices of manager of any remuneration for services rendered by him to the company in any other capacity. It cannot be disputed that a director can claim compensation in respect of services rendered by him in any other capacity as provided in section 318. This does not give any support to the contention that the remuneration paid to a director in any capacity other than as a director does not come within the scope of section 309(4) of the Act. Sri V. Krishna Murthy further referred to section 348 of the Act which provides for the remuneration of managing agents. The said section is as follows :

"348. Remuneration of managing agent ordinarily not to exceed 10 per cent of net profits. - (1) A company shall not pay to its managing agent, in respect of any financial year beginning at or after the commencement of this Act, by way of remuneration, whether in respect of his services as managing agent or in any other capacity, any sum in excess of ten per cent. of the net profits of the company for that financial year.

(2) For the purposes of this section, any payment made by way of remuneration to any of the following persons shall be deemed to be included in the remuneration of the managing agent :-

(a) Where the managing agent of the company is a firm, every partner in the firm;

(b) Where the managing agent of the company is a public company, every director of that public company;

(c) Where the managing agent of the company is a private company, every director and member of that private company.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be deemed to affect the operation of sections 352, 354 and 356 to 360."

33. Our attention is drawn to sub-section (1) of section 348, making reference to the services of managing agent, as managing agent or in any other capacity. So far as the managing agent is concerned, it will be seen that there are other provisions in the Act which provide for additional remuneration for the services rendered by the managing agent other than in his capacity as such. Section 352 provides for payment of additional remuneration in excess of the limits specified in sections 198 and 348, if such remuneration is sanctioned by a special resolution of the company and is approved by the Central Government as being in public interest. Similarly, sections 356 and 258 provide for payment to the managing agent otherwise as managing agent. A reference to the proviso to section 198 shows that the total of managerial remuneration referred to therein does not affect the operation of sections 352 to 354 and 356 to 360 of the Act, under which there is provision to make payment to the managing agents otherwise than as managing agents. Keeping in view the above sections of the Act, the provisions of section 309 are to be scrutinised. Section 309 of the Companies Act as amended by Act 65 of 1960 is set forth below to examine the validity of the relative contentions of the parties :

"309. (1) The remuneration payable to the directors of a company, including any managing or whole-time director shall be determined, in accordance with and subject to the provisions of section 198 and this section, either by the articles of the company, or by a resolution or, if the articles so require, by a special resolution, passed by the company in general meeting.

(2) A director may receive remuneration by way of a fee for each meeting of the board, or a committee thereof, attended by him :

Provided that where immediately before the commencement of the Companies (Amendment) Act, 1960, fees for meetings of the board and any committee thereof, attended by a director are paid on a monthly basis, such fees may continue to be paid on that basis for a period of two years after such commencement or for the remainder of the term of office of such director, whichever is less, but no longer.

(3) A director who is either in the whole-time employment of the company or a managing director may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other :

Provided that except with the approval of the Central Government such remuneration shall not exceed five per cent. of the net profits for one such director, and if there is more than one such director, ten per cent. for all of them together.

(4) In the case of a director who is neither in the whole-time employment of the company nor a managing director and whose remuneration does not include anything by way of a monthly payment, the company may, by special resolution, authorise the payment, to such director, or where there is more than one such

director, to all of them together -

(a) If the company has a managing or whole-time director, a managing agent or secretaries and treasurers, or a manager, of a commission not exceeding one per cent. of the net profits of the company ;

(b) In any other case of a commission not exceeding three per cent. of the net profits of the company :

Provided that the company in general meeting may, with the approval of the Central Government, authorise the payment of commission at a rate exceeding one per cent., or as the case may be, three per cent. of its net profits.

(5) The net profits referred to in sub-section (3) and (4) shall be computed in the manner referred to in section 198, sub-section (1).

(5A) If any director draws or receives, directly or indirectly, by way of remuneration any such sum in excess of the limits prescribed by this section or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company.

(5B) The company shall not waive the recovery of any sum refundable to it under sub-section (5A) unless permitted by the Central Government.

(6) No director of a company who is in receipt of any commissioner from the company and who is either in the whole-time employment of the company or a managing director shall be entitled to receive any commission or other remuneration from any subsidiary of such company.

(7) The special resolution referred to in sub-section (4) shall not remain in force for a period of more than five years; but may be renewed, from time to time, by special resolution for further period of not more than five years at a time :

Provided that no renewal shall be effected earlier than one year from the date on which it is to come into force.

(8) The provisions of this section shall come into force immediately on the commencement of this Act, or where such commencement does not coincide with the end of a financial year of the company, with effect from the expiry of the financial year immediately succeeding such commencement.

(9) The provisions of this section shall not apply to a private company unless it is a subsidiary of a public company."

34. Section 309, it will be seen, does not make any distinction between the remuneration payable to the director as such director or in any other capacity. There is nothing in the wording of section 309 to limit the application of the section to the remuneration paid to the directors in their capacity only as director. The opening sentence of section 309(1) signifies that the remuneration contemplated therein is remuneration payable to all directors including any

managing or whole-time director. Sub-section (2) provides that the director may receive remuneration by way of fee for each meeting of the board or a committee thereof attended by him. The change effected by the amendment is to omit any provision being made for monthly payment. Under the amended section the payment on a monthly basis can continue only for a period of two years after December 28, 1960, when the amendment of the Act came into force. Sub-section (3) refers to the remuneration payable to a director who is in the whole-time employment of the company or to a managing director either by monthly payment or at a specified percentage of the net profits of the company and partially by one and partially by the other. The limit of remuneration is also fixed. It should not exceed five per cent. of the net profits, if there is one director acting as a managing director. If there are more than one, the remuneration of the managing directors altogether cannot exceed ten per cent. of the net profits. u/s 309(4) provision is made for remuneration payable to a director who is neither in the whole-time employment of the company nor a managing director and whose remuneration does not include anything by way of a monthly payment. The limit for such payment is also prescribed. If within the limit prescribed u/s 198 more than one per cent. can be paid to a director u/s 309(4), it can be done only with the approval of the Central Government. It must be borne in mind that the maximum remuneration payable to a managing agent provided u/s 348 is ten per cent. of the net profits. The maximum remuneration payable to a managing director or a whole-time director is also fixed at five per cent. when there is one director and at ten per cent. when there are more than one director under sub-section (3), subject to payment at a higher percentage with the approval of the Central Government. u/s 198, the overall managerial remuneration is eleven per cent. of the net profits. It should be noted that but for the proviso in the section the payments referred to in sections 352, 356, 358, 359 and 360 would come within the limit stated in section 198. It can be deduced that the scope of remuneration to directors under the provisions of section 309(4) is circumscribed by the margin available between eleven per cent., the ceiling fixed u/s 198 and what has been paid to the managing agent or the managing director or the whole-time director as the case may be. Quite apart from these considerations, the terms of section 309 are such as to include all remuneration payable to directors. Therefore, it appears to me that if the payment under resolution No.1 of exhibit "I" provides for the remuneration to a director exceeding the permissible limit, it would be obligatory on the part of the company to comply with the terms of section 309(4) and obtain the approval of the Central Government. The provisions of sub-section 5A of section 309 are also significant. It refers to the remuneration received by a director directly or indirectly. The learned Advocate-General relies upon this provision in support of his argument that all sums received by the director directly or indirectly come within the scope of section 309 of the Act. The indirect remuneration can include the remuneration paid to a director for any office held by him as in this case the technical adviser. The contention of the Advocate-General that the provisions of section 309 envelop all remunerations paid to director in whatever capacity it

may be, should be accepted.

35. Strong reliance was placed by Sri V.Krishna Murthy on the decision of the Bombay High Court in *Ramaben Thanawala v. Jyoti Ltd.* [1957] 27 Comp. Cas. 105 as mentioned before. In that case a director who was a partner of the managing agency firm was appointed as a technical adviser on a salary of Rs.3,000 per mensem. Two questions arose for consideration. The first question was whether the amount of Rs.3,000 paid to the defendant as a technical adviser was included in the limit of 11 per cent. fixed by section 198, viz., the managerial remuneration. The second question was whether the payment of remuneration to the above-said director as technical adviser came within the stipulation of remuneration of 10 per cent. of the net profits of the company as stipulated in the managing agency agreement. The petitioner's counsel invites our attention to the following observations of Chief Justice Chagla [1957] 27 Com Cas. 105 :

"One possible view of section 198 is that we must calculate the total amount which the company pays to its directors, managing agent or secretaries and treasurers and the manager and such total amount must not exceed 11 per cent. of the net profits of the company, and it may be suggested that what the legislature intended was that there should be some limit put upon the company paying out sums to the various authorities mentioned in this section, and from that point of view it may be said that inasmuch as Rs.3,000 a month is being paid to the director, the defendant No.3, that sum should be included for the purpose of computing the 11 per cent. mentioned in section 198. But, in our opinion, although the heading of a section or a marginal note cannot control the clear language of the section, in this case we must consider the heading and the marginal note for the purpose of arriving at a conclusion as to what according to the legislature was the purpose of enacting this section, and in our opinion the marginal note correctly indicates what the legislature aimed at in enacting this section. What was sought to be controlled was the cost of management and if what was sought to be controlled was the cost of management, then what had to be considered was managerial remuneration and not remuneration paid for any other purpose. Even on principle this seems to be the correct view because it is difficult to understand why a company could employ a technical expert and pay him whatever amount it thinks proper and there should be no control with regard to it, and yet the company should be prohibited from making use of the technical knowledge of a director and pay him a large amounts may be paid to a director in the guise of these amounts being remuneration for the technical or expert knowledge of the director. Now, the legislature has provided a safeguard and that safeguard is to be found in section 314 and that section debar a director from holding any office or place of profit except with the previous consent of the company accorded by a special resolution, and in the case of the defendant No.3 a special resolution was necessary in order to enable him to hold this place of profit. In the absence of any such resolution, a director would have vacated his office as a director."

36. In appreciating these observations, we must have regard to the fact that the aforesaid decision pertains to the Act as it was before the amendment in 1960. The principle underlying the restrictions imposed under the Act is that there must be Governmental control on the apportionment of remuneration to top management of public companies. This principle has not been disputed. Sections 309 and 348 have also been amended and I have already analysed the provisions of section 309 taking into consideration the amendments effected under the 1960 Amending Act. The restriction set out in section 314 of the Act against a director of a company, from holding any office or place of profit does not apply to the appointment of a director as a technical adviser. Therefore, except the provisions of section 309(4) read with section 198, there is no safeguard against any provision being made for payment of remuneration by the company to a director in regard to his services in any capacity other than that of a director. Further, it must be noted that the Bombay High Court took the view that the remuneration of Rs.3,000 per mensem provided for the director who was a partner of the managing agency firm would be in violation of the provisions of section 348 which stipulate that the managing agent cannot receive more than 10 per cent. of the net profits either in his capacity as managing agent or in any other capacity. In fact they held that *Ramaben A. Thanawala Vs. Jyoti Ltd. and Others*, :

"The whole object of the legislature would be defeated and the mischief aimed at would not be overcome if we were to take the view that although the company had paid up to 10 per cent. of the net profits to the managing agents, it could further pay extra amounts to each one of the partners of the managing agents if the managing agency happened to be a firm."

37. Further, at page 217 they observe as follows :

"Therefore, in our opinion, although the defendant No.3 is permitted to receive Rs.3,000 as a technical expert and although that amount may not fall within the mischief of section 309 and even though that amount may not be taken into consideration for the purpose of section 198, that amount must be taken into consideration for the purpose of limiting the remuneration of the managing agents the defendant No.2 to the 10 per cent. mentioned in section 348."

38. These observations indicate that the decision in the case rested more on the provisions of section 348 of the Act than under the provisions of sections 198 and 309 of the Act. I may respectfully mention that the observations made in the Bombay decision with reference to section 314 overlook the fact that no safeguard is provided against the appointment of a director as a technical adviser u/s 314 of the Act. In view of the amendments effected under the Amending Act 65 of 1960, and the absence of any safeguard in section 314 in respect of the appointment of a director as technical adviser, it is difficult to say if the Bombay High Court would have taken the same views as it did prior to the amendment in 1960. The statement in the first resolution in exhibit "I" that the remuneration was being fixed by the company in accordance with section 309, sub-section (4),

of the Companies Act, 1956, accords with the correct position in law and there is no reason to take a different stand. The proposed payment can be made only with the approval of the Central Government as provided in the said section.

39. The second contention of Sri V. Krihna Murthi falls next to be considered. If, by resolution No.1 in exhibit "I" the company was fixing the remuneration of the director for the first time, perhaps the contentions of Sri Krishna Murthy would have been suitable. It is clear from the correspondence proposed in this case that under exhibit "C" the respondent had approved the payment of Rs.1,000 per mensem to V.S. Kudva as director-cum-technical adviser and he was paid at that rate up to December 28, 1960. The first resolution in exhibit "I" provides for a variation of the payment of the remuneration payable to the director V.S. Kudva. In these circumstances the provisions of section 310 of the Act would come in the way of Sri V. Krishna Murthy's contention. Section 310 is as follows :

‘In the case of a public company, or a private company which is a subsidiary of a public company, any provision relating to the remuneration of any director including a managing or whole-time director, or any amendment thereof, which purports to increase or has the effect of increasing, whether directly or indirectly, the amount thereof, whether that provision be contained in the company's memorandum or articles, or in an agreement entered into by it, or in any resolution, passed by the company in general meeting or by its board of directors, shall not have any effect unless approved by the Central Government; and the amendment shall become void if, and in so far as, it is disapproved by that Government."

40. The first resolution in exhibit "I" effects an amendment in the provision relating to the remuneration of a director and it is not contended before us that the amendment or the variation now effected under resolution No.1 does not purport to increase or has the effect of increasing the remuneration that is already being paid. In view of the application made by the company seeking the approval of the Central Government u/s 310, it is not possible to sustain the position that the resolution has not the effect of increasing the remuneration that was being paid to V.S. Kudva. The provisions of section 310 are wide enough to cover the present case and therefore I cannot accept the contention of Sri V. Krishna Murthy that it was not necessary to seek the approval of the Central Government proceeding on the basis that the provisions of section 309(4) apply to the payment of remuneration referred to in the first resolution.

41. Next, the validity of the conditions imposed by the Central Government in exhibit "L" with reference to the first resolution in exhibit "I" requires to be examined. The contention of Sri. V. Krishna Murthy in this regard is that before the conditions referred to in exhibit "L" were imposed, the petitioner was not given any opportunity to state what he had to say with respect to the variation proposed by the respondent. From exhibit "K" dated October 9, 1963, it appears that the application of the petitioner for approval was forwarded to the advisory commission u/s 411 of the Act. In this case it is found that prior to December 28,

1960, the technical adviser was paid a remuneration of Rs.1,000 per mensem. No reasons are mentioned in exhibit "L" as to why the remuneration payable to him from December 28, 1960, to April 1, 1962, should be reduced to a maximum of Rs.9,000 per annum. This action is not merely not in conformity with the principles of natural justice but also with the practice of the respondent that before making any final order on an application for approval the company was given an opportunity to make its representations to the Government in regard to the proposed variations. In fact the advisory commission gave a hearing to the company before passing orders as pr exhibit "C" on January 2, 1961, granting approval only for payment of a sum of Rs.1,000 per mensem while the company sought for approval to pay remuneration at Rs.2,000 per mensem to the technical adviser. The remuneration that V.S. Kudva gets as technical adviser is reckoned separately from the remuneration proposed to be paid to him for his services of a directorial nature. Before the conditions were imposed, the Central Government did not inform the company what they proposed to do and the company was unable to place any material before the Central Government as to why the imposition of that condition was not justified in the circumstances of the case. No reasons are shown to us as to how this condition can be justified even having regard to the provisions of section 637A of the Act.

42. In the second paragraph of exhibit "L", reference is made to the remuneration payable to V.S. Kudva with effect from April 1, 1962, both for his services as technical adviser of the company and the additional service of a directorial nature. As observed already, the two services are of different categories and there is no reason for making up the remuneration payable in respect of the services rendered by him as technical adviser and additional services of a directorial nature. Apart from this, the imposition of the condition referred to in paragraph 2 of exhibit "L" which covers both the resolutions cannot be justified, keeping in view the observations of my learned brother Sadashivayya J. in respect of the scope of section 637A of the Act. Therefore, the conditions imposed in exhibit "L" relating to the first resolution also cannot be sustained.

43. In the light of the foregoing conclusions, the prayer sought for in the petition, viz., that the respondent must be prohibited from interfering with the company to pay the remuneration to V.S. Kudva as fixed by the resolution dated June 28, 1963, cannot be granted. The directions in exhibit "L" according conditional approval in respect of the two resolutions in exhibit "I" cannot also be sustained. I think it proper that the Central Government should reconsider the grant of approval in respect of both resolutions keeping in view the observations made by this court regarding the scope of section 637A of the Act.

ORDER OF THE COURT

44. We are agreed that the conditions which have been imposed in the second paragraph of exhibit "L" should be quashed and we accordingly quash the same.

45. So far as the second resolution is concerned we direct that the Central Government shall reconsider as to what conditions, if necessary, should be attached to the remuneration proposed therein; while doing so, the Central Government will have regard to what has been stated by us in respect of section 637A of the Act.

46. Until the Central Government, after such reconsideration, passes further orders, the company will be at liberty to pay V.S. Kudva Rs.12,000 per annum towards his remuneration from December 28, 1960. This is without prejudice to the different views expressed by us and will be by way of an interim arrangement.

47. So far as the first resolution is concerned, no writ or direction will issue, in view of the differences of opinion as expressed above.

48. There is no order as to costs.