

## The Proviso Parable

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*"[The] proviso is hardly more than a legal incantation. The best that can be said for it is that it is an all-purpose conjunction, invented by lawyers and not known to or understood by the grammarians....But what it is supposed to be in any particular case is largely a matter of speculation."*[\[1\]](#)

*"[Provisos] are awkward and confusing as well as archaic, and you should avoid them like the plague."*[\[2\]](#)

### 1. Introduction:

Generally, a proviso provides that something that is provided for may be interpreted in the manner provided, provided that, or provided further, or provided also that certain conditions or qualifications are provided for. The above proposition is as perplexing as the exercise of interpreting certain provisos. Regardless of the supporters of the plain language movement marshalling support for simple, accessible legal language, the web of provisos has been spun far too wide, making it ubiquitous in the legal world. In the Income Tax Act, 1961 alone the word "provided" appears a whopping 1,411 times! With the general understanding of the proviso's function being that it merely carves out an exception, it becomes increasingly essential that a decisive interpretation of provisos in general is achieved, for, it becomes fundamental to one's understanding of the Income Tax Act, 1961, as well as other important statutes.

### 2. Definition of a Proviso

*A.Ramanatha Aiyar's Advanced Law Lexicon* defines proviso as "a proviso is generally intended to restrain the enacting clause and to except something which would have otherwise been within it or in some measure to modify the enacting clause."[\[3\]](#) On similar lines, Lush J., remarked the following about the scope of a proviso: "When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso."[\[4\]](#) As per Lord Macmillan, "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case."[\[5\]](#) Lord Macnaghten defined the proviso as "a qualification of the preceding enactment which is expressed in terms too general to be quite accurate"[\[6\]](#)

On similar lines, Justice Hidayatullah observed, "As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as

stating a general rule”.<sup>[7]</sup> Justice Kapur delineated the scope of the proviso as, “The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment.”<sup>[8]</sup>

A cursory look at these definitions should indicate that the function of the proviso is not solely limited to carving out an exception. A qualification of the enacting provision need not mean restriction. Lord Macmillan’s perspective on the “proper function” of the proviso does not align with its usage for clarificatory or qualifying purposes. Perhaps Lord Macmillan had anticipated the impending rampant abuse of the proviso. Regardless, the proviso has existed in India for more than a hundred years, and its brooding expansion sees no signs of abating.

### 3. Principles of Interpretation:

#### 3a. The Purva Mīmāṃsā Sūtras of Jaimini:

While the Supreme Court observed that principles of Mīmāṃsā and Maxwell’s principles would be suitable for interpretation on appropriate occasions<sup>[9]</sup>, such usage of the former has been relatively rare.<sup>[10]</sup> J.K. Verma takes the term arthavāda to mean proviso and vidhi to mean the rule or the substantive provision.<sup>[11]</sup> Thus, read accordingly certain relevant Sūtras by Jaimini are as follows:

prakaraṇe sambhavannapakarṣo na kalpayetavidhyānarthakyaṃsi taṃ prati. [1.2.24]<sup>[12]</sup>

“When the content can be construed reasonably the transference should not be made; the injunction will be useless by reason of it.”<sup>[13]</sup>

J.K. Verma takes this sūtra to mean that “a proviso can never be interpreted to be the substantive provision and vice versa”, and that in the process of interpretation, a proviso should not be read into the main provision.<sup>[14]</sup>

vidhau ca vākyabhedaḥ syāt. [1.2.25]<sup>[15]</sup>

“If you consider [arthavāda] to be a [vidhi] then there will be splitting of a sentence.”<sup>[16]</sup>

This sūtra provides that the provision and the proviso must be construed distinctly, and that construing the proviso as the main provision, would lead to two substantive provisions in one provision, which would not be sanctioned.<sup>[17]</sup> Verma reads further sūtras to delineate the scope of the proviso. He finds that the proviso “excepts, excludes or restricts, while an explanation explains or clarifies”, and that during interpretation the proviso cannot prevail over the main section.<sup>[18]</sup>

#### 3b. Modern Principles of Interpretation:

Vepa P. Sarathi, relying on several Indian and foreign precedents, culls out the key principles pertaining to the interpretation of statutes as follows:

(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held to be a repeal of the section as the proviso speaks the later intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation; but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

- (f) A proviso does not enlarge an enactment except for compelling reasons.
- (g) Sometimes an unnecessary proviso is inserted by way of abundant caution.
- (h) A construction placed upon a proviso which brings it into general harmony with the terms of the section should prevail.
- (i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.
- (j) A proviso may sometimes contain a substantive provision."[\[19\]](#)

Maxwell suggests that difficulties arising in interpretation may generally be resolved by applying the "general rule" that the words of the proviso should not be taken in the literal sense, but limited to the scope of the section qualified by it.[\[20\]](#) However, Maxwell cites *Piper v. Harvey* to posit that when the language of the statute makes it clear that the scope of operation of the proviso is larger than that of the provision, it must be effected in such a way. [\[21\]](#) What seems more distressing is the later assertion that Maxwell makes citing *Att.-Gen. v. Chelsea Waterworks Co.*, viz., "If a proviso cannot reasonably be construed otherwise than as contradicting the main enactment, then the proviso will prevail on the principle that [it] speaks the last intention of the [makers]" [\[22\]](#) Further, the main part of the section must not be construed in a manner that renders it otiose or redundant.[\[23\]](#) On similar lines, The Supreme Court of India in *CST v. B.G. Patal*, also approved a harmonious interpretation, wherein the proviso is not rendered otiose and ineffective.[\[24\]](#)

Some of the concerns raised above are somewhat assuaged by the judges of the Supreme Court. In *Dwarka Prasad v. Dwarka Das Saraf*, the Supreme Court laid down the "golden rule" of interpreting a proviso: "read the whole section, inclusive of the proviso, in such a manner that they mutually throw light on each other and result in a harmonious construction."[\[25\]](#) While doing so, the Court observed that the proviso must be prima facie read and considered with the original enactment, and that "it is not a separate or independent enactment".[\[26\]](#) Further, the Apex Court cited *Thompson v. Dibdin*, wherein it was held that provisos are dependent on the enacting provision, and that they cannot be interpreted in a manner separated from the context of the enacting provision.[\[27\]](#)

Another important principle was laid down in *CIT v. Hespera Reality (P) Ltd.*, 2024, wherein the Delhi High Court held that the proviso in reverse to Section 10(38) of the Income Tax Act, 1961 cannot be read in reverse to mean that if gains are not included as book profits under Section 115JB, then the gains could be treated as income for the purposes of assessment.[\[28\]](#)

It is now proper to consider the purpose of a proviso in a legislation as well as certain unorthodox modes of application.

#### 4. Purpose of a Proviso:

The Supreme Court, in *S. Sundaram Pillai v. V.R. Pattabhiraman* provided four broad purposes that a proviso may serve:

- "(1) qualifying or excepting certain provisions from the main enactment;
- (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
- (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself, and
- (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."[\[29\]](#)

Thus, a proviso may serve as an exception, impose mandatory conditions, a substantive enactment, or an elucidation of the intended meaning of the enactment. While, the first two, as well as the fourth

condition may seem rather innocuous, the proviso serving as a substantive enactment would seem to be perverse to the common understanding of provisos. P.M. Bakshi also developed a similar typology for provisos based on the roles performed by them, but omitted the function of a proviso as a substantive enactment.[\[30\]](#)

In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha*, it was reiterated that the proviso need not necessarily create an exception:

The law with regard to provisos is well settled and well understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But, provisos are often added not as exceptions or qualifications to the main enactment but as savings clauses, in which cases they will not be construed as controlled by the section. [\[31\]](#)

Due to the “proper purpose” of the proviso being restricted to carving out exceptions by many jurists, it is imperative to draw a distinction between the two.

## 5. Proviso v. Exception, Explanation

There is a difference both in the form and effect of the proviso and exception, hence a clear distinction must be drawn between the two. When one relies upon a general clause provision, one must positively demonstrate that one’s case does not fall within the purview of the exception to that provision.[\[32\]](#) On the other hand, when one relies upon a general clause of a provision, one need not positively demonstrate that one’s case does not fall within the proviso.[\[33\]](#) This rule holds, unless the proviso is adverse to one’s case, thereby relegating the proviso as a ground for the opposing party.[\[34\]](#)

In *Hiralal Rattanlal v. State of U.P.*, the Supreme Court clarified the distinction between a proviso and an explanation, by examining the effect of the respective aids of internal construction upon the scope of the main section.[\[35\]](#) The proviso takes out a part of the main section for special treatment, yet it is distinct from the main provision and alters it, in contradistinction to the explanation, which widens the scope of the main section.[\[36\]](#)

## 6. A Proviso as a Substantive Provision: A Wolf in Sheep’s Clothing

In *Rhondda Urban District Council v Taff Vale Rly Co.*, an apparent criterion is given, viz., that the proviso must be “in substance a fresh enactment, adding to and not merely qualifying that which goes before.”[\[37\]](#) In *Stamp Duties Comr v. Atwill*, it was held that the function of the proviso need not be to merely qualify or limit what precedes it, but the proviso may also independently add to it.[\[38\]](#)

Indian Courts have recognized that a proviso may not merely be inserted in the statute for a clarificatory or excepting purpose, rather to create a substantive provision in itself. However, nowhere has it been clarified absolutely as to which conditions may justify the treatment of a proviso as a substantive provision in itself. Curiously, in *Shah Bhojraj Kuverji Oil Mills*, the proviso in question operated as a saving clause, to keep the proceedings beyond the ambit of the Bombay General Clauses Act, and not as an exception or qualification.[\[39\]](#) In *State of Rajasthan v. Leela Jain*,[\[40\]](#) the Supreme Court provides an insight into a proviso that operates as a substantive provision. In this case, the proviso provided an alternative remedy which was prohibited by the main portion of the statute, and thus, the Court observed that the proviso covers a field wider than the main portion of the section, and is not co-extensive with it.[\[41\]](#)

In *Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver*, it was held that despite the general function of the proviso being creation of exceptions, in certain exceptional cases, the proviso may be a substantive provision in itself.[\[42\]](#) The Supreme Court cited *Rhondda Urban District Council* in support of this proposition.[\[43\]](#) In *Commissioner of Income Tax v. Ajax Products Ltd.*, the Supreme Court recognized the possibility that “the language of the statute may be so clear that a proviso may be construed as a substantive clause”.[\[44\]](#) Even so, the Court observed that it must be read harmoniously with the main enactment and cannot be divorced from it and be read independently.[\[45\]](#)

An instance where a proviso has substantially altered the understanding of a taxing statute, may be

found in *CIT v. Bipinchandra Maganlal & Co. Ltd.*, the Supreme Court observed that the second proviso of Section 10(2)(vii) read with Section 2(6-C) of the Income Tax Act, 1922, creates a legal fiction, that makes what is not really taxable income, taxable income for the purposes of computation of assessable income.<sup>[46]</sup> In another case pertaining to sales tax, *Hiralal Rattanlal v. State of U.P.*, the Supreme Court noted:

"Ordinarily a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so-called proviso has substantially altered the main section"<sup>[47]</sup>

The reference to the proviso in reality being a "separate provision" may be construed as Lord Macmillan's looming spectre in the interpretation of the proviso. The "proper purpose" of the proviso, as per Lord Macmillan would only be carving out an exception. Thus, any apparent aberration would be separated from the "proper proviso" and be designated as a "separate provision".

In *Union of India v. VKC Footsteps (India) (P) Ltd.*, the Supreme Court, the Apex Court analysed multiple precedents cited above, so as to decide whether the proviso is an exception or a substantive enactment.<sup>[48]</sup> However, the Court used the direct Parliamentary intent as a critical factor to arrive at the conclusion that the proviso to Section 54(3) is not a condition of eligibility, rather a restriction governing the grant of refund under Section 54(3) of The Central Goods and Services Tax Act, 2017.<sup>[49]</sup>

Despite such a role of the proviso being recognized, it is desirable that the draftsmen do not resort to using such form and function routinely to efface the object of the statute itself. In fact, an opposition to the very usage of the proviso is gaining ground in the international arena.

## 7. Is the Proviso a Relic of the (Colonial) Past?

Keeping with the maxim *ubi jus incertum, ibi jus nullum*, where the law is uncertain, there is no law, many inheritors of the UK's common law system have decisively denounced the proviso.<sup>[50]</sup> George Coode found that the abuse of the proviso is ubiquitous, and that it was used as an afterthought of the drafters of the legislation, either as a mere exception, or for displacing and disguising 'the case, the condition, the legal subject and the legal action', or to introduce "several stages of consecutive action' or to contain a perceived anomaly that the draftsmen were unwilling or incapable of expressly mentioning.<sup>[51]</sup> Along with Coode, several other western thinkers have now sought to do away with provisos by substituting them with the conjunction "and", so as to do away with the unnecessary verbiage as well as the concomitant litigation pertaining to its interpretation.<sup>[52]</sup> Yuen-Ching Fung Spring found that in the United Kingdom, Canada, Hong Kong as well as in Australia, the proviso was in rapid decline, and in the latter, the proviso has been conspicuously absent.<sup>[53]</sup> It thus follows that the international perception of the proviso is moving towards denouncing and decrying its usage as an "all-purpose conjunction"<sup>[54]</sup> conjured by lawyers.

## 8. Conclusion:

The proviso, which was originally a simple tool for carving out exceptions, has become increasingly complex with vague and often conflicting functions. Though its intent has mostly been to clarify, except, or qualify enactments, its abuse has created ambiguity and long-lasting litigation. While Indian Courts have interpreted it over decades, but ambiguity persists, so long as the proviso persists. As the other common law jurisdictions around the globe eschew the use of provisos in favour of more precise drafting, India needs to reassess her commitment to this archaic construct.

<sup>[1]</sup> E. A. Driedger, *The Composition of Legislation, Legislative Forms and Precedents* 96 (2nd edn., 1976).

<sup>[2]</sup> L. Filson, *The Legislative Drafter's Desk Reference* 311 (1992).

<sup>[3]</sup> P. Ramanatha Aiyar, *Advanced Law Lexicon* 3817 (2005); G.P. Singh, *Principles of Statutory Interpretation* 195 (13th ed. 2012).

<sup>[4]</sup> *Mullins v. Treasurer of Survey*, (1880) 5 QBD 170; G.P. Singh, *Principles of Statutory Interpretation*

195 (13th ed. 2012).

[5] Madras & Southern Maharatta Rly. Co. Ltd. v. Bezwada Municipality, AIR 1944 PC 71; G.P. Singh, Principles of Statutory Interpretation 195 (13th ed. 2012).

[6] Local Govt. Board v. South Stoneham Union, (1909) AC 57, p. 62 (HL); G.P. Singh, Principles of Statutory Interpretation 196 (13th ed. 2012).

[7] Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha, 1961 SCC OnLine SC 60; G.P. Singh, Principles of Statutory Interpretation 196 (13th ed. 2012).

[8] CIT, Mysore etc. v. Indo Mercantile Bank Ltd., AIR 1959 SC 713; G.P. Singh, Principles of Statutory Interpretation 196 (13th ed. 2012).

[9] Surjit Singh v. MTNL, (2009) 16 SCC 722; See also J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 53 (2022).

[10] J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 53 (2022).

[11] J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 94-95 (2022).

[12] Transliterated from the original qtd. in J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 92 (2022).

[13] 27 Pandit Mohan Lal Sandal, The Sacred Books of the Hindus 15 (Major B.D. Basu ed., 1923).

[14] J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 92-93 (2022).

[15] Transliterated from the original qtd. in J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 93 (2022).

[16] 27 Pandit Mohan Lal Sandal, The Sacred Books of the Hindus 14 (Major B.D. Basu ed., 1923).

[17] J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 93 (2022).

[18] J.K. Verma, Interpreting Law with Mîmâmsâ Sûtras (Codified into Rules of Interpretation) 95 (2022).

[19] Vepa P Sarathi, Interpretation of Statutes 276 (5th ed., 2010).

[20] P.B. Maxwell, Maxwell on The Interpretation of Statutes 189 (J. Langan ed., 12th ed., 1980).

[21] [1958] 1 Q.B. 439; P.B. Maxwell, Maxwell on The Interpretation of Statutes 189 (J. Langan ed., 12th ed., 1980)

[22] (1731) Fitzg. 195; P.B. Maxwell, Maxwell on The Interpretation of Statutes 190 (J. Langan ed., 12th ed., 1980)

[23] P.B. Maxwell, Maxwell on The Interpretation of Statutes 38 (J. Langan ed., 12th ed., 1980).

[24] 1995 Supp (1) SCC 429.

[25] (1976) 1 SCC 128.

[26] (1976) 1 SCC 128.

[27] 1912 AC 533.

[28] SCC OnLine Del 9176.

[29] (1985) 1 SCC 591.

[30] P. M. Bakshi, PROVISIO IN LEGISLATIVE DRAFTING, 34(2) Journal of the Indian Law Institute 180 (1992). JSTOR, <http://www.jstor.org/stable/43951423>. Accessed 25 Jan. 2025.

[31] 1961 SCC OnLine SC 60.

[32] P. M. Bakshi, PROVISIO IN LEGISLATIVE DRAFTING, 34(2) Journal of the Indian Law Institute 185 (1992). JSTOR, <http://www.jstor.org/stable/43951423>. Accessed 25 Jan. 2025.

[33] P. M. Bakshi, PROVISIO IN LEGISLATIVE DRAFTING, 34(2) Journal of the Indian Law Institute 185 (1992). JSTOR, <http://www.jstor.org/stable/43951423>. Accessed 25 Jan. 2025.

[34] P. M. Bakshi, PROVISIO IN LEGISLATIVE DRAFTING, 34(2) Journal of the Indian Law Institute 185 (1992). JSTOR, <http://www.jstor.org/stable/43951423>. Accessed 25 Jan. 2025.

[35] (1973) 1 SCC 216.

[36] (1973) 1 SCC 216.

[37] [1909] AC 253.

[38] [1973] AC 558.

[39] 1961 SCC OnLine SC 60.

[40] 1964 SCC OnLine SC 15.

[41] Hiralal Rattanlal v. State of U.P., [\[TS-5055-SC-1972-O\]](#)

[42] [\[TS-5061-SC-1967-O\]](#)

[43] [\[TS-5061-SC-1967-O\]](#)

[44] [\[TS-5-SC-1964-O\]](#)

[45] [\[TS-5-SC-1964-O\]](#)

[46] [\[TS-5052-SC-1960-O\]](#)

[47] (1973) 1 SCC 216.

[48] (2022) 2 SCC 603.

[49] Union of India v. VKC Footsteps (India) (P) Ltd., (2022) 2 SCC 603.

[50] Bouvier's 1856 Law Dictionary [HTML]. [Bouvier Law Dictionary](#).

[51] YCF Fung, The Rise and Fall of the Proviso, 18(2) Statute Law Review 105-106 (1997). <https://academic.oup.com/slr/article/18/2/104/1675023>.

[52] YCF Fung, The Rise and Fall of the Proviso, 18(2) Statute Law Review 106 (1997). <https://academic.oup.com/slr/article/18/2/104/1675023>.

[53] YCF Fung, The Rise and Fall of the Proviso, 18(2) Statute Law Review 108-111 (1997). <https://academic.oup.com/slr/article/18/2/104/1675023>.

[54] YCF Fung, The Rise and Fall of the Proviso, 18(2) Statute Law Review 110 (1997).  
<https://academic.oup.com/slr/article/18/2/104/1675023>.