

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRIMINAL REVISION PETITION NO. 154 OF 2010**

% **Reserved on : 16th August, 2010.**
Date of Decision: 30th August, 2010.

SANYO ELECTRIC COMPANY THR. ITS
CONSTITUTED ATTORNEY PANKAJ GUPTA Petitioners
Through Ms. Nitya Ramakrishnan, Mr. Rajendra
Kumar & Mr. Aashish Marbaniang, Advocates.

VERSUS

STATE Respondent
Through Mr. Arvind Kumar Gupta, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | |
| 2. To be referred to the Reporter or not ? | Yes. |
| 3. Whether the judgment should be reported in the Digest ? | Yes. |

SANJIV KHANNA, J.:

1. The order under challenge of the Additional Chief Metropolitan Magistrate (hereinafter referred to as ACMM, for short) dated 12th March, 2010 directs that the warrant of search issued by the Court under Section 93 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code, for short) shall not be executed till the police officer obtains opinion and shall abide by the opinion of the Registrar of Trade Marks under the proviso to Section 115(4) of the Trade Marks Act, 1999 (hereinafter referred to as TM Act, for short). ACMM has held that compliance with the proviso to Section

115(4) is mandatory before any search warrant is executed for offences under the TM Act.

2. The contention of the petitioner is that the proviso to Section 115(4) of the TM Act is not applicable to search warrants which are issued by the Courts under Section 93 of the Code. Section 115(4) of the TM Act authorizes a police officer to conduct searches without a warrant and the proviso to Section 115(4) of the TM Act applies only to the said sub-section and not a search warrant which is issued by a Court under Section 93 of the Code.

3. The relevant provisions of the two enactments; viz., Sections 93, 102, 165 and 166 of the Code and Section 115(3) and (4) of the TM Act read as under:-

CODE OF CRIMINAL PROCEDURE,
1973

“93. When search warrant may be issued.—(1)(a) Where any Court has reason to believe that a person to whom a summons or order under Section 91 or a requisition under sub-section (1) of Section 92 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

(b) where such document or thing is not known to the Court to be in the possession of any person, or

(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.

Section 102. Power of police officer to seize certain property.—(1) Any

police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

[(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court[or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation], he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:]

[Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of

such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.]

Section 165. Search by police officer.—

(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under subsection (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search warrants and the general provisions as to searches contained in Section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

Section 166. When officer in charge of police station may require another to issue search warrant.—(1)

An officer in charge of a police station or a police officer not being below the rank of sub-inspector making an investigation may require an officer in charge of another police station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of Section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police station or a police officer making any investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station in accordance with the provisions of Section 165, as if such place were within the limits of his own police station.

(4) Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer in charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any)

prepared under Section 100, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in sub-sections (1) and (3) of Section 165.

(5) The owner or occupier of the place searched shall, on application, be furnished free of cost with a copy of any record sent to the Magistrate under sub-section (4).

TRADE MARKS ACT, 1999

115. Cognizance of certain offences and the powers of police officer for search and seizure.—

(3) The offences under Section 103 or Section 104 or Section 105 shall be cognizable.

(4) Any police officer not below the rank of Deputy Superintendent of Police or equivalent, may, if he is satisfied that any of the offences referred to in sub-section (3) has been, is being, or is likely to be, committed, search and seize without warrant the goods, die, block, machine, plate, other instruments or things involved in committing the offence, wherever found, and all the articles so seized shall, as soon as practicable, be produced before a Judicial Magistrate of the First Class or Metropolitan Magistrate, as the case may be:

Provided that the police officer, before making any search and seizure, shall obtain the opinion of the Registrar on facts involved in the offence relating to trade mark and shall abide by the opinion so obtained.”

4. TM Act is a special Act relating to trade marks. Chapter XII of the said Act in Sections 101 to 121 prescribes offences, penalties and procedure in relation to offences etc. Section 115(4) of the TM Act is

a part of the fascicle of the said chapter. Sub-section 3 to Section 115 of the TM Act states that offences under Sections 103, 104 and 105 of the TM Act shall be cognizable i.e. the police can register an FIR and start investigation without seeking approval or permission of the court. The provisions of the Code relating to cognizable offences are applicable except to the extent a special procedure, restriction or prohibition to the contrary is prescribed in the TM Act.

5. Under Sections 165 and 166 of the Code, search and seizure can be conducted by a police officer subject to the conditions stipulated being satisfied. Similarly, under Section 102 of the Code, police officer has power to seize any property, which is alleged or suspected to have been stolen or found under circumstances which create suspicion of commission of any offence. Under Sections 102, 165 and 166 of the Code, post a search and seizure operation, the matter has to be informed and brought to the notice of the Magistrate. Prior approval of the Magistrate is not required and necessary. Under the said Sections, a prior warrant of the Court which is mandated under Section 93 of the Code is not required.

6. Section 115(4) of the TM Act states that a police officer not below the rank of Deputy Superintendent or equivalent can conduct search and seizure operations without warrant in respect of offences under the TM Act. This empowerment or power is similar and analogous to the general power of search and seizure of a police officer under Sections 102, 165 and 166 of the Code. However, to protect the right to privacy and to ensure that the power of search

and seizure is not misused and abused, proviso to Section 115(4) of the TM Act stipulates and requires that the police officer should take opinion of the Registrar of the Trade Marks on facts involved in the offence of trade mark and the police officer shall abide by that opinion. In other words, opinion of the Registrar is binding on the police officer. Right to privacy being a constitutional right, guaranteed to the citizens of India, cannot be infringed except for valid, good and justified reasons. Right to search is an exception to right to privacy, honour and reputation and can be denied when an important counter veiling interest is shown to be superior (See, ***District Registrar and Collector Versus Canara Bank***, (2005) 1 SCC 496). The provisions of Section 115(4) of the TM Act including the proviso will override the general provisions of the Code under Sections 102, 165 and 166, which relate to general power of search and seizure by the police.

7. Section 115(4) of the TM Act relates to search and seizure by the police without warrant. Section 93 of the Code, on the other hand, deals with power of the Court to authorize search and seizure. The Court can issue a search warrant when conditions mentioned in Section 93 of the Code are satisfied. Search authorized under Section 93 of the Court is not a search without a warrant but a search under a warrant issued by the Court after due application of mind. The words “reason to believe” coupled with clauses (a) to (c) contemplate an objective determination based on judicial deliberation by the Court. The court applies its mind to decide whether or not a request for

search and seizure made by a party should be allowed. An order under Section 93 of the Code is a judicial order passed after weighing and examining facts. There should be application of mind which should be discernible from the order under section 93 of the Code. (see ***V.S. Kuttan Pillai Vs. Raina Kishan***, (1980) 1 SCC 264).

Thus, the power of the police to conduct searches and searches on a warrant issued by a Court under Section 93 of the Code are distinct and separate. It is expected and required that the court would take due notice and will ensure that the right to privacy is not violated except when warranted, required and justified.

8. The question raised is whether proviso to Section 115(4) of TM Act is applicable to search warrants issued by the Courts under Section 93 of the Code.

9. A proviso can serve four different purposes;

(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.

10. However, normally a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the

preview of the enactment. The following quote from **S.Sundaram Pillai Versus V.R. Pattabiraman**, (1985) 1 SCC 591, is apt:

“28. Craies in his book *Statute Law* (7th Edn.) while explaining the purpose and import of a proviso states at p. 218 thus:

The effect of an exception or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it.... The natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

29. Odgers in *Construction of Deeds and Statutes* (5th Edn.) while referring to the scope of a proviso mentioned the following ingredients:

“p. 317. *Provisos* —These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it.

p. 318. Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment”

30. Sarathi in *Interpretation of Statutes* at pages 294-295 has collected the following principles in regard to a proviso:

(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 a repeal of the section as the proviso speaks the latter 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 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.

31. In the case of *Local Government Board v. South Stoneham Union* Lord Macnaghten made the following observation:

“I think the proviso is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate.”

32. In *Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai* it was held that the main object of a proviso is merely to qualify the main enactment. In *Madras and Southern Mahrata Railway Co. Ltd. v. Bezwada Municipality* Lord Macmillan observed thus:

“The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case.”

33. The above case was approved by this Court in *CIT v. Indo Mercantile Bank Ltd.* where Kapur, J. held that the proper function of a proviso was merely to qualify 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. In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha* Hidayatullah, J., as he then was, very aptly and succinctly indicated the parameters of a proviso thus:

“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.”

34. In *West Derby Union v. Metropolitan Life Assurance Society* while guarding against the danger of interpretation of a proviso, Lord Watson observed thus:

“a very dangerous and certainly unusual course to import legislation from a proviso wholesale into the body of the statute.”

35. A very apt description and extent of a proviso was given by Lord Oreburn in *Rhondda Urban District Council v. Taff Vale Railway Co.* where it was pointed out that insertion of a proviso by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before. To the same effect is a later decision of the same Court in *Jennings v. Kelly* where it was observed thus:

“We must now come to the proviso, for there is, I think, no doubt that, in the construction of the section, the whole of it must be read, and a consistent meaning, if possible, given to every part of it. The words are:... ‘provided that such licence shall be granted only for premises situate in the ward or district electoral division in which such increase in population has taken place...’ There seems to be no doubt that the words “such increase in population” refer to the increase of not less than 25 per cent of the population mentioned in the opening words of the section.”

36. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.

37. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself.

38. Apart from the authorities referred to above, this Court has in a long course of decisions explained and adumbrated the various shades, aspects and elements of a proviso. In *State of Rajasthan v. Leela Jain* the following observations were made:

“So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part.”

39. In the case of *STO, Circle-I, Jabalpur v. Hanuman Prasad Bhargava*, J. observed thus:

“It is well-recognised that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded.”

40. In *Commissioner of Commercial Taxes v. R.S. Jhaver* this Court made the following observations:

“Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be a substantive provision itself.”

41. In *Dwarka Prasad v. Dwarka Das Saraf* Krishna Iyer, J. speaking for the Court observed thus: (SCC pp. 136-37, paras 16, 18)

“There is some validity in this submission but if, on a fair construction, the principal provision is clean a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges. Here, such is the case.

* * *

If the rule of construction is that *prima facie* a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.”

11. Looking at the language of Section 115(4) of the TM Act, object and purpose behind the proviso to the said Section and Section 93 of the Code, the proviso in the present case does not warrant a wider application beyond the substantive Section 115(4) i.e. all searches by the police without warrant. Legislative intent behind the proviso can

be gathered from the explicit language and words used in 115(4) of the TM Act. The Section is confined to searches without warrants and prevents misuse of the power of search by the police. There is no indication in the language that the proviso is intended to apply as a proviso to Section 93 of the Code.

12. Section 115(4) of the TM Act does not override and obliterate the power of the court to issue a search warrant under Section 93 of the Code. Learned ACMM has in fact exercised the power under Section 93 of the Code and entertained the application. In other words, learned ACMM has held that an application under Section 93 of the Code would be maintainable and the court can issue a search warrant in spite of the power given to the police under Section 115(4) of the TM Act to conduct search without warrant. It has been accordingly held, and in my opinion rightly, that the two provisions operate independently as one relates to searches pursuant to warrants issued by the courts and the other relates to searches by police officers without a Court warrant. The pre-requisite or pre-conditions for a search by a police officer without warrant under the proviso to Section 115(4) of the TM Act cannot be read into and made a pre-condition before a search warrant issued by a court under Section 93 of the Code is executed. Otherwise, a judicial order of the court issuing warrant of search will be a paper order and unexecutable unless the Registrar gives a positive opinion. It makes a judicial order of a court ineffective till an opinion is given by the Registrar, who has right to overwrite the judicial decision. This is not

warranted by the language of the proviso or the legislative intent behind the proviso. The object and purpose is to control searches without warrants by the police and not impose a post decision precondition before warrants issued by the court are executed. If the proviso is to apply to Section 93 of the Code, the language would have been different and more specific. There can be cases where immediate searches are required under the TM Act. Searches under Section 115(4) of the TM Act may be counterproductive or self defeating in case the time consuming process in view of the proviso to section 115(4) of the TM Act is followed. In such cases, searches under Section 93 of the Code after a judicial order may be more appropriate and necessary. The legislative intent behind empowering a police officer to conduct a search only pursuant to an opinion of the Registrar under Section 115(4) is clearly to protect the right to privacy and to ensure that the power of search and seizure under Section 115(4) is not misused/abused. A judicial order serves the same purpose and protects against misuse of the power of search.

13. In view of the aforesaid reasoning, it is held that a search warrant issued by the court under Section 93 of the Code can be executed without the requirement stipulated in the proviso to Section 115(4) of the TM Act. The said proviso will apply to searches made by police officers without warrant issued by the court i.e., all searches under Section 115(4) of the TM Act including Sections 102, 165 and 166 of the Code, except searches on a warrant issued by a court under Section 93 of the Code.

14. The above interpretation does not mean that the court, before issuing a warrant under Section 93 of the Code, cannot seek opinion of the Registrar. In a given case, the court may seek opinion of the Registrar of Trade Marks before it decides whether or not to issue a warrant under Section 93 of the Code. This will depend upon factual matrix of each case. There may be straight forward cases of counterfeiting, where opinion is not necessary; but there may be other cases where the Court may feel the necessity to have an opinion or clarification of the Registrar before a search warrant is issued. Courts have to keep in mind Section 110 of the TM Act and the defences to the proceedings under Sections 102, 103, 104 and 105 of the TM ACT. Opinion of the Registrar of Trade Marks has to be given due weightage and consideration but will not be binding on the court. For good and valid reasons, a court can still issue a warrant in spite of a negative opinion of the Registrar of Trade Marks. Powers and an order of the Appellate Board are different from an opinion of the Registrar of Trade Mark. The court will also have to keep in mind the provisions of Section 113 of the TM Act, if a request for a search warrant is against a registered owner of a trade mark. The court can also impose conditions to protect interest of the person to be searched or stipulate that the search would not be undertaken if the person to be searched produces material to show and establish that he is the registered owner of the mark.

15. The revision petition is accordingly allowed but the matter is remanded back to the learned ACMM to decide the application for

search warrant under Section 93 of the Code after considering the aforesaid aspects.

16. The matter will be listed before the learned ACMM on 14th September, 2010.

(SANJIV KHANNA)
JUDGE

AUGUST 30, 2010.
VKR/P