IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN

CIVIL APPEAL NO.450 OF 2010
(Against the order dated 18.3.2010 of the High Court of Sindh at Karachi passed in C.P.No.D-777/2008)

Collector of Customs Appraisement, Collectorate, Customs House, Karachi
...Appellant(s)

VERSUS

M/s Gul Rehman, Proprietor M/s G. Kin Enterprises, Ghazali Street, Nasir Road, Sialkot
...Respondent(s)

For the appellant(s): Raja Muhammad Iqbal, ASC

For the respondent(s): Mr. Azhar Maqbool Shah, ASC
Mr. Ahsan Hameed Lilla, ASC

Date of hearing: 25.11.2016

...

ORDER

MIAN SAQIB NISAR, J.- This appeal with the leave of the Court turns on whether the respondent is entitled to the refund of customs duty paid *(along with the penalty)*, when, as per the case of the appellant the respondent was required to prove that the incidence of customs duty had not been passed onto the consumer in terms of the provisions of Section 19A of the Customs Act, 1969 *(the Act)*, which it failed to do.

2. The facts are that the respondent is an importer of fabrics and it made a declaration in the bill of entry that the imported goods were covered by heading 5407.5200, attracting 14% customs duty. The department controverted this declaration and claimed that instead the correct PTC heading would be 5903.1000, on which 25% customs duty was payable. Pursuant to a show-cause notice, an order-in-original dated 3.7.2006 was passed in which the latter heading was held to be applicable

and the imported consignments were confiscated, an additional penalty was imposed and the respondent was given the option under Section 181 of the Act to redeem the confiscated goods on payment of a fine. In order to get the consignments released the respondent made the requisite payments but simultaneously assailed the order-in-original before the Collector of Customs, Sales Tax & Federal Excise (Appeal) *[Collector (Appeals)]* who, *vide* order dated 8.12.2006, accepted the plea of the respondent and determined that the appropriate heading was indeed 5407.5200 and there was no mis-declaration by the respondent. The department has admitted before us today that they did not challenge this order and thus for all intents and purposes it attained finality. Be that as it may, on account of the favourable order of the Collector (Appeals) the respondent sought refund of the amount paid by it on the basis of the order-in-original dated 3.7.2006. The department declined to refund the said amount. Instead, *vide* another order-in-original dated 5.3.2008 the department held that as the incidence of the duty had been passed onto the consumer by the respondent therefore it was not entitled to any refund in terms of Section 33 and 19A of the Act. This order was successfully assailed by the respondents through a constitutional petition filed before the learned High Court of Sindh, resulting in the impugned judgment. Leave in this case was granted *vide* order dated 30.6.2010, however it is important to note that in the same order an admission on behalf of the learned counsel for the appellant was recorded in the following terms:-

> *"Raja Muhammad Iqbal, learned ASC for the petitioner contends that the petitioner department has no cavil to the classification of PTC heading made by appellate court of Collector of Customs in its order dated 8.12.2006."*

The only plea taken at the time of granting leave and which prevailed with this Court was whether the amount paid by the respondent could be refunded according to the mandatory provisions of Section 19A of the Act when the incidence of the duty had been passed onto the end consumer.

3. Learned counsel for the appellant, referring to Section 33 of the Act, argued that the proviso contained therein is clear, which states that, *"Provided that no refund shall be allowed under this section if the sanctioning authority is satisfied that incidence of customs duty and other levies has been passed on to the buyer or consumer"*. In this context he stated that according to Section 19A of the Act, it was for the importer to prove that the incidence of duty had not been passed onto the consumer, thus, by virtue of this strict liability, the burden was on the respondent to prove the same, in the absence of which it would be presumed that the incidence of duty had been passed onto the consumer. Hence refund was impermissible under the law.

4. Heard. We find that Section 33 of the Act has to be read as a whole in order to appreciate the letter and spirit of its proviso. The said section reads as under:-

> *"**33. Refund to be claimed within one year.**-(1) No refund of any customs-duties or charges claimed to have been paid or over-paid through inadvertence, error or misconstruction shall be allowed, unless such claim is made within one year of the date of payment:*
>
> *Provided that no refund shall be allowed under this section if the sanctioning authority is satisfied that incidence of customs duty and other levies has been passed on to the buyer or consumer.*

> *(2) In the case of provisional payments made under section 81, the said period of one year shall be reckoned from the date of the adjustment of duty after its final assessment.*
>
> *(3) In the case where the refund has become due in consequence of any decision or judgment by any appropriate officer of Customs of the Board or the Appellate Tribunal or the Court, the said period of one year shall be reckoned from the date of such decision or judgment, as the case may be."*

5. Thus it is clear from the language of Section 33(1) that refund in terms thereof is to be allowed only where/if customs duty has been paid as a result of some inadvertence, error or misconstruction, which is not the position in the present matter. Right from the beginning the respondent has agitated that the declaration made by it under PTC heading 5407.5200 was correct. There was no inadvertence, error or misconstruction involved in such declaration whereas it has been the stance of the department that this heading was incorrectly attributed to the goods. This issue was conclusively resolved by the Collector (Appeals) *vide* its order dated 8.12.2006 in favour of the respondent, which, as mentioned earlier, has attained finality.

6. Before proceeding further, we find it pertinent to discuss the purpose and scope of a proviso; in relation to the arguments submitted before us in respect of the proviso to Section 33(1) of the Act. Generally a proviso is an exception to or qualifies the main provision of law to which it is attached.[1] Its purpose is to qualify or modify the scope or ambit of the matter dealt with in the main provision, and its effect is restricted to the particular situation specified in the proviso itself.[2] Further, it is a settled

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[1] Per Anwar Zaheer Jamali, J in *Dr. Muhammad Anwar Kurd and 2 others Vs. The State through Regional Accountability Bureau, Quetta* (2011 SCMR 1560).
[2] Interpretation of Statutes (11th Ed.), N. S. Bindra.

canon of interpretation that a proviso is to be strictly construed[3] and that it applies only to the particular provision to which it is appended[4]. Whilst holding that a proviso is limited to the provision which immediately precedes it, Shafiur Rahman, J, in a four member judgment of this Court reported as **K.E.S.C. Progressive Workers' Union through its Chairman and others Vs. K.E.S.C. Labour Union through its General Secretary and others (1991 SCMR 888)** cited with approval, *inter alia*, the following principles:-

> *"(i) Wilberforce on Statute Law, page 303:*
> *"**A proviso** is of great importance when the Court has to consider what cases come within the enacting part of a section and it **is always to be construed with reference to the preceding parts of the clause to which it is appended.**"*
>
> *(ii) Maxwell on the Interpretation of Statutes. Twelfth Edition by P. St. J. Langan, page 189:*
> *"It will, however, generally be found that inconsistencies can be avoided by applying the general rule that the words of a proviso are not to be taken "absolutely in their strict literal sense," but that **a proviso is "of necessity ...limited in its operation to the ambit of the section which it qualifies**".*
>
> *(v) The Construction of Statutes by Earl T. Crawford, page 605:*
> *"**As a general rule, however, the operation of a proviso should be confined to that clause or portion of the statute which directly precedes it in the statute**"."*
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> *(Emphasis supplied)*

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[3] *Sh. Liaquat Hussain and others Vs. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others* (PLD 1999 SC 504).
[4] Per Hamoodur Rahman, J in *Pramatha Nath Chowdhury and 17 others Vs. (1) Kamir Mondal, (2) Ismail Mondal, (3) Baju Mondal alias Hagura Mondal and (4) Dukha Mondal* (PLD 1965 SC 434).

Therefore the proviso to Section 33 has to be confined to the particular sub-section to which it is attached, i.e. sub-section (1), and if the case does not fall within the purview of such sub-section in that the customs duty was not paid as a result of inadvertence, error or misconstruction then obviously the proviso would not be relevant. Before a proviso can have any application, the section itself must apply. A holistic reading of Section 33 of the Act, particularly the provisions of sub-section (3), clarifies that where a refund becomes due as a result of any decision or judgment passed by a customs officer, Appellate Tribunal etc., the proviso to sub-section (1) would not be applicable because no such proviso is attached to sub-section (3), meaning thereby that the refund has to be made **notwithstanding** the fact that the incidence of customs duty had been passed onto the customer and therefore Section 19A of the Act would not be attracted. Resultantly we do not find any merit in this appeal which is accordingly dismissed.

JUDGE

JUDGE

JUDGE

Bench-I
Islamabad, the
25th November, 2016
Approved For Reporting
Ghulam Raza/*